ment] against such party unless written notice of objection to its contents is given within 10 days after it is received.

We must emphasize that the only effect of this exception is to take away from a merchant who receives a writing in confirmation of a contract the Statute of Frauds defense if the merchant does not object. The sender must still persuade the trier of fact that a contract was in fact made orally, to which the written confirmation applies.

In the instant case, James Thomson sent a "writing in confirmation" to Goodrich four days after his meeting with Ingram Meyers, a Goodrich employee and agent. The purchase order contained Thomson Printing's name, address, telephone number and certain information about the machinery purchase. The check James Thomson sent to Goodrich with the purchase order also had on it Thomson Printing's name and address, and the check carried notations that connected the check with the purchase order.

Goodrich argues, however, that Thomson's writing in confirmation cannot qualify for the 2-201(2) exception because it was not received by anyone at Goodrich who had reason to know its contents.[5] Goodrich claims that Thomson erred in not specifically designating on the envelope, check or purchase order that the items were intended for Ingram Meyers or the surplus equipment department. Consequently, Goodrich contends, it was unable to "find a home" for the check and purchase order despite attempts to do so, in accordance with its regular procedures, by sending copies of the documents to several of its various divisions. Ingram Meyers testified that he never learned of the purchase order until weeks later when James Thomson called to arrange for removal of the machines. By then, however, the machines had long been sold to someone else.

We think Goodrich misreads the requirements of 2-201(2). First, the literal requirements of 2-201(2), as they apply here, are that a writing "is received" and that Goodrich "has reason to know its contents." There is no dispute that the purchase order and check were received by Goodrich, and there is at least no specific or express requirement that the "receipt" referred to in 2-201(2) be by any Goodrich agent in particular.

> These issues are not resolved by [2-201(2)], but it is probably a reasonable projection that a delivery at either the recipient's principal place of business, a place of business from which negotiations were conducted, or to which the sender may have transmitted previous communications, will be an adequate receipt.

3 R. Duesenberg & L. King, Bender's UCC Service §2-204[2] at 2-70 (1982).

As for the "reason to know its contents" requirement, this element "is best understood to mean that the confirmation was an instrument which

5. The district court found that both parties were merchants for the purpose of 2-201(2). We agree. "For purposes of [2-201(2)] almost every person in business would, therefore, be deemed to be a 'merchant' . . . since the practices involved in the transaction are nonspecialized business practices such as answering mail" UCC §2-104, Comment 2.

should have been anticipated and therefore should have received the attention of appropriate parties." Perdue Farms, Inc. v. Motts, Inc., 459 F. Supp. 7, 20 (N.D. Miss. 1978) (quoting from Bender's UCC Service, supra, §2-204[2] at 2-69). "The receipt of a spurious document would not burden the recipient with a risk of losing the [Statute of Frauds] defense. . ." Id. In the case before us there is no doubt that the confirmatory writings were based on actual negotiations (although the legal effect of the negotiations was disputed), and therefore the documents were not "spurious" but could have been anticipated and appropriately handled.

Even if we go beyond the literal requirements of 2-201(2) and read into the "receipt" requirement the "receipt of notice" rule of 1-201(27), we still think Thomson Printing satisfied the "merchants" exception. Section 1-201, the definitional section of the UCC, provides that notice received by an organization

> is effective for a particular transaction . . . from the time when it would have been brought to [the attention of the individual conducting that transaction] if the organization had executed *due diligence.*

UCC §1-201(27) (emphasis supplied). The Official Comment states:

> [R]eason to know, knowledge, or a notification, although "received" for instance by a clerk in Department A of an organization, is effective for a transaction conducted in Department B only from the time when it was *or should have been* communicated to the individual conducting that transaction.

UCC §1-201(27), Official Comment (emphasis supplied).

Thus, the question comes down to whether Goodrich's mailroom, given the information it had, should have notified the surplus equipment manager, Ingram Meyers, of Thomson's confirmatory writing. At whatever point Meyers should have been so notified, then at that point Thomson's writing was effective even though Meyers did not see it. See 2 A. Squillante & J. Fonseca, Williston on Sales §14-8 at 284 (4th ed. 1974) ("the time of receipt will be measured as if the organization involved had used due diligence in getting the document to the appropriate person").

The definitional section of the UCC also sets the general standard for what mailrooms "should do":

> An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines.

UCC §1-201(27). One cannot say that Goodrich's mailroom procedures were reasonable as a matter of law: if Goodrich had exercised due diligence in handling Thomson Printing's purchase order and check, these items would have reasonably promptly come to Ingram Meyers' attention. First, the purchase order on its face should have alerted the mailroom that the documents referred to a purchase of used printing equipment. Since Goodrich had only one surplus machinery department, the documents'

"home" should not have been difficult to find. Second, even if the mailroom would have had difficulty in immediately identifying the kind of transaction involved, the purchase order had Thomson Printing's phone number printed on it and we think a "reasonable routine" in these particular circumstances would have involved at some point in the process a simple phone call to Thomson Printing. Thus, we think Goodrich's mailroom mishandled the confirmatory writings. This failure should not permit Goodrich to escape liability by pleading non-receipt. See Williston on Sales, supra, §14-8 at 284-85.

We note that the jury verdict for Thomson Printing indicates that the jury found as a fact that the contract had in fact been made and that the Statute of Frauds had been satisfied. Also, Goodrich acknowledges those facts about the handling of the purchase order which we regard as determinative of the "merchants" exception question. We think that there is ample evidence to support the jury findings both of the existence of the contract and of the satisfaction of the Statute.

The district court, in holding as a matter of law that the circumstances failed to satisfy the Statute of Frauds, was impressed by James Thomson's dereliction in failing to specifically direct the purchase order and check to the attention of Ingram Meyers or the surplus equipment department. We agree that Thomson erred in this respect, but, for the reasons we have suggested, Goodrich was at least equally derelict in failing to find a "home" for the well-identified documents. Goodrich argues that in the "vast majority" of cases it can identify checks within a week without contacting an outside party; in the instant case, therefore, if Goodrich correctly states its experience under its procedures, it should presumably have checked with Thomson Printing promptly after the time it normally identified checks by other means — in this case, by its own calculation, a week at most. Under the particular circumstances of this case, we therefore think it inappropriate to set aside a jury verdict on Statute of Frauds grounds.

The district court's order granting judgment for Goodrich is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Problem 103

Despard Murgatroyd, knowing the reputation that the Oakapple Farms had for slow responses, sent a letter to the Farms stating the terms of a mythical phone conversation between the two parties in which Oakapple Farms had supposedly agreed to sell all of its 2001 crop to Despard. The letter was received by Oakapple Farms on the first of December 2000, and on February 8, 2001, the sales manager sent back a letter to Despard informing him that no such deal existed. Despard filed suit, pointing to UCC §2-201(2). What result? See §1-203.[3] If there really

3. Section 1-404 in the revised version of Article 1.

had been an oral deal, but the letter did not correctly reflect its terms, could that still be an issue in the resulting lawsuit? See Columbus Trade Exch., Inc. v. Amca Intl. Corp., 763 F. Supp. 946, 15 U.C.C. Rep. Serv. 2d 51 (S.D. Ohio 1991); Perdue Farms, Inc. v. Motts, Inc., 459 F. Supp. 7 (N.D. Miss. 1978); Cox Caulking & Insulating Co. v. Brockett Distrib. Co., 150 Ga. App. 424, 258 S.E.2d 51 (1979); Comment, The Merchants Exception to the Uniform Commercial Code's Statute of Frauds, 32 Vill. L. Rev. 133 (1987). What is the relationship between UCC §§2-201(2) and 2-207?

E. Waiver and Estoppel

Problem 104

When Charles Baskerville decided to sell his house, the buyer was lawyer John Watson. The parties orally agreed to the terms but never signed a writing. If Watson backs out of the deal, is the need for a writing excused where

(a) Watson told Baskerville that no writing was required for the validity of this sale? Would your answer change if Watson were not a lawyer?

(b) Baskerville signed the writing and mailed it to Watson, who phoned Baskerville and told him he had signed it? In fact, Watson never got around to actually putting pen to paper.

(c) Watson told Baskerville that they ought to sign a writing but added, "Never mind about these legal technicalities. I promise never to raise this issue"?

A technical point: The statute of frauds, being a matter of avoidance, is an affirmative defense. Therefore, if the party claiming the protection of the statute wants to preserve the defense, it must be raised in that party's pleadings or it is *waived.*

It has been long settled in most jurisdictions that a party may be estopped to assert the defense of the statute of frauds when the elements of an *equitable estoppel* exist. For an equitable estoppel to arise, there must be some misrepresentation giving rise to the detrimental reliance. In a case where the statute of frauds is at issue, the misrepresentation may be shown by evidence that the party relying on the statute had misrepresented that a writing was needed, that a writing would be executed, or that a writing had already been executed. Traditionally, however, courts would not prohibit the use of the statute of frauds defense if merely a *promissory estoppel* was claimed to exist (that is, there was no misrepresentation but merely reliance on an oral promise). The avoidance of the statute of frauds using the promissory estoppel doctrine, however, gained acceptance in yet another trend-setting case by California Justice Roger

Traynor. Monarco v. Lo Greco, 35 Cal. 2d 621, 220 P.2d 737 (1950). This case and its progeny gave rise to Restatement (Second) of Contracts §139, reprinted below. See generally Farnsworth §6.12; Childres and Garamella, The Law of Restitution and the Reliance Interest in Contract, 64 Nw. U. L. Rev. 433 (1969); Annotation, 64 A.L.R.3d 1191 (1975).

RESTATEMENT (SECOND) OF CONTRACTS

§139. Enforcement by Virtue of Action in Reliance

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

(2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:

(a) the availability and adequacy of other remedies, particularly cancellation and restitution;
(b) the definite and substantial character of the action or forbearance in relation to the remedy sought;
(c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
(d) the reasonableness of the action or forbearance;
(e) the extent to which the action or forbearance was foreseeable by the promisor.

NOTES AND QUESTIONS

1. How does this section compare with §90 of the Restatement (Second) of Contracts?

2. Section 139 is broader than the part performance doctrine of §129. Part performance, as envisioned under §129, is typically more difficult to show than the reliance necessary to meet §139. In Ragosta v. Wilder, 156 Vt. 390, 592 A.2d 367 (Vt. 1991), unsuccessful purchasers were unable to show the applicability of the part performance exception because their actions — incurring costs to obtain financing — were merely "preparation to perform" and not part performance. The court remanded for a determination of whether the promissory estoppel doctrine would serve as an exception.

3. Read UCC §§2-201(3)(a) and 1-103.

McINTOSH v. MURPHY
Supreme Court of Hawaii, 1970
52 Haw. 29, 469 P.2d 177

LEVINSON, J. This case involves an oral employment contract which allegedly violates the provision of the Statute of Frauds requiring "any agreement that is not to be performed within one year from the making thereof" to be in writing in order to be enforceable, HRS §656-1(5). In this action the plaintiff-employee Dick McIntosh seeks to recover damages from his employer, George Murphy and Murphy Motors, Ltd., for the breach of an alleged one-year oral employment contract.

While the facts are in sharp conflict, it appears that defendant George Murphy was in southern California during March, 1964 interviewing prospective management personnel for his Chevrolet-Oldsmobile dealerships in Hawaii. He interviewed the plaintiff twice during that time. The position of sales manager for one of the dealerships was fully discussed but no contract was entered into. In April, 1964 the plaintiff received a call from the general manager of Murphy Motors informing him of possible employment within thirty days if he was still available. The plaintiff indicated his continued interest and informed the manager that he would be available. Later in April, the plaintiff sent Murphy a telegram to the effect that he would arrive in Honolulu on Sunday, April 26, 1964. Murphy then telephoned McIntosh on Saturday, April 25, 1964 to notify him that the job of assistant sales manager was open and work would begin on the following Monday, April 27, 1964. At that time McIntosh expressed surprise at the change in job title from sales manager to assistant sales manager but reconfirmed the fact that he was arriving in Honolulu the next day, Sunday. McIntosh arrived on Sunday, April 26, 1964 and began work on the following day, Monday, April 27, 1964.

As a consequence of his decision to work for Murphy, McIntosh moved some of his belongings from the mainland to Hawaii, sold other possessions, leased an apartment in Honolulu and obviously forwent any other employment opportunities. In short, the plaintiff did all those things which were incidental to changing one's residence permanently from Los Angeles to Honolulu, a distance of approximately 2200 miles. McIntosh continued working for Murphy until July 16, 1964, approximately two and one-half months, at which time he was discharged on the grounds that he was unable to close deals with prospective customers and could not train the salesmen.

At the conclusion of the trial, the defense moved for a directed verdict arguing that the oral employment agreement was in violation of the Statute of Frauds, there being no written memorandum or note thereof. The trial court ruled that as a matter of law the contract did not come within the Statute, reasoning that Murphy bargained for acceptance by the actual commencement of performance by McIntosh, so that McIntosh was not bound by a contract until he came to work on Monday, April 27, 1964. Therefore, assuming that the contract was for a year's employment, it was performable within a year exactly to the day and no writing was required

for it to be enforceable. Alternatively, the court ruled that if the agreement was made final by the telephone call between the parties on Saturday, April 25, 1964, then that part of the weekend which remained would not be counted in calculating the year, thus taking the contract out of the Statute of Frauds. With commendable candor the trial judge gave as the motivating force for the decision his desire to avoid a mechanical and unjust application of the Statute.[1]

The case went to the jury on the following questions: (1) whether the contract was for a year's duration or was performable on a trial basis, thus making it terminable at the will of either party; (2) whether the plaintiff was discharged for just cause; and (3) if he was not discharged for just cause, what damages were due the plaintiff. The jury returned a verdict for the plaintiff in the sum of $12,103.40. The defendants appeal to this court on four principal grounds, three of which we find to be without merit. The remaining ground of appeal is whether the plaintiff can maintain an action on the alleged oral employment contract in light of the prohibition of the Statute of Frauds making unenforceable an oral contract that is not to be performed within one year.

I. Time of Acceptance of the Employment Agreement

The defendants contend that the trial court erred in refusing to give an instruction to the jury that if the employment agreement was made more than one day before the plaintiff began performance, there could be no recovery by the plaintiff. The reason given was that a contract not to be performed within one year from its making is unenforceable if not in writing.

The defendants are correct in their argument that the time of acceptance of an offer is a question of fact for the jury to decide. But the trial court alternatively decided that even if the offer was accepted on the Saturday prior to the commencement of performance, the intervening Sunday and part of Saturday would not be counted in computing the year for the purposes of the Statute of Frauds. The judge stated that Sunday was a non-working day and only a fraction of Saturday was left which he would not count. In any event, there is no need to discuss the relative merits of either ruling since we base our decision in this case on the doctrine of equitable estoppel which was properly briefed and argued by both parties before this court, although not presented to the trial court.

1. The Court:

You make the law look ridiculous, because one day is Sunday and the man does not work on Sunday, the other day is Saturday; he is up in Fresno. He can't work down there. And he is down here Sunday night and shows up for work on Monday. To me that is a contract within a year. I don't want to make the law look ridiculous, Mr. Clause, because it is one day later, one day too much, and that one day is a Sunday, and a non-working day.

II. Enforcement by Virtue of Action in Reliance on the Oral Contract

In determining whether a rule of law can be fashioned and applied to a situation where an oral contract admittedly violates a strict interpretation of the Statute of Frauds, it is necessary to review the Statute itself together with its historical and modern functions. The Statute of Frauds, which requires that certain contracts be in writing in order to be legally enforceable, had its inception in the days of Charles II of England. Hawaii's version of the Statute is found in HRS §656-1 and is substantially the same as the original English Statute of Frauds.

The first English Statute was enacted almost 300 years ago to prevent "many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury." 29 Car. 2, c.3 (1677). Certainly, there were compelling reasons in those days for such a law. At the time of enactment in England, the jury system was quite unreliable, rules of evidence were few, and the complaining party was disqualified as a witness so he could neither testify on direct examination nor, more importantly, be cross-examined. Summers, The Doctrine of Estoppel and the Statute of Frauds, 79 U. Pa. L. Rev. 440, 441 (1931). The aforementioned structural and evidentiary limitations on our system of justice no longer exist.

Retention of the Statute today has nevertheless been justified on at least three grounds: (1) the Statute still serves an evidentiary function thereby lessening the danger of perjured testimony (the original rationale); (2) the requirement of a writing has a cautionary effect which causes reflection by the parties on the importance of the agreement; and (3) the writing is an easy way to distinguish enforceable contracts from those which are not, thus channelling certain transactions into written form.[2]

In spite of whatever utility the Statute of Frauds may still have, its applicability has been drastically limited by judicial construction over the years in order to mitigate the harshness of a mechanical application.[3] Furthermore, learned writers continue to disparage the Statute regarding it as "a statute for promoting fraud" and a "legal anachronism."[4]

Another method of judicial circumvention of the Statute of Frauds has grown out of the exercise of the equity powers of the courts. Such

2. Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 800-803 (1941); Note: Statute of Frauds—The Doctrine of Equitable Estoppel and the Statute of Frauds, 66 Mich. L. Rev. 170 (1967).

3. Thus a promise to pay the debt of another has been construed to encompass only promises made to a creditor which do not benefit the promisor (Restatement of Contracts §184 (1932); 3 Williston, Contracts §452 (Jaeger ed. 1960)); a promise in consideration of marriage has been interpreted to exclude mutual promises to marry (Restatement, supra §192; 3 Williston, supra §485); a promise not be performed within one year means a promise not performable within one year (Restatement, supra §198; 3 Williston, supra §495); a promise not to be performed within one year may be removed from the Statute of Frauds if one party has fully performed (Restatement, supra §198; 3 Williston, supra §504); and the Statute will not be applied where all promises involved are fully performed (Restatement, supra §219; 3 Williston, supra §528).

4. Burdick, A Statute for Promoting Fraud, 16 Colum. L. Rev, 273 (1916); Willis, The Statue of Frauds—A Legal Anachronism, 3 Ind. L.J. 427, 528 (1928).

judicially imposed limitations or exceptions involved the traditional dispensing power of the equity courts to mitigate the "harsh" rule of law. When courts have enforced an oral contract in spite of the Statute, they have utilized the legal labels of "part performance" or "equitable estoppel" in granting relief. Both doctrines are said to be based on the concept of estoppel, which operates to avoid unconscionable injury. 3 Williston, Contracts §533A at 791 (Jaeger ed. 1960), Summers, supra at 443-449; Monarco v. Lo Greco, 35 Cal. 2d 621, 220 P.2d 737 (1950) (Traynor, J.).

Part performance has long been recognized in Hawaii as an equitable doctrine justifying the enforcement of an oral agreement for the conveyance of an interest in land where there has been substantial reliance by the party seeking to enforce the contract. Perreira v. Perreira, 50 Haw. 641, 447 P.2d 667 (1968) (agreement to grant life estate); Vierra v. Shipman, 26 Haw. 369 (1922) (agreement to devise land); Yee Hop v. Young Sak Cho, 25 Haw. 494 (1920) (oral lease of real property). Other courts have enforced oral contracts (including employment contracts) which failed to satisfy the section of the Statute making unenforceable an agreement not to be performed within a year of its making. This has occurred where the conduct of the parties gave rise to an estoppel to assert the Statute. Oxley v. Ralston Purina Co., 349 F.2d 328 (6th Cir. 1965) (equitable estoppel); Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295, 15 Alaska 272 (9th Cir. 1954) ("promissory estoppel"); Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88 (1909) (equitable estoppel).

It is appropriate for modern courts to cast aside the raiments of conceptualism which cloak the true policies underlying the reasoning behind the many decisions enforcing contracts that violate the Statute of Frauds. There is certainly no need to resort to legal rubrics or meticulous legal formulas when better explanations are available. The policy behind enforcing an oral agreement which violated the Statute of Frauds, as a policy of avoiding unconscionable injury, was well set out by the California Supreme Court. In Monarco v. Lo Greco, 35 Cal. 2d 621, 623, 220 P.2d 737, 739 (1950), a case which involved an action to enforce an oral contract for the conveyance of land on the grounds of 20 years performance by the promisee, the court said:

> The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract.

See also Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88 (1909) (an employment contract enforced).

In seeking to frame a workable test which is flexible enough to cover diverse factual situations and also provide some reviewable standards, we find very persuasive section 217A of the Second Restatement of Contracts.[5]

5. Restatement (Second) of Contracts §217A (Supp. Tentative Draft No. 4, 1969).

That section specifically covers those situations where there has been reliance on an oral contract which falls within the Statute of Frauds. Section 217A states:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.
>
> (2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant: (a) the availability and adequacy of other remedies, particularly cancellation and restitution; (b) the definite and substantial character of the action or forbearance in relation to the remedy sought; (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence; (d) the reasonableness of the action or forbearance; (e) the extent to which the action or forbearance was forseeable by the promisor.

We think that the approach taken in the Restatement is the proper method of giving the trial court the necessary latitude to relieve a party of the hardships of the Statute of Frauds. Other courts have used similar approaches in dealing with oral employment contracts upon which an employee had seriously relied. See Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295 (9th Cir. 1954); Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88 (1909). This is to be preferred over having the trial court bend over backwards to take the contract out of the Statute of Frauds. In the present case the trial court admitted just this inclination and forthrightly followed it.

There is no dispute that the action of the plaintiff in moving 2,200 miles from Los Angeles to Hawaii was foreseeable by the defendant. In fact, it was required to perform his duties. Injustice can only be avoided by the enforcement of the contract and the granting of money damages. No other remedy is adequate. The plaintiff found himself residing in Hawaii without a job.

It is also clear that a contract of some kind did exist. The plaintiff performed the contract for two and one-half months receiving $3,484.60 for his services. The exact length of the contract, whether terminable at will as urged by the defendant, or for a year from the time when the plaintiff started working, was up to the jury to decide.

In sum, the trial court might have found that enforcement of the contract was warranted by virtue of the plaintiff's reliance on the defendant's promise. Naturally, each case turns on its own facts. Certainly there is considerable discretion for a court to implement the true policy behind the Statute of Frauds, which is to prevent fraud or any other type of unconscionable injury. We therefore affirm the judgment of the trial court on the ground that the plaintiff's reliance was such that injustice could only be avoided by enforcement of the contract.

Affirmed.

ABE, J. (dissenting). The majority of the court has affirmed the judgment of the trial court; however, I respectfully dissent.

I

Whether alleged contract of employment came within the Statute of Frauds:

As acknowledged by this court, the trial judge erred when as a matter of law he ruled that the alleged employment contract did not come within the Statute of Frauds; however, I cannot agree that this error was not prejudicial as this court intimates.

On this issue, the date that the alleged contract was entered into was all important and the date of acceptance of an offer by the plaintiff was a question of fact for the jury to decide. In other words, it was for the jury to determine when the alleged one-year employment contract was entered into and if the jury had found that the plaintiff had accepted the offer[1] more than one day before plaintiff was to report to work, the contract would have come within the Statute of Frauds and would have been unenforceable. Sinclair v. Sullivan Chevrolet Co., 31 Ill. 2d 507, 202 N.E.2d 516 (1964); Chase v. Hinkley, 126 Wis. 75, 105 N.W. 230 (1905).

II

This court holds that though the alleged one-year employment contract came within the Statute of Frauds, nevertheless the judgment of the trial court is affirmed "on the ground that the plaintiff's reliance was such that injustice could only be avoided by enforcement of the contract."

I believe this court is begging the issue by its holding because to reach that conclusion, this court is ruling that the defendant agreed to hire the plaintiff under a one-year employment contract. The defendant has denied that the plaintiff was hired for a period of one year and has introduced into evidence testimony of witnesses that all hiring by the defendant in the past has been on a trial basis. The defendant also testified that he had hired the plaintiff on a trial basis.

I kept looking for this

Here on one hand the plaintiff claimed that he had a one-year employment contract; on the other hand, the defendant claimed that the plaintiff had not been hired for one year but on a trial basis for so long as his services were satisfactory. I believe the Statute of Frauds was enacted to avoid the consequences this court is forcing upon the defendant. In my opinion, the legislature enacted the Statute of Frauds to negate claims such as has been made by the plaintiff in this case. But this court holds that because the plaintiff in reliance of the one-year employment contract (alleged to have been entered into by the plaintiff, but denied by the defendant) has changed his position, "injustice could only be avoided by enforcement of the contract." Where is the sense of justice?

Now assuming that the defendant had agreed to hire the plaintiff under a one-year employment contract and the contract came within the Statute of Frauds, I cannot agree, as intimated by this court, that we should circumvent the Statute of Frauds by the exercise of the equity powers of

1. Plaintiff testified that he accepted the offer in California over the telephone.

courts. As to statutory law, the sole function of the judiciary is to interpret the statute and the judiciary should not usurp legislative power and enter into the legislative field. A. C. Chock, Ltd. v. Kaneshiro, 51 Haw. 87, 93, 451 P.2d 809 (1969); Miller v. Miller, 41 Ohio Op. 233, 83 N.E.2d 254 (Ct. C.P. 1948). Thus, if the Statute of Frauds is too harsh as intimated by this court, and it brings about undue hardship, it is for the legislature to amend or repeal the statute and not for this court to legislate.

KOBAYASHI, J., joins in this dissent.

NOTE

The Alaska Supreme Court has cited *McIntosh* with approval in a very similiar situation. Alaska Democratic Party v. Rice, 934 P.2d 1313(Alaska 1997) (promise to employee Rice as executive director was enforced where worker resigned from her job and moved to Alaska in reliance on promise to employ her). However, there is strong authority to the contrary, with more courts than not denying the use of promissory estoppel doctrine to overcome the statute of frauds in this fashion. Sterns v. Emery-Waterhouse Co., 596 A.2d 72 (Me. 1991) and McInerney v. Charter Golf, Inc. 680 N.E.2d 1347 (Ill. 1997) (must show fraud and not mere promise).

The last case cited, *McInerney,* was an employment case, and there is probably no tougher case for a proponent of estoppel than one in which a prospective employee or a current employee attempts to circumvent a writing requirement through the use of estoppel theory. The underlying rationale may be the strong reluctance of a court to undermine the "at will" limitation on employment contracts adopted by most states. This doctrine is relatively straightforward: Subject to few exceptions, without a specific contract to the contrary an employee can be fired for *any reason at any time.* Exceptions include, for example, prohibitions against discrimination on a prohibited basis such as race, gender, or age. By strictly enforcing the statute of frauds requirement — not allowing promissory estoppel to be used to enforce an oral contract contra to the at-will contract — the at-will doctrine has one less weakness. For a review of the at-will doctrine, its history in one state, and the use of promissory estoppel in light of the at-will doctrine, see Robert J. Connor, A Study of the Interplay Between Promissory Estoppel and At Will Employment in Texas, 53 SMU L. Rev. 579 (2000).

CHAPTER

5

THE PAROL EVIDENCE RULE AND INTERPRETATION OF THE CONTRACT

Few things are darker than this, or fuller of subtle difficulties.
—Thayer, A Preliminary Treatise on Evidence at Common Law 390 (1898)

I. INTRODUCTION

Problem 105

For two years World Wide Widgets (WWW) negotiated for the construction and purchase of a new computer system from MegaHard Computers, with teams of lawyers bargaining heatedly over the contract terms. The contract was finally signed by the two parties, and the new system designed and installed. Two days later the president of WWW cancelled the purchase, saying that the system was unsatisfactory and that, in addition to all the terms of the written contract, the parties had an oral understanding that WWW could get out of the deal at any time if it didn't like the way the computer system was functioning.

You are the trial judge hearing the lawsuit that arose out of this. Will you allow in evidence of this oral understanding?

In this chapter the focus is on defining the parties' agreement in order to determine their contractual obligations. This inquiry involves two basic steps. One requires setting the boundaries of the parties' agreement; a step the parties may have begun by putting their agreement in writing. If the parties have integrated some or all of their understandings into a writing, to what extent may evidence of prior agreements or negotiations be introduced to add to or vary the written statement? The resolution of that question requires exploration of the *parol evidence rule.*

The other step requires a determination of the "meaning" of the parties' "agreement." Of course, the court is interested in what the parties intended by their agreement. What the parties wrote in their final contract is the starting point. But writings, as we know from our own writings and you may as well, are not necessarily a model of clarity. Thus, a word or phrase or paragraph or more may be ambiguous; that is, susceptible to more than one meaning. Which meaning should the court apply: what the court itself presumes to be the intent of the parties after reading only the writing, what one of the parties to the contract argues the words mean, or how an outside party or parties may interpret such words? And to what extent should the court take into consideration the surrounding circumstances, who drafted the contract, and other matters outside the writing itself? The resolution of the meaning of a written contract is the process of *interpretation*.

The parol evidence rule and the process of interpretation are closely related and may be discussed together in any given court decision with no clear indication of which doctrine is truly relevant. We, therefore, divide the discussion of the two doctrines (with some trepidation) with the hope that the meaning of all this is clearer.

II. PAROL EVIDENCE RULE

A. *Meaning of "Parol Evidence"*

If the parties have taken the time and trouble to reduce their agreement to a writing, our law presumes that they have integrated into that writing all matter, written or oral, that occurred prior to signing the writing and will not allow in evidence to the contrary. This is what is meant by the *parol evidence rule*.

"Parol evidence" is generally assumed to include evidence of oral or written agreements or negotiations that are prior to or contemporaneous with a writing intended to be the complete or partial integration of the parties' final agreement. (Although note that the UCC does not include in its limitation writings that are contemporaneous with a final written agreement.) The word parol does not mean "oral" as is often supposed. Instead it is a French word meaning "informal" (i.e., not under seal). As such it bars the introduction of all negotiations or agreements occurring prior to the signing of the writing, whether written or oral.

Problem 106

Jane Bean and Hiram Walkup agreed that Jane would build a dock for Hiram on a lake near Big Rock Candy Mountain. They entered into a

formal written contract utilizing a construction contract form supplied by Jane's attorney. Construction began. One day while sitting near Lemonade Springs, Jane commented that it was becoming difficult to purchase copper-clad nails as specified in the contract. Hiram said, "Oh, Jane you can use galvanized nails if you like." And Jane did. Now Hiram has sued Jane for breach of contract because Jane used galvanized nails. Jane has offered evidence of the oral agreement. Hiram objects because of the parol evidence rule. Is it applicable here?

B. Exceptions to the Rule

RESTATEMENT (SECOND) OF CONTRACTS

§213. Effect of Integrated Agreement on Prior Agreements (Parol Evidence Rule)

(1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.

(2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope. . . .

UNIFORM COMMERCIAL CODE §2-202

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

MITCHILL v. LATH
Court of Appeals of New York, 1928
247 N.Y. 377, 160 N.E. 646

Andrews, J. In the fall of 1923 the Laths owned a farm. This they wished to sell. Across the road, on land belonging to Lieutenant-Governor Lunn, they had an ice house which they might remove. Mrs. Mitchill looked over the land with a view to its purchase. She found the ice house objectionable. Thereupon "the defendants orally promised and agreed,

for and in consideration of the purchase of their farm by the plaintiff, to remove the said ice house in the spring of 1924." Relying upon this promise, she made a written contract to buy the property for $8,400, for cash and a mortgage and containing various provisions usual in such papers. Later receiving a deed, she entered into possession and has spent considerable sums in improving the property for use as a summer residence. The defendants have not fulfilled their promise as to the ice house and do not intend to do so. We are not dealing, however, with their moral delinquencies. The question before us is whether their oral agreement may be enforced in a court of equity.

This requires a discussion of the parol evidence rule—a rule of law which defines the limits of the contract to be construed. Glackin v. Bennett, 226 Mass. 316, 115 N.E. 490. It is more than a rule of evidence and oral testimony even if admitted will not control the written contract, O'Malley v. Grady, 222 Mass. 202, 109 N.E. 829, unless admitted without objection. Brady v. Nally, 151 N.Y. 258, 45 N.E. 547. It applies, however, to attempts to modify such a contract by parol. It does not affect a parol collateral contract distinct from and independent of the written agreement. It is, at times, troublesome to draw the line. Williston, in his work on Contracts (sec. 637) points out the difficulty. "Two entirely distinct contracts," he says, "each for a separate consideration may be made at the same time and will be distinct legally. Where, however, one agreement is entered into wholly or partly in consideration of the simultaneous agreement to enter into another, the transactions are necessarily bound together. . . . Then if one of the agreements is oral and the other is written, the problem arises whether the bond is sufficiently close to prevent proof of the oral agreement." That is the situation here. It is claimed that the defendants are called upon to do more than is required by their written contract in connection with the sale as to which it deals.

The principle may be clear, but it can be given effect by no mechanical rule. As so often happens, it is a matter of degree, for as Professor Williston also says where a contract contains several promises on each side it is not difficult to put any one of them in the form of a collateral agreement. If this were enough written contracts might always be modified by parol. Not form, but substance is the test.

In applying this test the policy of our courts is to be considered. We have believed that the purpose behind the rule was a wise one not easily to be abandoned. Notwithstanding injustice here and there, on the whole it works for good. Old precedents and principles are not to be lightly cast aside unless it is certain that they are an obstruction under present conditions. New York has been less open to arguments that would modify this particular rule, than some jurisdictions elsewhere. . . .

Under our decisions before such an oral agreement as the present is received to vary the written contract at least three conditions must exist, (1) the agreement must in form be a collateral one; (2) it must not contradict express or implied provisions of the written contract; (3) it must be one that parties would not ordinarily be expected to embody in the writing; or put in another way, an inspection of the written contract, read in the light of surrounding circumstances must not indicate that the

writing appears "to contain the engagement of the parties, and to define the object and measure the extent of such engagement." Or again, it must not be so clearly connected with the principal transaction as to be part and parcel of it.

The respondent does not satisfy the third of these requirements. It may be, not the second. We have a written contract for the purchase and sale of land. The buyer is to pay $8,400 in the way described. She is also to pay her portion of any rents, interest on mortgages, insurance premiums and water meter charges. She may have a survey made of the premises. On their part the sellers are to give a full covenant deed of the premises as described, or as they may be described by the surveyor if the survey is had, executed and acknowledged at their own expense; they sell the personal property on the farm and represent they own it; they agree that all amounts paid them on the contract and the expense of examining the title shall be a lien on the property; they assume the risk of loss or damage by fire until the deed is delivered; and they agree to pay the broker his commissions. Are they to do more? Or is such a claim inconsistent with these precise provisions? It could not be shown that the plaintiff was to pay $500 additional. Is it also implied that the defendants are not to do anything unexpressed in the writing?

That we need not decide. At least, however, an inspection of this contract shows a full and complete agreement, setting forth in detail the obligations of each party. On reading it one would conclude that the reciprocal obligations of the parties were fully detailed. Nor would his opinion alter if he knew the surrounding circumstances. The presence of the ice house, even the knowledge that Mrs. Mitchill thought it objectionable would not lead to the belief that a separate agreement existed with regard to it. Were such an agreement made it would seem most natural that the inquirer should find it in the contract. Collateral in form it is found to be, but it is closely related to the subject dealt with in the written agreement—so closely that we hold it may not be proved.

Where the line between the competent and the incompetent is narrow the citation of authorities is of slight use. Each represents the judgment of the court on the precise facts before it. How closely bound to the contract is the supposed collateral agreement is the decisive factor in each case. . . .

It is argued that what we have said is not applicable to the case as presented. The collateral agreement was made with the plaintiff. The contract of sale was with her husband and no assignment of it from him appears. Yet the deed was given to her. It is evident that here was a transaction in which she was the principal from beginning to end. We must treat the contract as if in form, as it was in fact, made by her.

Our conclusion is that the judgment of the Appellate Division and that of the Special Term should be reversed and the complaint dismissed, with costs in all courts.

LEHMAN, J. (dissenting). I accept the general rule as formulated by Judge Andrews. I differ with him only as to its application to the facts shown in the record. The plaintiff contracted to purchase land from the

defendants for an agreed price. A formal written agreement was made between the sellers and the plaintiff's husband. It is on its face a complete contract for the conveyance of the land. It describes the property to be conveyed. It sets forth the purchase price to be paid. All the conditions and terms of the conveyance to be made are clearly stated. I concede at the outset that parol evidence to show additional conditions and terms of the conveyance would be inadmissible. There is a conclusive presumption that the parties intended to integrate in that written contract every agreement relating to the nature or extent of the property to be conveyed, the contents of the deed to be delivered, the consideration to be paid as a condition precedent to the delivery of the deeds, and indeed all the rights of the parties in connection with the land. The conveyance of that land was the subject-matter of the written contract and the contract completely covers that subject.

The parol agreement which the court below found the parties had made was collateral to, yet connected with, the agreement of purchase and sale. It has been found that the defendants induced the plaintiff to agree to purchase the land by a promise to remove an ice house from land not covered by the agreement of purchase and sale. No independent consideration passed to the defendants for the parol promise. To that extent the written contract and the alleged oral contract are bound together. The same bond usually exists wherever attempt is made to prove a parol agreement which is collateral to a written agreement. Hence "the problem arises whether the bond is sufficiently close to prevent proof of the oral agreement." See Judge Andrews' citation from Williston on Contracts, section 637.

Judge Andrews has formulated a standard to measure the closeness of the bond. Three conditions, at least, must exist before an oral agreement may be proven to increase the obligation imposed by the written agreement. I think we agree that the first condition that the agreement "must in form be a collateral one" is met by the evidence. I concede that this condition is met in most cases where the courts have nevertheless excluded evidence of the collateral oral agreement. The difficulty here, as in most cases, arises in connection with the two other conditions.

The second condition is that the "parol agreement must not contradict express or implied provisions of the written contract." Judge Andrews voices doubt whether this condition is satisfied. The written contract has been carried out. The purchase price has been paid; conveyance has been made, title has passed in accordance with the terms of the written contract. The mutual obligations expressed in the written contract are left unchanged by the alleged oral contract. When performance was required of the written contract, the obligations of the parties were measured solely by its terms. By the oral agreement the plaintiff seeks to hold the defendants to other obligations to be performed by them thereafter upon land which was not conveyed to the plaintiff. The assertion of such further obligation is not inconsistent with the written contract unless the written contract contains a provision, express or implied, that the defendants are not to do anything not expressed in the writing. Concededly there is no such express provision

in the contract, and such a provision may be implied, if at all, only if the asserted additional obligation is "so clearly connected with the principal transactions as to be part and parcel of it," and is not "one that the parties would not ordinarily be expected to embody in the writing." The hypothesis so formulated for a conclusion that the asserted additional obligation is inconsistent with an implied term of the contract is that the alleged oral agreement does not comply with the third condition as formulated by Judge Andrews. In this case, therefore, the problem reduces itself to the one question whether or not the oral agreement meets the third condition.

I have conceded that upon inspection the contract is complete. "It appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement"; it constitutes the contract between them and is presumed to contain the whole of that contract. (Eighmie v. Taylor, 98 N.Y. 288.) That engagement was on the one side to convey land; on the other to pay the price. The plaintiff asserts further agreement based on the same consideration to be performed by the defendants after the conveyance was complete, and directly affecting only other land. It is true, as Judge Andrews points out, that "the presence of the ice house, even the knowledge that Mrs. Mitchill thought it objectionable, would not lead to the belief that a separate agreement existed with regard to it"; but the question we must decide is whether or not, *assuming* an agreement was made for the removal of an unsightly ice house from one parcel of land as an inducement for the purchase of another parcel, the parties would ordinarily or naturally be expected to embody the agreement for the removal of the ice house from one parcel in the written agreement to convey the other parcel. Exclusion of proof of the oral agreement on the ground that it varies the contract embodied in the writing may be based only upon a finding or presumption that the written contract was intended to cover the oral negotiations for the removal of the ice house which lead up to the contract of purchase and sale. To determine what the writing was intended to cover "the document alone will not suffice. What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered." (Wigmore on Evidence (2d ed.), section 2430.)

key issue

The subject-matter of the written contract was the conveyance of land. The contract was so complete on its face that the conclusion is inevitable that the parties intended to embody in the writing all the negotiations covering at least the conveyance. The promise by the defendants to remove the ice house from other land was not connected with their obligation to convey, except that one agreement would not have been made unless the other was also made. The plaintiff's assertion of a parol agreement by the defendants to remove the ice house was completely established by the great weight of evidence. It must prevail unless that agreement was part of the agreement to convey and the entire agreement was embodied in the writing.

The fact that in this case the parol agreement is established by the overwhelming weight of evidence is, of course, not a factor which may be considered in determining the competency or legal effect of the evidence. Hardship in the particular case would not justify the court in disregarding or emasculating the general rule. It merely accentuates the outlines of our problem. The assumption that the parol agreement was made is no longer obscured by any doubts. The problem then is clearly whether the parties are presumed to have intended to render that parol agreement legally ineffective and non-existent by failure to embody it in the writing. Though we are driven to say that nothing in the written contract which fixed the terms and conditions of the stipulated conveyance suggests the existence of any further parol agreement, an inspection of the contract, though it is complete on its face in regard to the subject of the conveyance, does not, I think, show that it was intended to embody negotiations or agreements, if any, in regard to a matter so loosely bound to the conveyance as the removal of an ice house from land not conveyed. . . .

CARDOZO, C.J., POUND, KELLOGG, and O'BRIEN, JJ., concur with ANDREWS, J.; LEHMAN, J., dissents in opinion in which CRANE, J., concurs.

QUESTIONS

The exception to the parol evidence rule discussed in *Mitchill* is commonly called the "collateral matter" exception, allowing in evidence of side agreements as long as there is a reasonable explanation as to why these agreements might have been omitted from the writing. In a sale of goods, UCC §2-202 calls these agreements "consistent additional terms." If Mrs. Mitchill really did contract for the removal of the ice house, why, as a practical matter, didn't she insist on this agreement being included in the writing?

The court says that the parol evidence rule is established by New York policy. What policy would that be?

The effect of the Restatement (Second) parol evidence rule depends, as it has historically, on whether the writing purported to represent the final agreement is in fact the final agreement; that is, is it "integrated"? A written agreement has no effect on the admission of parol evidence unless it is integrated. If it is integrated, the extent to which it is integrated is important. If partially integrated (i.e., the writing is final as to some terms of the agreement but not all), the writing serves to exclude parol evidence of terms that are inconsistent with those in the final writing. If completely integrated (i.e., that is, the writing is the final agreement as to all agreed terms), the Restatement (Second) tells us that the rule will exclude all parol evidence.

Although the UCC does not use the term "integrated," §2-202 begins with the same inquiry: Is the writing a complete or partial representation of the parties final agreement? The effect is the same as under the Restatement Second: Parol evidence is not admissible to contradict terms of a final writing, and further it is not adimissible to even supplement

(add to) the agreement if the final writing is the "complete and exclusive" statement of the parties agreement.

How is a court to make the determination of whether the agreement is integrated and whether there is a total or partial integration? The issue is one of intent of the parties. But what evidence should the court consider in determining the intent? Historically, the court saw its role as fairly straightforward:

> The only criterion of the completeness of the written contract as a full expression of the agreement is the writing itself.

Thompson v. Libbey, 34 Minn. 374, 26 N.W. 1 (Minn. 1885).

This quote is representative of Professor Williston's so-called four-corners test. In some jurisdictions, the harshness of this test, which looked only to the writing itself to determine the issue of completeness, became modified by the acceptance of evidence of surrounding circumstances such as "the situation of the parties, the subject matter and purposes of the transaction." Bussard v. College of St. Thomas, Inc., 294 Minn. 215, 200 N.W.2d 155 (1972). The Willistonian approach is still very much alive in many jurisdictions. See, e.g., Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Investments, 750 F. Supp. 711 (W.D. Pa. 1990), aff'd, 951 F.2d 1399 (3d Cir. 1991).

Corbin's view and that of the drafters of the Restatement (Second) is that a court may consider the parol evidence (evidence of prior oral agreements and negotiations) itself to determine whether there is an integration and if so the extent of integration. See Restatement (Second) of Contracts §214. Corbin was no fan of the parol evidence rule, believing that it merely restated the obvious: later agreements cancel prior ones if so intended by the parties; see Corbin §574.

BETACO, INC. v. CESSNA AIRCRAFT CO.
32 F.3d 1126 (7th Cir. 1994)

ROVNER, Circuit Judge. Betaco, Inc. ("Betaco") agreed in 1990 to purchase a six-passenger CitationJet from the Cessna Aircraft Company ("Cessna"). Betaco's decision was based in part on Cessna's representation in a cover letter accompanying the purchase agreement that the new jet was "much faster, more efficient and has more range than the popular Citation I," a model with which Betaco was familiar. After advancing $150,000 toward the purchase of the new plane, Betaco became convinced that the CitationJet would not have a greater range than the Citation I with a full passenger load and decided to cancel the purchase. When Cessna refused to return Betaco's deposit, Betaco filed suit in diversity claiming, inter alia, that Cessna had breached an express warranty that the CitationJet had a greater range than the Citation I. The district court rejected Cessna's contention that the purchase agreement signed by the parties was a fully integrated document that precluded Betaco's attempt to rely on this warranty. A jury concluded that the cover letter's representa-

tion as to the range of the plane did amount to an express warranty and that Cessna had breached this warranty, and Betaco was awarded damages of $150,000 with interest. We reverse the district court's entry of partial summary judgment in favor of Betaco on the threshold integration issue, concluding that a question of fact exists as to the parties' intent that can be resolved only after a factual hearing before the district court.

I. BACKGROUND

A. FACTS

Betaco is a Delaware corporation headquartered in Indiana; it is a holding company that acquires aircraft for sale or lease to other companies and also for the personal use of J. George Mikelsons, the company owner. Betaco leases aircraft to Execujet and also to American Transair, an airline that Mikelsons founded in 1973 and of which he is the chairman and chief executive. Both companies interlock with Betaco. Mikelsons is himself an experienced pilot.

In late 1989, Betaco became interested in a new aircraft known as the CitationJet to be manufactured by Cessna, a Kansas corporation. Mikelsons contacted Cessna and asked for information about the forthcoming plane. On January 25, 1990, Cessna forwarded to Mikelsons a packet of materials accompanied by a cover letter which read as follows:

> Dear Mr. Mikelsons:
>
> We are extremely pleased to provide the material you requested about the phenomenal new CitationJet.
>
> Although a completely new design, the CitationJet has inherited all the quality, reliability, safety and economy of the more than 1600 Citations before it. At 437 miles per hour, the CitationJet is much faster, more efficient, and has more range than the popular Citation I. And its luxurious first-class cabin reflects a level of comfort and quality found only in much larger jets.
>
> And you get all this for less than an ordinary turboprop!
>
> If you have questions or need additional information about the CitationJet, please give me a call. I look forward to discussing this exciting new airplane with you.
>
> Sincerely,
>
> Robert T. Hubbard
> Regional Manager

App. 97. Enclosed with Hubbard's letter was a twenty-three page brochure providing general information about the CitationJet, including estimates of the jet's anticipated range and performance at various fuel and payload weights. A purchase agreement was also enclosed. The preliminary specifications attached and incorporated into that agreement as "Exhibit A" indicated that the CitationJet would have a full fuel range of 1,500 nautical miles, plus or minus four percent, under specified conditions. App. 108.

Mikelsons signed the purchase agreement on January 29, 1990 and returned it to Cessna, whose administrative director, Ursula Jarvis, added her signature on February 8, 1990. The agreement occupied both sides of a single sheet of paper. As completed by the parties, the front side reflected a purchase price of $2.495 million and a preliminary delivery date of March, 1994, with Betaco reserving the right to opt for an earlier delivery in the event one were possible. The payment terms required Betaco to make an initial deposit of $50,000 upon execution of the contract, a second deposit of $100,000 when Cessna gave notice that the first prototype had been flown, and a third deposit of $125,000 at least six months in advance of delivery. The balance was to be paid when the plane was delivered. The agreement expressly incorporated the attached preliminary specifications, although Cessna reserved the right to revise them "whenever occasioned by product improvements or other good cause as long as such revisions do not result in a reduction in performance standards." Item number 9 on the front page stated:

> The signatories to this Agreement verify that they have read the complete Agreement, understand its contents and have full authority to bind and hereby do bind their respective parties.

Following this provision, in a final paragraph located just above the signature lines (written in capital lettering that distinguished this provision from the preceding provisions), the agreement stated:

> PURCHASER AND SELLER ACKNOWLEDGE AND AGREE BY EXECUTION OF THIS AGREEMENT THAT THE TERMS AND CONDITIONS ON REVERSE SIDE HEREOF ARE EXPRESSLY MADE PART OF THIS AGREEMENT. EXCEPT FOR THE EXPRESS TERMS OF SELLER'S WRITTEN LIMITED WARRANTIES PERTAINING TO THE AIRCRAFT, WHICH ARE SET FORTH IN THE SPECIFICATION (EXHIBIT A), SELLER MAKES NO REPRESENTATIONS OR WARRANTIES EXPRESS OR IMPLIED, OF MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE, OR OTHERWISE WHICH EXTEND BEYOND THE FACE HEREOF OR THEREOF. THE WRITTEN LIMITED WARRANTIES OF SELLER ACCOMPANYING ITS PRODUCT ARE IN LIEU OF ANY OTHER OBLIGATION OR LIABILITY WHATSOEVER BY REASON OF THE MANUFACTURE, SALE, LEASE OR USE OF THE WARRANTED PRODUCTS AND NO PERSON OR ENTITY IS AUTHORIZED TO MAKE ANY REPRESENTATIONS OR WARRANTIES OR TO ASSUME ANY OBLIGATIONS ON BEHALF OF SELLER. THE REMEDIES OF REPAIR OR REPLACEMENT SET FORTH IN SELLER'S WRITTEN LIMITED WARRANTIES ARE THE ONLY REMEDIES UNDER SUCH WARRANTIES OR THIS AGREEMENT. IN NO EVENT SHALL SELLER BE LIABLE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING, WITHOUT LIMITATION, LOSS OF PROFITS OR GOODWILL, LOSS OF USE, LOSS OF TIME, INCONVENIENCE, OR COMMERCIAL LOSS. THE ENGINES AND ENGINE ACCESSORIES ARE SEPARATELY WARRANTED BY THEIR MANUFACTURER AND ARE EXPRESSLY EXCLUDED FROM THE LIMITED WARRANTIES OF SELLER. THE LAWS OF SOME STATES DO NOT PERMIT CERTAIN LIMITATIONS ON WARRANTIES OR REMEDIES. IN THE EVENT THAT SUCH A LAW

APPLIES, THE FOREGOING EXCLUSIONS AND LIMITATIONS ARE AMENDED INSOFAR AND ONLY INSOFAR, AS REQUIRED BY SAID LAW.

App. 99 ¶9 (emphasis in original). On the reverse side, the agreement included the following integration clause among its "General Terms":

> This agreement is the only agreement controlling this purchase and sale, express or implied, either verbal or in writing, and is binding on Purchaser and Seller, their heirs, executors, administrators, successors or assigns. This Agreement, including the rights of Purchaser hereunder, may not be assigned by Purchaser except to a wholly-owned subsidiary or successor in interest by name change or otherwise and then only upon the prior written consent of Seller. Purchaser acknowledges receipt of a written copy of this Agreement which may not be modified in any way except by written agreement executed by both parties.

App. 100, Section IV ¶7.

In early 1992, Paul Ruley and another Betaco employee visited Cessna's facilities in order to select the radio and navigational equipment to be installed in the plane. In the course of his work as an administrator for Execujet and American Transair, Ruley assesses the suitability of aircraft for particular charter flights based on the distance, passenger load, fuel, aircraft weight, and runway requirements. After his visit to Cessna, Ruley completed some calculations concerning the CitationJet and showed them to Mikelsons. By Ruley's estimate, the new jet would have a greater range than its predecessor, the Citation I, when carrying three to five passengers; but with a full passenger load of six (plus two crew members), the CitationJet would have a range no greater than or slightly less than that of the Citation I. Ruley also believed that the new plane would not meet the full fuel range of 1,500 nautical miles set forth in the preliminary specifications.

After seeing Ruley's numbers, Mikelsons contacted Cessna in March or April 1992. The testimony at trial was in conflict as to exactly what Cessna personnel told Mikelsons about the range of the new plane. In any case, Mikelsons was not satisfied that the CitationJet would live up to his expectations and decided to cancel the purchase. On April 16, 1992, Mick Hoveskeland of Cessna wrote to Mikelsons accepting the cancellation and offering to apply Betaco's deposit toward the purchase of another aircraft. Cessna subsequently refused Betaco's demand for a return of the deposit, however, invoking the contract's proviso that "all cash deposits shall be retained by [Cessna] not as a forfeiture but as liquidated damages for default if this Agreement is canceled or terminated by [Betaco] for any cause whatsoever. . . ." Betaco proceeded to file this suit.

B. PROCEEDINGS BELOW

[Of relevance here is the district court's decision concerning the admissibility of the express warranty made in Hubbard's letter of January 25, 1990.] . . .

The district court granted partial summary judgment in favor of Betaco [on the issue of whether the parol evidence rule of §2-202 excluded evidence of the express warranty]. The court found that Hubbard's January 25, 1990 cover letter to Mikelsons did, in fact, contain an express warranty to the effect that the range of the CitationJet would exceed the range of the Citation I. The court then considered whether the purchase agreement was a fully integrated document that would rule out extrinsic evidence concerning such an independent express warranty. Although the court acknowledged that the terms of the agreement declared it to be fully integrated and disclaimed any express warranties beyond its four corners, the court nonetheless concluded that the parties did not intend the contract to be the sole and exclusive reflection of their agreement. The court reasoned that Hubbard's representation as to the range of the CitationJet vis a vis the Citation I was not the type of term that would necessarily have been included in the contract itself; it was not, for example, so central to the agreement that Betaco would have insisted that it be written into the pre-printed purchase agreement. At the same time, the fact that the representation had been made in the cover letter accompanying the purchase agreement (which Mikelsons signed shortly after he received it) suggested to the court that the parties considered that representation to be the basis of their bargain. Finally, the court noted that the purchase agreement had not been the subject of extensive negotiation, and that Mikelsons had simply signed it without first seeking the counsel of an attorney. "Not only does this tend to excuse Betaco for failing to have the representations [as to the relative range of the jet] included in the Purchase Agreement, but it minimizes the impact of the warranty limitation and contract integration clauses in the Purchase Agreement." Mem. Op. at 8. . . .

II. Analysis

The sole issue before us is whether the district court erred in concluding that the contract signed by Betaco and Cessna was not a fully integrated contract containing a complete and exclusive statement of the parties' agreement. . . . Both parties agree that we should look to Kansas law in resolving this issue [that is, UCC §2-202]. . . .

The parties agree that they intended the signed purchase contract as a final expression of the terms set forth within its four corners. Betaco, however, has relied on Hubbard's cover letter as evidence of a "consistent additional term" of the agreement. Section 2-202(b) bars that evidence (and thus Betaco's claim for breach of the warranty in Hubbard's letter) if the parties intended the signed contract to be the "complete and exclusive" statement of their agreement.

An initial question arises as to the appropriate standard of review. Cessna urges us to review the district court's decision de novo, whereas Betaco contends that the court's ruling was a factual determination that we may review for clear error only.

Although the rule set forth in §2-202 is superficially a rule of evidence, Kansas does not treat it as such: " 'The parol evidence rule is not a rule of evidence, but of substantive law. Its applicability is for the court to determine, and, when the result is reached it is a conclusion of substantive law.' " In re Estate of Goff, 379 P.2d 225, 234 (Kan. 1963) (quoting Phipps v. Union Stock Yards Nat'l Bank, 34 P.2d 561, 563 (Kan. 1934)); see also Prophet v. Builders, Inc., 462 P.2d 122, 125 (Kan. 1969); Willner v. University of Kansas, 848 F.2d 1020, 1022 (10th Cir. 1988) (per curiam), cert. denied, 488 U.S. 1011, 109 S. Ct. 797 (1989). We have likewise treated the rule as a substantive one, and have accordingly considered the determination of whether or not an agreement was completely integrated to be a legal determination subject to de novo review. Merk v. Jewel Food Stores, 945 F.2d 889, 893 (7th Cir. 1991), cert. denied, 112 S. Ct. 1951 (1992); Calder v. Camp Grove State Bank, 892 F.2d 629, 632 (7th Cir. 1990) (applying Illinois law).

Betaco correctly points out, however, that insofar as this determination turns on the intent of the contracting parties, it poses a factual question. See Willner, 848 F.2d at 1022 n.3; Transamerica Oil Corp. v. Lynes, Inc., 723 F.2d 758, 763 (10th Cir. 1983). Thus, in cases where the integration assessment amounts to "a predominantly factual inquiry, revolving around the unwritten intentions of the parties instead of interpretation of a formal integration clause," courts have treated the district court's determination as a finding of fact subject to review only for clear error. Northwest Cent. Pipeline Corp. v. JER Partnership, 943 F.2d 1219, 1225 (10th Cir. 1991); Transamerica Oil, 723 F.2d at 763; see also In re Pearson Bros. Co., 787 F.2d 1157, 1161 (7th Cir. 1986) ("When a court interpreting a contract goes beyond the four corners of the contract and considers extrinsic evidence, the court's determination of the parties' intent is a finding of fact.").

Yet, in this case, the district court decided the question on summary judgment. Essentially, the court determined that the evidence before it could only be construed in one way, and that Betaco was entitled to judgment as a matter of law on the integration issue. Thus, the precise question before us is not who should prevail ultimately on the integration issue, but whether it was appropriate to enter partial summary judgment in favor of Betaco and against Cessna on the matter. Our review of that particular determination is of course, de novo, as it would be in any other appeal from the grant of summary judgment. . . .

The familiar rule of contractual interpretation is that absent an ambiguity, the intent of the parties is to be determined from the face of the contract, without resort to extrinsic evidence. [Citations omitted.] Yet, the drafters of §2-202 rejected any presumption that a written contract sets forth the parties' entire agreement. See Kan. Stat. Ann. §84-202, Official U.C.C. Comment (1); Mid Continent Cabinetry, Inc. v. George Koch Sons, Inc., 1991 WL 151074, at *8 (D. Kan. July 11, 1991). Instead, in ascertaining whether the parties intended their contract to be completely integrated, a court looks beyond the four corners of the document to the circumstances surrounding the transaction, "including the words and actions of the parties." Burge v. Frey, 545 F. Supp. 1160,

1170 (D. Kan. 1982). *Mid Continent Cabinetry* identifies the relevant considerations:

> The focus is on the intent of the parties. Sierra Diesel Injection Service v. Burroughs Corp., 890 F.2d 108, 112 (9th Cir. 1989). Section 2-202 does not offer any tests for determining if the parties intended their written agreement to be integrated. Comment three to §2-202 offers one measure of when a statement is complete and exclusive: 'If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.' The courts have looked to several factors, not just the writing, in deciding if the writing is integrated. These factors include merger or integration clauses, B. Clark & C. Smith, The Law of Product Warranties ¶4.04[1] and [2] at 4-37—4-40 (1984) (1990 Supp.); disclaimer clauses, see, e.g., St. Croix Printing Equipment, Inc. v. Rockwell Intern. Corp., [428 N.W.2d 877, 880] (Minn. App. 1988)]; the nature and scope of prior negotiations and any alleged extrinsic terms, J. White and R. Summers, Uniform Commercial Code §2-10 at 108 (3d ed. 1988); and the sophistication of the parties, Sierra Diesel Injection Service, 890 F.2d at 112.

1991 WL 151074, at *8. See also Transamerica Oil, 723 F.2d at 763; Ray Martin Painting, Inc. v. Ameron, Inc., 638 F. Supp. 768, 773 (D. Kan. 1986).

We look first to the warranty limitation and integration clauses of the purchase agreement, as these speak directly to the completeness and exclusivity of the contract. The warranty limitation clause states that "[e]xcept for the express terms of seller's written limited warranties pertaining to the aircraft, which are set forth in the specification (Exhibit A), [Cessna] makes no representations or warranties express or implied, of merchantability, fitness for any particular purpose, or otherwise *which extend beyond the face hereof or thereof.*" (Emphasis supplied.) The clause goes on to admonish the buyer that no individual is authorized to make representations or warranties on behalf of Cessna. On its face, this clause might be construed to disavow the types of representations found in Hubbard's letter to Mikelsons. However, as a general rule, express warranties, once made, cannot be so easily disclaimed. Section 2-316(1) of the Kansas U.C.C. provides that "subject to the provisions of this article on parol or extrinsic evidence (K.S.A. §84-2-202), negation or limitation [of an express warranty] is inoperative to the extent such construction is unreasonable." Kan. Stat. Ann. §84-2-316(1); see L. S. Heath & Son, Inc. v. AT&T Info. Sys., Inc., 9 F.3d 561, 570 (7th Cir. 1993); *Transamerica Oil*, 723 F.2d at 762. The commentary explains that the purpose of this provision is to "protect a buyer from unexpected and unbargained language of disclaimer." Kan. Stat. Ann. §84-2-316(1), Official U.C.C. Comment (1); see also Kan. Stat. Ann. §84-2-313, Official U.C.C. Comment (4), Kansas Comment 1983; Hemmert Agric. Aviation, Inc. v. Mid-Content Aircraft Corp., 663 F. Supp. 1546, 1553 (D. Kan. 1987); *Ray Martin Painting*, 638 F. Supp. at 772-73. On the other hand, the disclaimer rule is, by its express terms, subject to the provisions of §2-202 (see Kan. Stat. Ann. §84-2-316(1) & Kansas Comment 1983); thus, if the signed contract is deemed fully integrated, the plaintiff is precluded from attempting to establish any express

warranty outside the signed contract. Jordan v. Doonan Truck & Equip., Inc., 552 P.2d 881, 884 (Kan. 1976); *Ray Martin Painting*, 638 F. Supp. at 774; see also Jack Richards Aircraft Sales, Inc. v. Vaughn, 457 P.2d 691, 696 (Kan. 1969); *Prophet*, 462 P.2d at 125-26.

We thus turn to the integration clause of the contract. Although not dispositive, "the presence of a merger clause is strong evidence that the parties intended the writing to be the complete and exclusive agreement between them. . . ." *L. S. Heath & Co.*, 9 F.3d at 569 (citing *Sierra Diesel*, 890 F.2d at 112; R. Anderson, Uniform Commercial Code, §2-202:25 (1983)); see also *Ray Martin Painting*, 638 F. Supp. at 773-74. Here the clause states that "[t]his agreement is the only agreement controlling this purchase and sale, express or implied, either verbal or in writing, and is binding on Purchaser and Seller" and that the agreement "may not be modified in any way except by written agreement executed by both parties." (Emphasis supplied.)[2] The language is simple and straightforward; and Betaco does not suggest that a reasonable buyer would find it difficult to comprehend. On the other hand, Betaco does note, as the district court did (Mem. Op. at 8), that this was, like most other provisions in the contract, a preprinted clause that was not the subject of negotiation by the parties. Yet, that fact alone does not render the provision unenforceable. See Northwestern Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 377 (7th Cir. 1990). The clause was not buried in fine print, nor was it written so as to be opaque. See id. It was relegated to the back of the contract rather than the front, but the front page admonished the signatories in bold, capitalized lettering that the terms on the back were part of the agreement, and although the reverse side contained a number of provisions, they were neither so many nor so complicated that the reader would have given up before he or she reached the integration clause. Mikelsons signed the contract, and there is no dispute that he had the opportunity to review it in as much detail as he wished before signing it. Under these circumstances, the integration provision should have come as no surprise to Betaco. Compare *Transamerica Oil*, 723 F.2d at 763 (where plaintiff's order was taken over telephone, document that plaintiff received and signed upon delivery did not constitute fully integrated agreement); *Hemmert*, 663 F. Supp. at 1553 (same). In our view, therefore, the clause is strong evidence that the parties intended and agreed for the signed contract to be the complete embodiment of their agreement.

The district court focused on another circumstance that courts frequently consider in assessing the degree to which a contract is integrated:

2. Betaco points out that the integration clause purports only to disavow other agreements, not other warranties. We do not find the distinction persuasive, however. The essence of the integration inquiry, after all, is whether the parties intended their written contract to embody the entirety of their agreement; if so, extrinsic evidence of an additional warranty that Cessna purportedly made cannot be admitted. Thus, although the integration clause speaks in terms of agreements rather than warranties, if it is given effect and the signed purchase contract is deemed to be a fully integrated agreement, it effectively operates so as to preclude the plaintiff from relying on purported warranties beyond the four corners of that agreement.

is the term contained in a purported warranty outside the contract one that the parties would have included in the contract itself had they intended it to be part of the agreement? U.C.C. §2-202, Official Comment (3); *Mid-Continent Cabinetry*, 1991 WL 151074, at *8. The court though that Hubbard's representation as to the relative range of the CitationJet was not such a term, although neither the court nor Betaco has cited any evidence in the record to support that proposition. The court did note that "[t]he representation made by Mr. Hubbard was not so formally presented nor central to the purchase that Mr. Mikelsons of Betaco would most likely have insisted it be included, especially where the Purchase Agreement was a standard form. The representation did not include the word 'warranty,' a red flag that might have clued a non-attorney into the necessity of including it in the Purchase Agreement." Mem. Op. at 7. Our analysis is somewhat different on this score, however.

We are not persuaded that the range of the aircraft was not something that certainly would be included in the agreement. On the contrary, the specifications made part of the contract do contain an express representation as to the range of the CitationJet, and, in fact, it was that warranty that formed the basis for Count I of Betaco's complaint. In that sense, an extraneous reference to the range of the aircraft arguably is less like a supplemental term on a subject as to which the contract is otherwise silent, and more like a potentially conflicting term that section 2-202 would explicitly exclude from admission into evidence. See generally Souder v. Tri-County Refrigeration Co., 373 P.2d 155, 159-60 (Kan. 1962) (noting the distinction between using extrinsic evidence to explain or supplement the contract and using it to vary the terms of the agreement).

The context of the representation does not alter our analysis in this regard. It may well be, as the district court emphasized, that because the statement as to the relative range of the CitationJet was contained in the cover letter accompanying the purchase agreement, Mr. Mikelsons may have given it more weight than he would a more isolated statement. Mem. Op. at 7. At the same time, as the court pointed out, the reference was informal, without language that might alert the reader that the contract should include a comparable provision. Id. But in our view, one might just as readily infer from this that the contents of the letter were not meant to supplement the purchase agreement. Recall the wording of the passage on which Betaco relies: "At 437 miles per hour, the CitationJet is much faster, more efficient, and has more range than the popular Citation I." Like the balance of the letter, this statement is long on adjectives and short on details — how much faster? how much more efficient? how much more range? Consider, in contrast, the following excerpt from the specifications incorporated into the purchase agreement:

> 2. ESTIMATED PERFORMANCE (Preliminary) Conditions:
>
> All estimated performance data are based on a standard aircraft and International Standard Atmosphere. Takeoff and landing field lengths are based on level, hard surface, dry runways with zero wind.

Range +/–4% (Includes Takeoff, Climb, Cruise at 41,000 Feet, Descent and 45-Minute Reserve)	At 10,000 lbs. (4536 kg) TOGW 1500 nautical miles (2779 km) with full fuel
Stall Speed 81 knots	(150 km/hr) (93 MPH) CAS at 9500 lbs (4309 kg)
(Landing Configuration) Maximum Altitude	41,000 ft (12,497 m)
Single Engine Climb Rate (Sea Level, ISA, 10,000 lbs)	1070 feet per minute
Takeoff Runway Length (Sea Level, ISA, Balanced Field Length per FAR 25)	2960 ft (902 m) at 10,000 lbs (4536 kg)
Landing Runway Length (Sea Level, ISA, per FAR 25)	2800 ft (854 m) at 9500 lbs (4309 kg)
Cruising Speed +/–3% (Maximum Cruise Thrust, ISA Conditions at 35,000 Feet)	380 kts (704 km/hr) (437 mph) TAS at 8500 lbs (3856 kg) cruise weight

App. 108. This summary of the aircraft's performance capabilities is, in stark contrast to the letter, quite precise and quite explicit about the assumptions underlying each of the estimates. Given the marked difference in style and detail between these specifications and ~~the indeter~~minate ~~braggadocio in the cover letter, we find it~~ somewhat implausible that the parties might have considered the "more range" reference to be part of their agreement yet failed to ~~include~~ it in the ~~purchase~~ contract with the level of specificity characteristic of that document.

Finally, we ~~do not find it~~ particularly significant that Mikelsons did not consult a lawyer before signing the purchase agreement. Again, the contract was neither lengthy nor obtuse. Nor was this a contract of adhesion. These were two seemingly sophisticated parties entering into a commercial agreement, and Mikelsons's significant experience as a pilot, as an airline executive, and as a purchaser of an earlier model of the Citation aircraft surely went a long way toward balancing whatever advantage Cessna may have enjoyed as the drafter of the agreement. See Bowers Mfg. Co. v. Chicago Mach. Tool Co., 453 N.E.2d 61, 66 (Ill. App. 1983) ("the courts are less reluctant to hold educated businessmen to the terms of contracts to which they have entered than consumers dealing with skilled corporate sellers") (quoted with approval in *Ray Martin Painting*, 638 F. Supp. at 773); see also Brinks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109, 1116 (7th Cir. 1983)). Furthermore, there is no evidence that the contract was tainted by fraud, mutual mistake, or any other circumstance that would call into question the binding nature of the agreement. See generally *Prophet*, 462 P.2d at 126. That Betaco chose not to have the contract reviewed by an attorney before Mikelsons signed it does not, standing alone, permit Betaco to escape the operation of the terms it signed on to, including the integration clause. As the Kansas Supreme Court has stated:

> This court follows the general rule that a contracting party is under a duty to learn the contents of a written contract before signing it. Sutherland v. Sutherland, 187 Kan. 599, 610, 358 P.2d 776 (1961). We have interpreted this duty to include the duty to obtain a reading and explanation of the contract, and we have held that the negligent failure to do so will estop the contracting party from avoiding the contract on the ground of ignorance of its contents. Maltby v. Sumner, 169 Kan. 417, Syl. ¶5, 219 P.2d 395 (1950). As a result of this duty, a person who signs a written contract is bound by its terms regardless of his or her failure to read and understand its terms.

Rosenbaum v. Texas Energies, Inc., 736 P.2d 888, 891-92 (Kan. 1987). Accord Albers v. Nelson, 809 P.2d 1194, 1197 (Kan. 1991); Washington v. Claassen, 545 P.2d 387, 390-91 (Kan. 1976); see also Paper Express, Ltd. v. Pfankuch Maschinen GmbH, 972 F.2d 753, 757 (7th Cir. 1992); Northwestern Nat'l Ins. Co. v. Donovan, supra, 916 F.2d at 378. That we would make this assumption should come as no surprise to Betaco, for in signing the contract, Mikelsons also assented to its provision that "[t]he signatories to this Agreement verify that they have read the complete Agreement, understand its contents and have full authority to bind and hereby do bind their respective parties."

The circumstances identified by the district court do not, in sum, establish as a matter of law that the purchase agreement was not fully integrated and that extrinsic evidence of additional, consistent terms was therefore admissible. Nor has Betaco identified anything more in the record that would support partial summary judgment in its favor on this question. The district court's decision to grant partial summary judgment in favor of Betaco and against Cessna therefore must be reversed, and the jury's verdict (which was based upon the extrinsic evidence admitted pursuant to the district court's summary judgment ruling) must be vacated. . . .

[At this point the Seventh Circuit seemed prepared to award summary judgment in Cessna's favor. However, the court found, without the help of either party's briefs, statements in a supporting affidavit of Mikelsons (president of Betaco) that the court felt had bearing on the issue of the admissibility of the parol evidence. This evidence was in the form of statements about conversations Mikelsons had had concerning the performance of the aircraft. This evidence prompted the court in part to add:]

If, in fact, there were substantial discussions preceding Betaco's commitment to the purchase of the CitationJet focusing specifically on the range of the new jet vis-à-vis the Citation I, one might infer that the signed agreement did not, ultimately, embody the complete agreement between the parties. In that respect, the case could be viewed as being more like *Transamerica Oil*, for example, where the court concluded that the parties' agreement extended beyond the signed "Sales and Service Invoice" to include the representations that the plaintiff had seen in trade journals and the assurances that the seller had given it over the telephone prior to the purchase. 723 F.2d at 761, 763. We do not mean to suggest that the evidence ought to be viewed in that way,

of course. Although Mikelsons' affidavit appears to characterize Hubbard's letter as the culmination of prior discussions about the range of the new plane, the wording of the letter is far more consistent with that of a standard promotional letter than a confirmation of prior discussions concerning what Betaco contends was an essential contract term. Moreover, as we have noted, Mikelsons was an apparently sophisticated businessman who had the opportunity to review the contract at length before deciding to purchase, very much in contrast to the situation in *Transamerica Oil*. Still, as we consider the merits of Cessna's cross-motion for summary judgment, we must take care to give Betaco the benefit of every reasonable inference that may be drawn from the record. Construed favorably to Betaco, we believe that Mikelsons' affidavit raises a question of fact as to whether the parties considered the purchase contract to be the complete and exclusive statement of their agreement.

Both parties seem to have forgotten that where competing inferences may be drawn from facts that are otherwise undisputed, summary judgment is improper. See Texas Refrigeration Supply, Inc. v. FDIC, 953 F.2d 975, 982 (5th Cir. 1992) (citing Phillips Oil Co. v. OKC Corp., 812 F.2d 265, 274 n.15 (5th Cir.), cert. denied, 484 U.S. 851, 108 S. Ct. 152 (1987)); see generally Sarsha v. Sears Roebuck & Co., 3 F.3d 1035, 1041 (7th Cir. 1993) (collecting cases). Just as we believe that plausible inferences from the record rendered partial summary judgment in Betaco's favor on the integration issue improper, so we believe that contrary inferences preclude summary judgment in favor of Cessna. We therefore remand the case for a hearing in which the district judge will sit as a finder of fact and decide, based on whatever evidence the parties choose to submit, whether the parties intended the purchase agreement to be the complete embodiment of their understanding or not. In the event the court answers this question in the affirmative, of course, the rule set forth in §2-202 would bar Betaco's warranty claim and compel the entry of final judgment in Cessna's favor on Count II of the complaint. We express no opinion as to the appropriate outcome of this hearing; that is a matter for the district court to decide based on the totality of the circumstances and the resolution of the competing inferences that the evidence permits.

III. Conclusion

Because we find that the record before the court on summary judgment was reasonably subject to contrary assessments of whether the parties intended their signed contract to be the complete embodiment of their agreement, we reverse the entry of partial summary judgment against Cessna on this question and vacate the final judgment subsequently entered in favor of Betaco on Count II of the complaint. The case is remanded for a factual hearing before the bench on the integration issue and for appropriate disposition based on the outcome of that hearing. . . .

QUESTIONS AND NOTES

1. If the common law, as expressed in the Restatement (Second) §213 (see p. 415) preceding this case, had been applicable, what test would the court have used? Would the result be different?

2. On remand, the district court held that the contract was not integrated and that, therefore, the express warranty was admissible. The Seventh Circuit promptly reversed holding that the decision of the district court was "clearly erroneous" and directing a judgment in the favor of Cessna. 103 F.3d 1281 (7th Cir. 1996). How much do you think all of that second go round concerning the issue of integration cost the parties and the courts? Why did the Seventh Circuit pull evidence out of the affidavit (which both parties ignored in their briefs) and address a further issue on integration when the court apparently felt that there was clearly a complete integration? Did the Seventh Circuit in its remand telegraph the way it thought the district court should hold on the integration issue?

3. What consideration is given to parol evidence after it is introduced for purposes of determining whether the agreement is integrated? Was the agreement in *Betaco* completely or partially integrated? Did it make any difference in this case? Why didn't the court simply find that the express warranty was in conflict with the disclaimer and, therefore, inadmissible for that reason?

4. Courts often state that the parol evidence rule is a rule of substantive law and not a rule of evidence. What is the importance of this distinction? See generally Farnsworth §7.2.

5. The court discusses the importance of an integration clause, sometimes called a *merger* clause. If integration is determined by intent of the parties, a statement by the parties of their intent in the writing should go a long way toward establishing that intent and avoiding arguments about alleged collateral matters. But should the merger clause be conclusive? Was it in *Betaco*? Why? The cases are not in agreement as to the conclusiveness of a merger clause. As the court in *Betaco* indicates, a merger clause in a form contract foisted off on hapless consumers might meet another end. The Restatement (Second) drafters have stated that the clause should generally not be conclusive. See comment e to §216. Certainly the failure to include a merger clause should not demonstrate that the parties did not intend an integration. Intershoe, Inc. v. Bankers Trust Co., 77 N.Y.2d 517, 569 N.Y.S.2d 333, 571 N.E.2d 641, 14 U.C.C. Rep. Serv. 2d 1 (N.Y. App. Div. 1991).

In the next chapter we will further discuss some doctrines that may provide an approach to avoid the effect of a merger clause.

LURIA BROS. & CO. v. PIELET BROS. SCRAP IRON
United States Court of Appeals, Seventh Circuit, 1978
600 F.2d 103

[Plaintiff alleged that defendant breached a contract to deliver scrap steel.]

FAIRCHILD, C.J. . . . Pielet contends that even if the evidence is sufficient to establish the existence of a binding contract between the parties, it was error for the district court to exclude evidence that the sales contract was expressly conditional upon Pielet obtaining the scrap metal from a particular supplier. In an offer of proof, Bloom testified that in their first conversation in September, he told Fechheimer "I was doing business with people that I had never heard of, that they were fly-by-night people, that I was worried about shipment and if I didn't get shipment, I didn't want any big hassle, but if I got the scrap, he would get it." . . .

In excluding this offered testimony, the district court relied on the Uniform Commercial Code's parol evidence rule, §2-202 (Ill. Rev. Stat. Ch. 26, §2-202), which provides:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (a) By course of dealing or usage of trade (§1-205) or by course of performance (§2-208); and
>
> (b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

The determination that the writings of the parties were intended to be a final expression of their agreement is to be made by the trial court. In light of Luria's acceptance of the terms stated in the Pielet writing, we agree with the district court's conclusion that the Pielet sales confirmation brought §2-202 into play to bar Bloom's testimony. . . .

Having found §2-202 applicable, the next question is whether the excluded evidence contradicts or is inconsistent with the terms of the writings. Pielet argues that the offered testimony did not "contradict" but instead "explained or supplemented" the writings with "consistent additional terms." For this contention, Pielet relies upon Hunt Foods & Industries, Inc. v. Doliner, 26 A.D.2d 41, 270 N.Y.S.2d 937 (1966). In reversing the trial court's summary judgment for plaintiff, the court in *Hunt* held that evidence of an oral condition precedent did not contradict the terms of a written stock option which was unconditional on its face. Therefore evidence of the condition precedent should not have been barred by UCC §2-202. "In a sense any oral provision which would prevent the ripening of the obligations of a writing is inconsistent with the writing. But that obviously is not the sense in which the word is used. To be inconsistent the term must contradict or negate a term of the writing." Id. at 43, 270 N.Y.S.2d at 940. This reasoning in *Hunt* was followed in Michael Schiavone & Sons, Inc. v. Securalloy Co., 312 F. Supp. 801 (D. Conn. 1970). In that case, the court found that parol evidence that the quantity in a sales contract was "understood to be up to 500 tons cannot be said to be inconsistent with the terms of the written contract which specified the

quantity as '500 Gross Ton.'" Id. at 804.The narrow view of inconsistency espoused in these two cases has been criticized. In Snyder v. Herbert Greenbaum & Assoc., Inc., 38 Md. App. 144, 380 A.2d 618 (1977), the court held that parol evidence of a contractual right to unilateral rescission was inconsistent with a written agreement for the sale and installation of carpeting. The court defined "inconsistency" as used in §2-202(b) as "the absence of reasonable harmony in terms of the language *and* respective obligations of the parties." Id. at 623 (emphasis in original) (citing UCC §1-205(4)). See also Southern Concrete v. Mableton Contractors, 407 F. Supp. 581 (N.D. Ga. 1975), aff'd memo., 569 F.2d 1154 (5th Cir. 1978).

We adopt this latter view of inconsistency and reject the view expressed in *Hunt*. Where writings intended by the parties to be a final expression of their agreement call for an unconditional sale of goods, parol evidence that the seller's obligations are conditioned upon receiving the goods from a particular supplier is inconsistent and must be excluded.

Had there been some additional reference such as "per our conversation" on the written confirmation indicating that oral agreements were meant to be incorporated into the writing, the result might have been different. See Ralston Purina v. Rooker, 346 So. 2d 901 (Miss. 1977), distinguishing Paymaster Oil Mill Company v. Mitchell, 319 So. 2d 652 (Miss. 1975).

We also note that Comment 3 of the Official Comment to §2-202 provides, among other things:

> If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

Pielet makes much of the fact that this transaction was an unusual one due to the size and the amount of scrap involved. Surely a term relieving Pielet of its obligations under the contract in the event its supplier failed it would have been included in the Pielet sales confirmation. . . .

QUESTIONS AND NOTES

1. The alleged prior agreement concerning source of supply conflicted with which term of the written agreement?

2. In O'Neill v. United States, 50 F.3d 677 (9th Cir. 1995), the issue was the admissibilty of statements by the President of the United States and government officials that water would be available to fulfill the governments promise to provide a continuous supply of water despite the completion of a reclamation project. Evidence of these statements was offered for the purposes of showing a contractual obligation to this effect. The court held that such parol evidence was in contradiction of a term in the water service contract at issue that the government could not be held liable for shortages in water available for supply.

LEE v. JOSEPH E. SEAGRAM & SONS
United States Court of Appeals for the Second Circuit, 1977
552 F.2d 447

GURFEIN, Circuit Judge. This is an appeal by defendant Joseph E. Seagram & Sons, Inc. ("Seagram") from a judgment entered by the District Court, Hon. Charles H. Tenney, upon the verdict of a jury in the amount of $407,850 in favor of the plaintiffs on a claim asserting common law breach of an oral contract. The court also denied Seagram's motion under Rule 50(b), Fed. R. Civ. P., for judgment notwithstanding the verdict. Harold S. Lee, et al. v. Joseph E. Seagram and Sons, 413 F. Supp. 693 (S.D.N.Y. 1976). It had earlier denied Seagram's motion for summary judgment. The plaintiffs are Harold S. Lee (now deceased) and his two sons, Lester and Eric ("the Lees"). Jurisdiction is based on diversity of citizenship. We affirm.

The jury could have found the following. The Lees owned a 50 percent interest in Capitol City Liquor Company, Inc. ("Capitol City"), a wholesale liquor distributorship located in Washington, D.C. The other 50 percent was owned by Harold's brother, Henry D. Lee, and his nephew, Arthur Lee. Seagram is a distiller of alcoholic beverages. Capitol City carried numerous Seagram brands and a large portion of its sales were generated by Seagram lines.

The Lees and the other owners of Capitol City wanted to sell their respective interests in the business and, in May 1970, Harold Lee, the father, discussed the possible sale of Capitol City with Jack Yogman ("Yogman"), then Executive Vice President of Seagram (and now President), whom he had known for many years. Lee offered to sell Capitol City to Seagram but conditioned the offer on Seagram's agreement to relocate Harold and his sons, the 50 percent owners of Capitol City, in a new distributorship of their own in a different city.

About a month later, another officer of Seagram, John Barth, an assistant to Yogman, visited the Lees and their co-owners in Washington and began negotiations for the purchase of the assets of Capitol City by Seagram on behalf of a new distributor, one Carter, who would take it over after the purchase. The purchase of the assets of Capitol City was consummated on September 30, 1970 pursuant to a written agreement. The promise to relocate the father and sons thereafter was not reduced to writing.

Harold Lee had served the Seagram organization for thirty-six years in positions of responsibility before he acquired the half interest in the Capitol City distributorship. From 1958 to 1962, he was chief executive officer of Calvert Distillers Company, a wholly-owned subsidiary. During this long period he enjoyed the friendship and confidence of the principals of Seagram.

In 1958, Harold Lee had purchased from Seagram its holdings of Capitol City stock in order to introduce his sons into the liquor distribution business, and also to satisfy Seagram's desire to have a strong and friendly distributor for Seagram products in Washington, D.C. Harold Lee and Yogman had known each other for 13 years.

The plaintiffs claimed a breach of the oral agreement to relocate Harold Lee's sons, alleging that Seagram had had opportunities to procure another distributorship for the Lees but had refused to do so. The Lees brought this action on January 18, 1972, fifteen months after the sale of the Capitol City distributorship to Seagram. They contended that they had performed their obligation by agreeing to the sale by Capitol City of its assets to Seagram, but that Seagram had failed to perform its obligation under the separate oral contract between the Lees and Seagram. The agreement which the trial court permitted the jury to find was "an oral agreement with defendant which provided that if they agreed to sell their interest in Capitol City, defendant in return, within a reasonable time, would provide the plaintiffs a Seagram distributorship whose price would require roughly an amount equal to the capital obtained by the plaintiffs for the sale of their interest in Capitol City, and which distributorship would be in a location acceptable to plaintiffs." No specific exception was taken to this portion of the charge. By its verdict for the plaintiffs, we must assume—as Seagram notes in its brief—that this is the agreement which the jury found was made before the sale of Capitol City was agreed upon.[2]

Appellant urges several grounds for reversal. It contends that, as a matter of law, (1) plaintiffs' proof of the alleged oral agreement is barred by the parol evidence rule; and (2) the oral agreement is too vague and indefinite to be enforceable. Appellant also contends that plaintiffs' proof of damages is speculative and incompetent.

I

Judge Tenney, in a careful analysis of the application of the parol evidence rule, decided that the rule did not bar proof of the oral agreement. We agree.

The District Court, in its denial of the defendant's motion for summary judgment, treated the issue as whether the written agreement for the sale of assets was an "integrated" agreement not only of all the mutual agreements concerning the sale of Capitol City assets, but also of *all* the mutual agreements of the parties. Finding the language of the sales agreement "somewhat ambiguous," the court decided that the determination of whether the parol evidence rule applies must await the taking of evidence on the issue of whether the sales agreement was

2. The complaint alleged that Seagram agreed to "obtain" or "secure" or "provide" a "similar" distributorship within a reasonable time, and plaintiffs introduced some testimony to that effect. Although other testimony suggested that Seagram agreed merely to provide an opportunity for the Lees to negotiate with third parties, and Judge Tenney indicated in his denial of judgment n.o.v. that Seagram merely agreed "to notify plaintiffs as they learned of distributors who were considering the sale of their businesses," 413 F. Supp. at 698-699, the jury was permitted to find that the agreement was in the nature of a commitment to provide a distributorship. There was evidence to support such a finding, and the jury so found.

intended to be a complete and accurate integration of all of the mutual promises of the parties.

Seagram did not avail itself of this invitation. It failed to call as witnesses any of the three persons who negotiated the sales agreement on behalf of Seagram regarding the intention of the parties to integrate all mutual promises or regarding the failure of the written agreement to contain an integration clause.

Appellant contends that, as a matter of law, the oral agreement was "part and parcel" of the subject-matter of the sales contract and that failure to include it in the written contract barred proof of its existence. Mitchill v. Lath, 247 N.Y. 377, 380, 160 N.E. 646 (1928). The position of appellant, fairly stated, is that the oral agreement was either an inducing cause for the sale or was a part of the consideration for the sale, and in either case, should have been contained in the written contract. In either case, it argues that the parol evidence rule bars its admission.

Appellees maintain, on the other hand, that the oral agreement was a collateral agreement and that, since it is not contradictory of any of the terms of the sales agreement, proof of it is not barred by the parol evidence rule. Because the case comes to us after a jury verdict we must assume that there actually was an oral contract, such as the court instructed the jury it could find. The question is whether the strong policy for avoiding fraudulent claims through application of the parol evidence rule nevertheless mandates reversal on the ground that the jury should not have been permitted to hear the evidence. See Fogelson v. Rackfay Constr. Co., 300 N.Y. 334 at 337-338, 90 N.E.2d 881 (1950).

The District Court stated the cardinal issue to be whether the parties "intended" the written agreement for the sale of assets to be the complete and accurate integration of all the mutual promises of the parties. If the written contract was not a complete integration, the court held, then the parol evidence rule has no application. We assume that the District Court determined intention by objective standards. See 3 Corbin on Contracts §§573-574. The parol evidence rule is a rule of substantive law. Fogelson v. Rackfay Constr. Co., supra; Higgs v. De Maziroff, 263 N.Y. 473, 477, 189 N.E. 555 (1934); Smith v. Bear, 237 F.2d 79, 83 (2d Cir. 1956).

The law of New York is not rigid or categorical, but is in harmony with this approach. As Judge Fuld said in *Fogelson:*

> Decision in each case must, of course, turn upon the type of transaction involved, the scope of the written contract and the content of the oral agreement asserted.

300 N.Y. at 338, 90 N.E.2d at 883. And the Court of Appeals wrote in Ball v. Grady, 267 N.Y. 470, 472, 196 N.E. 402, 403 (1935):

> In the end, the court must find the limits of the integration as best it may by reading the writing in the light of surrounding circumstances.

Accord, *Fogelson,* supra, 300 N.Y. at 338, 90 N.E.2d 881. Thus, certain oral collateral agreements, even though made contemporaneously, are not

within the prohibition of the parol evidence rule "because [if] they are separate, independent, and complete contracts, although relating to the same subject . . . [t]hey are allowed to be proved by parol, because they were made by parol, and no part thereof committed to writing." Thomas v. Scutt, 127 N.Y. 133, 140-141, 27 N.E. 961, 963 (1891).

Although there is New York authority which in general terms supports defendant's thesis that an oral contract inducing a written one or varying the consideration may be barred, see, e.g., Fogelson v. Rackfay Constr. Co., supra, 300 N.Y. at 340, 90 N.E.2d 881, the overarching question is whether, in the context of the particular setting, the oral agreement was one which the parties would ordinarily be expected to embody in the writing. Ball v. Grady, supra, 267 N.Y. at 470, 196 N.E. 402; accord, Fogelson v. Rackfay Constr. Co., supra, 300 N.Y. at 338, 90 N.E.2d 881. See Restatement on Contracts §240. For example, integration is most easily inferred in the case of real estate contracts for the sale of land, e.g., Mitchill v. Lath, supra, 247 N.Y. 377, 160 N.E. 646, or leases, *Fogelson,* supra; Plum Tree, Inc. v. N.K. Winston Corp., 351 F. Supp. 80, 83 (S.D.N.Y. 1972). In more complex situations, in which customary business practice may be more varied, an oral agreement can be treated as separate and independent of the written agreement even though the written contract contains a strong integration clause. See Gem Corrugated Box Corp. v. National Kraft Container Corp., 427 F.2d 499, 503 (2d Cir. 1970).

Thus, as we see it, the issue is whether the oral promise to the plaintiffs, as individuals, would be an expectable term of the contract for the sale of assets by a corporation in which plaintiffs have only a 50 percent interest, considering as well the history of their relationship to Seagram.

Here, there are several reasons why it would *not* be expected that the oral agreement to give Harold Lee's sons another distributorship would be integrated into the sales contract. In the usual case, there is an identity of parties in both the claimed integrated instrument and in the oral agreement asserted. Here, although it would have been physically possible to insert a provision dealing with only the shareholders of a 50 percent interest, the transaction itself was a *corporate* sale of assets. Collateral agreements which survive the closing of a corporate deal, such as employment agreements for particular shareholders of the seller or consulting agreements, are often set forth in separate agreements. See Gem Corrugated Box Corp. v. National Kraft Container Corp., supra, 427 F.2d at 503 ("it is . . . plain that the parties ordinarily would not embody the stock purchase agreement in a writing concerned only with box materials purchase terms"). It was expectable that such an agreement as one to obtain a new distributorship for certain persons, some of whom were not even parties to the contract, would not necessarily be integrated into an instrument for the sale of *corporate* assets. As with an oral condition precedent to the legal effectiveness of an otherwise integrated written contract, which is not barred by the parol evidence rule if it is not directly contradictory of its terms, Hicks v. Bush, 10 N.Y.2d 488, 225 N.Y.S.2d 34, 180 N.E.2d 425 (1962); cf. 3 Corbin on Contracts §589, "it is certainly not improbable that parties contracting in these circumstances would make the asserted oral agreement. . . . 10 N.Y.2d at 493, 225 N.Y.S.2d at 39, 180 N.E.2d at 428.

Similarly, it is significant that there was a close relationship of confidence and friendship over many years between two old men, Harold Lee and Yogman, whose authority to bind Seagram has not been questioned. It would not be surprising that a handshake for the benefit of Harold's sons would have been thought sufficient. In point, as well, is the circumstance that the negotiations concerning the provisions of the sales agreement were not conducted by Yogman but by three other Seagram representatives, headed by John Barth. The two transactions may not have been integrated in their minds when the contract was drafted.

Finally, the written agreement does not contain the customary integration clause, even though a good part of it (relating to warranties and negative covenants) is boilerplate. The omission may, of course, have been caused by mutual trust and confidence, but in any event, there is no such strong presumption of exclusion because of the existence of a detailed integration clause, as was relied upon by the Court of Appeals in *Fogelson,* supra, 300 N.Y. at 340, 90 N.E. 881.

Nor do we see any contradiction of the terms of the sales agreement. Mitchill v. Lath, supra, 247 N.Y. at 381, 160 N.E. 646; 3 Corbin on Contracts §573, at 357. The written agreement dealt with the sale of corporate assets, the oral agreement with the relocation of the Lees. Thus, the oral agreement does not vary or contradict the money consideration recited in the contract as flowing to the selling corporation. That is the only consideration recited, and it is still the only consideration to the corporation.[5]

We affirm Judge Tenney's reception in evidence of the oral agreement and his denial of the motion under Rule 50(b) with respect to the parol evidence rule.

[The court also found that the contract was not too indefinite for enforcement and that the trial court's award of damages was reasonable.]

Affirmed.

written agreement indicates the oral agreement — but Court's view then separately

NOTES AND QUESTIONS

1. The last two cases discuss the term *collateral agreement* and state that, if the oral agreement were an independent collateral agreement, the parol evidence rule would not exclude evidence of it. In deciding this matter, courts typically ask if the alleged collateral matter is such as would "naturally" be included in the written agreement. See Masterson v. Sine, 68 Cal. 2d 222, 65 Cal. Rptr. 545, 436 P.2d 561 (1968). If the agreement might naturally be left out of the writing even though truly agreed to by the parties, the agreement is "collateral" and evidence of it may be introduced in spite of the written contract's apparent completeness.

2. Restatement (Second) of Contracts:

5. Cf. Mitchill v. Lath, 247 N.Y. 377, 380-381, 160 N.E. 646, 647 (1928) (to escape the parol evidence rule, the oral agreement "must not contradict express or implied provisions of the written contract"). The parties do not contend, and we would be unwilling to hold, that the oral agreement was not "in form a collateral one." Id.

§216. Consistent Additional Terms

(1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.

(2) An agreement is not completely integrated if the writing omits a consistent additional agreed term which is

(a) agreed to for separate consideration, or
(b) such a term as in the circumstances might naturally be omitted from the writing.

Comment 3 to §2-202 of the Uniform Commercial Code:

> If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

3. When is a prior oral agreement of a type that would naturally (or, under the UCC, "certainly") be included within a later written agreement? Note that in the last case, the court in citing *Mitchill* felt that real estate contracts for the sale of land were writings from which other agreed terms would not naturally be omitted. However, the strong dissent in *Mitchill* disputes this. In *Masterson,* Justice Traynor stated for the court, "the difficulty of accommodating the formalized structure of a deed to the insertion of collateral agreements makes it less likely that all the terms of such an agreement were included." See also comment d to Restatement (Second) of Contracts §216 stating that the more standardized the written contract form the more likely it would naturally omit nonstandardized terms arrived at in prior oral agreements.

4. The collateral agreement exception may soon have more historical interest than current impact. It is, in fact, but another way of addressing the partial versus complete integration issue. If the court finds that there is an independent collateral agreement, this is tantamount to finding that there was never a complete integration. "While there is some distinction between these two doctrines, there is nevertheless a considerable similarity between them, both in their general application and also in the limitations governing them." Buyken v. Ertner, 33 Wash. 2d 334, 205 P.2d 628 (1949). The *Lee* case demonstrates the court's confusion as to whether to treat the collateral agreement attempt to introduce parol as a separate exception or nothing more than a part of the integration issue. Further, note that in *Betaco*, UCC Official Comment 3's test of "they would certainly have been included" is used there in the context of determining whether the agreement is completely interagrated and not in the context of determining whether there was a collateral agreement.

Also, the collateral agreement language of Restatement (Second) of Contracts §216 is worded so that the tests for independent collateral agreements define only whether or not a "complete integration" exists. See generally Farnsworth §7.3. Farnsworth states at pages 437 and 438

that the collateral agreement exception is important to a party only when they are faced with a merger clause. Why?

Above, you have already learned that the parol evidence rule does not apply to evidence of enforceable agreements that are entered into *after* a writing of the parties is executed. This makes sense does it not? A writing final as to previous matters is not final as to matters agreed to after the writing is executed. You also learned that a writing that was never executed by the parties does not serve to exclude evidence; for example, if a signature is required by the terms of the agreement and none exists, there is no integrated writing and therefore the parol evidence rule is not applicable.

There are other limitations to the rule. In the next chapter we consider issues of fraud, mistake, and duress among other doctrines of *avoidance* that prevent a party from enforcing the contract even though the contract might otherwise be enforceable. For example, if Maude holds a gun to Joe's head to get him to execute a writing, the writing is not enforceable because of duress, and parol evidence is admissible to prove that the contract is not enforceable because of this duress. We wait till Chapter 6 to discuss exceptions to the parol evidence rule as they relate to issues of avoidance because you need background on these issues before you consider the impact that they have on the applicability of the parol evidence rule. But as we consider the avoidance doctrines in Chapter 6, remember that proof of them is not going to be excluded because of the parol evidence rule.

PYM v. CAMPBELL
Queen's Bench, 1856
6 Ellis & Blackburn 370

First count. That defendants agreed to purchase of the plaintiff, for 800£., the eighth parts of the benefits to accrue from an invention of plaintiff's. General averments of readiness to convey, and tender of a conveyance of the three eighths. Breach: that defendants refused to accept them. Counts for shares in inventions bargained and sold, and on accounts stated. Pleas. 1st, to first count: That defendants did not agree. 9th, to the other counts: Never indebted. It is not necessary to notice the other seven pleas.

On the trial, before Lord Campbell C.J., at the Sittings at Guildhall after last Hilary term, the plaintiff was called as a witness. He produced and gave in evidence a paper of which the following is a copy.

> 500£. for a quarter share. 300£. for one eighth, and 50£. to be paid to Mr. Sadler. No other shares to be sold without mutual consent for three months. London, 17th January 1854.
>
> | | |
> |---|---|
> | One eighth. | R. J. R. Campbell. |
> | | John Pym. |
> | One eighth. | J. T. Mackenzie. |
> | One eighth. | R. P. Pritchard. |

With reference to the above agreement and in consideration of the sum of five pounds paid me I engage, within two days from this date, to execute the legal documents, to the satisfaction of your solicitors, to complete your title to the respective interests against your names in my Crushing, Washing and Amalgamating Machine.

London. 17 January 1854.

John Pym

He gave evidence that he was inventor of a machine which he wished to sell through the instrumentality of one Sadler, who had introduced the defendants to him; that, after some negotiations, the defendant Campbell drew out the above paper, which both plaintiff and defendants then signed, and which plaintiff took away.

The defendants gave evidence that, in the course of the negotiations with the plaintiff, they had got so far as to agree on the price at which the invention should be purchased if bought at all, and had appointed a meeting at which the plaintiff was to explain his invention to two engineers appointed by the defendants, when, if they approved, the machine should be bought. At the appointed time the defendants and two engineers of the names of Fergusson and Abernethie attended; but the plaintiff did not come; and the engineers went away. Shortly after they were gone the plaintiff arrived. Fergusson was found, and expressed a favourable opinion; but Abernethie could not then be found. It was then proposed that, as the parties were all present, and might find it troublesome to meet again, an agreement should be then drawn up and signed, which, if Abernethie approved of the invention, should be the agreement, but, if Abernethie did not approve, should not be one. Abernethie did not approve of the invention when he saw it; and the defendants contended that there was no bargain.

The Lord Chief Justice told the jury that, if they were satisfied that, before the paper was signed, it was agreed amongst them all that it should not operate as an agreement until Abernethie approved of the invention, they should find for the defendant on the pleas denying the agreement. Verdict for the defendants.

Thomas Serjt., in the ensuing term, obtained a rule nisi for a new trial on the ground of misdirection.

Watson and Manisty now shewed cause. The direction was correct. When parties have signed an instrument in writing as the record of their contract, it is not competent to them to shew by evidence that the contract really was something different from that contained in the writing; and therefore in this case, if the defendants had signed this as an agreement, they could not have shewn that the agreement was subject to condition. But they may shew that the writing was signed on the terms that it should be merely void till a condition was fulfilled; for that shews there never was a contract; Davies v. Jones (17 Com. B. 625). So, where the holder of a bill writes his name on it and hands it over, that is no indorsement if it was done on the terms that it should not operate as an indorsement till a

condition is fulfilled; Bell v. Lord Ingestre (12 Q.B. 317), Marston v. Allen. It is true that a deed cannot be delivered as an escrow to the party (Co. Litt. 36, a): but that is for purely technical reasons, inapplicable to parol contracts.

Thomas SERJT and J. H. HODGSON, contra. The very object of reducing a contract to writing and signing it is to prevent all disputes as to the terms of the contract. Here the attempt is to shew by parol that the agreement to take this invention was subject to a condition that Abernethie approved; while the writing is silent as to that. Davies v. Jones (17 Com. B. 625) proceeded on the ground that the instrument was imperfect; the cases as to bills of exchange proceed upon the necessity that there should be a delivery to make an indorsement.

ERLE J. I think that this rule ought to be discharged. The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to shew it was conditional: and if that had been so it would have been wrong. But I am of opinion that the evidence shewed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper animo contrahendi, the terms contained in it are conclusive, and cannot be varied by parol evidence: but in the present case the defence begins one step earlier: the parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defence with suspicion: but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to shew that there is not an agreement at all is admissible.

CROMPTON J. I also think that the point in this case was properly left to the jury. If the parties had come to an agreement, though subject to a condition not shewn in the agreement, they could not shew the condition, because the agreement on the face of the writing would have been absolute, and could not be varied: but the finding of the jury is that this paper was signed on the terms that it was to be an agreement if Abernethie approved of the invention, not otherwise. I know of no rule of law to estop parties from shewing that a paper, purporting to be a signed agreement, was in fact signed by mistake, or that it was signed on the terms that it should not be an agreement till money was paid, or something else done. When the instrument is under seal it cannot be a deed until there is a delivery; and when there is a delivery that estops the parties to the deed; that is

a technical reason why a deed cannot be delivered as an escrow to the other party. But parol contracts, whether by word of mouth or in writing, do not estop. There is no distinction between them, except that where there is a writing it is the record of the contract. The decision in Davis v. Jones (17 Com. B. 625) is, I think, sound law, and proceeds on a just distinction: the parties may not vary a written agreement; but they may shew that they never came to an agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement; for they never had agreeing minds. Evidence to shew that does not vary an agreement, and is admissible.

Lord CAMPBELL C. J. I agree. No addition to or variation from the terms of a written contract can be made by parol: but in this case the defence was that there never was any agreement entered into. Evidence to that effect was admissible; and the evidence given in this case was overwhelming. It was proved in the most satisfactory manner that before the paper was signed it was explained to the plaintiff that the defendants did not intend the paper to be an agreement till Abernethie had been consulted, and found to approve of the invention; and that the paper was signed before he was seen only because it was not convenient to the defendants to remain. The plaintiff assented to this, and received the writing on those terms. That being proved, there was no agreement.

(WIGHTMAN J., not having heard the whole argument, gave no opinion.)

Rule discharged.

Our next segment concerns a doctrine that has historically been viewed both as an exception to the parol evidence rule and as a stand-alone doctrine. It definitely has an impact on the admissibility of parol evidence, as you will see.

III. INTERPRETATION

Above we have been considering to what extent parol evidence can be introduced to add to or contrdict an integrated agreement. In order to determine parties' contractual obligations, it may not be enough to know which of the parties' expressions are within the scope of the agreement. The meaning of the expressions must also be determined. This involves the process of *interpretation*, which is often a difficult task. Meanings may vary with textual context, user, time, and locality, among other factors.

A. *Admissibility of Evidence of Surrounding Circumstances and Evidence of Intent*

EICHENGREEN v. ROLLINS, INC.
Illinois Court of Appeals, 2001
25 Ill. App. 3d 517, 757 N.E.2d 952

Presiding Justice GALLAGHER delivered the opinion of the court:

Plaintiff, Myron Eichengreen, brought an action alleging breach of contract and negligence against defendant, Rollins, Inc., f/k/a Apollo Central Protection, Inc., resulting from a fire at his residence. The trial court granted defendant's motion for summary judgment on both counts of the complaint. Plaintiff now appeals. We affirm.

In 1983, plaintiff purchased a residence at 100 Maple Hill Road in Glencoe, Illinois. At that time, the house included a security system that had been installed in 1980 by defendant Apollo. In 1985, plaintiff constructed a bath house at his property that could not be accessed through the residence, but did share one common wall with the house. The bath house contained a natural gas fueled water heater and a natural gas fueled barbeque grill affixed to an exterior wall. From the time of plaintiff's purchase of the residence until August 1988, defendant maintained the security system that was in place.

In August 1988, the parties entered into a contract, which is now the subject of this lawsuit. Specifically, on August 16, 1988, defendant Apollo submitted a letter, for plaintiff's approval, containing an estimate of work to be done. The original letter listed the following items: one digital dialer transmitter; one smoke detector; five heat detectors — replace; one temperature switch — 45°; one heat detector — electrical room; one fire horn; one fire signal; and one building temperature signal. The letter also listed a price of $675 as the amount for the items as installed and additionally provided that the terms were one-half down, balance upon completion. It is undisputed that this letter became the final written contract between the parties. Plaintiff did not sign the letter, but it is further undisputed that plaintiff made the several handwritten modifications and additions contained in the letter changing the original terms proposed by defendant. Plaintiff crossed out the "temperature switch" and "fire horn" items. Plaintiff changed the "installed" price from $675 to $575 and added the notation "battery incl." Plaintiff also added the term "$287.50 plus 100 for # 2414 battery 8/22/88." In addition, plaintiff inserted the following provision: "system to be in good working order and guaranteed for at least 12 months." The system was installed sometime shortly after the letter was exchanged.

On September 13, 1995, a fire occurred at plaintiff's home. The fire originated in the bath house in the area of the grill. The fire activated the burglar alarm at plaintiff's residence. When police officers responded to the alarm, they noticed the southeast wall of the home engulfed in flames. The police then summoned the fire department. By the time the fire department arrived, plaintiff and his wife had already exited the residence.

On December 5, 1997, plaintiff filed a two-count verified complaint against defendant. Count I alleged breach of contract. Count II alleged negligence. On March 25, 1999, defendant filed a motion for summary judgment. After full briefing and two hearings, the trial court granted defendant's motion for summary judgment in its entirety. Plaintiff appeals the trial court's grant of summary judgment. . . .

Count I: Breach of Contract

On appeal, plaintiff argues that the trial court erred in granting summary judgment on plaintiff's breach of contract claim because an issue of material fact existed regarding the "intent" of the parties. Plaintiff contends that the "intent" of the parties was for the installation of a new security system that would provide protection for plaintiff's entire premises. Plaintiff does not rely on the terms of the written agreement in support of his assertion of the parties' intent. Instead, plaintiff contends that "[h]e informed [defendant] that he wanted the security of having the entire home protected." Thus, plaintiff asks this court to consider extrinsic evidence of the parties' prior negotiations in determining the intent of the parties. He further relies on extrinsic evidence as support for the reasonableness of his subjective belief that the parties intended to enter into a contract for protection of the entire premises.

Defendant counters that the August 16, 1988 letter stands unchallenged as the only and entire agreement between the parties. As such, defendant asserts, the terms of that letter, alone, represent the intentions of the parties.

A proper analysis of this case begins with a review of the established guidelines of contract interpretation under Illinois law. It is well settled that a court, when construing a contract, should ascertain the intent of the parties and give effect to that intent. In re Marriage of Olsen, 124 Ill. 2d 19, 25-26, 123 Ill. Dec. 980, 528 N.E.2d 684, 687 (1988). As the Illinois Supreme Court has further explained:

> Traditional contract interpretation principles in Illinois require that: "[a]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence." [Citation.]

Air Safety, Inc. v. Teachers Realty Corp., 185 Ill. 2d 457, 462, 236 Ill. Dec. 8, 706 N.E.2d 882, 884 (1999).

The *Air Safety* court noted that this approach has been referred to as the "four corners" rule. *Air Safety*, 185 Ill. 2d at 462, 236 Ill. Dec. 8, 706 N.E.2d at 884. The "four corners" rule has been described as related, although not identical to the parol evidence rule. Coplay Cement Co. v. Willis & Paul Group, 983 F.2d 1435, 1438 (7th Cir. 1993). The parol evidence rule has been explained as follows: "[The parol evidence] rule generally precludes evidence of understandings, not reflected in a

writing, reached before or at the time of its execution which would vary or modify its terms." J & B Steel Contractors, Inc. v. C. Iber & Sons, Inc., 162 Ill. 2d 265, 270, 205 Ill. Dec. 98, 642 N.E.2d 1215, 1217 (1994). "Under the parol evidence rule, extrinsic or parol evidence concerning a prior or contemporaneous agreement is not admissible to vary or contradict *a fully integrated writing.*" (Emphasis added.) Geoquest Productions, Ltd. v. Embassy Home Entertainment, 229 Ill. App. 3d 41, 44, 170 Ill. Dec. 838, 593 N.E.2d 727, 730 (1992). A party may not introduce parol or extrinsic evidence to show additional consistent terms of a contract unless the writing is incomplete or ambiguous. *Geoquest Productions,* 229 Ill. App. 3d at 44-45, 170 Ill. Dec. 838, 593 N.E.2d at 730.

In *Air Safety,* the court considered the applicability of what has been referred to as the provisional admission approach. Under the provisional admission approach, in contrast to the four corners rule or the parol evidence rule, "although the language of a contract is facially unambiguous, a party may still proffer parol evidence to the trial judge for the purpose of showing that an ambiguity exists which can be found only by looking beyond the clear language of the contract." *Air Safety,* 185 Ill. 2d at 463, 236 Ill. Dec. 8, 706 N.E.2d at 885. Based upon the facts of the case before it, the court expressly declined to formally adopt the provisional admission approach. *Air Safety,* 185 Ill. 2d at 464, 236 Ill. Dec. 8, 706 N.E.2d at 885 ("This court, however, has never formally adopted the provisional admission approach, and we decline to do so today because the contract in the case before us contains an explicit integration clause."). In a footnote, however, the court stated as follows: "We expressly decline to rule on whether the provisional admission approach may be applied to interpret a contract which does not contain an integration clause until such a case is squarely before the court." *Air Safety,* 185 Ill. 2d at 464 n. 1, 236 Ill. Dec. 8, 706 N.E.2d at 886 n. 1. Thus, the *Air Safety* court confirmed the continued viability of the four corners rule in cases where a contract is facially unambiguous *and contains an express integration clause. Air Safety*, 185 Ill. 2d 457, 236 Ill. Dec. 8, 706 N.E.2d 882 (1999).

The contract at issue here does not contain an integration clause. Nevertheless, citing *Air Safety,* defendant contends that this court should apply the four corners rule and decide that the terms of the August 16, 1988 letter alone represent the intentions of the party. Defendant further asserts that the letter constitutes the entire contract between the parties. Plaintiff has not directly challenged defendant's contention that the contract is a final and complete expression of the parties' intent. Instead, in arguing that a genuine issue of material fact exists regarding the parties' intent, plaintiff does not address the contract principles we have outlined but, rather, presupposes that extrinsic evidence may be considered. Plaintiff takes no position on the applicability of the four corners rule or parol evidence rule in the present case with respect to the issue of ascertaining the parties' intent.

In *J & B Steel Contractors*, the Illinois Supreme Court specifically considered the issue of "whether evidence beyond a writing itself may be

considered in determining its completeness for purposes of the parol evidence rule." *J & B Steel Contractors*, 162 Ill. 2d 265, 267, 205 Ill. Dec. 98, 642 N.E.2d 1215, 1217 (1994). No integration clause was identified in the contract at issue in *J & B Steel Contractors*, which consisted of a purchase order. Based upon the nature of the document and the court's discussion on the issue of integration, we can assume no integration clause existed. The court acknowledged that "[t]he more modern approach favors liberalizing the admission of evidence to determine the integration question." *J & B Steel Contractors*, 162 Ill. 2d at 271-72, 205 Ill. Dec. 98, 642 N.E.2d at 1219, citing J. Calamari & J. Perillo, Contracts §3-3, at 111 (2d ed. 1977). Nonetheless, the court reaffirmed the rule stated in Armstrong Paint & Varnish Works v. Continental Can Co., 301 Ill. 102, 106, 133 N.E. 711 (1921), that only the subject writing may be considered to determine the integration question.[3] *J & B Steel Contractors*, 162 Ill. 2d at 271, 205 Ill. Dec. 98, 642 N.E.2d at 1218-19.

Sound policy reasons exist for this rule. The *Armstrong* court explained the rationale for the rule as follows:

> When parties sign a memorandum expressing all the terms essential to a complete agreement, they are to be protected against the doubtful veracity of the interested witnesses and the uncertain memory of disinterested witnesses concerning the terms of their agreement, and the only way in which they can be so protected is by holding each of them conclusively bound by the terms of the agreement as expressed in the writing. All conversations and parol agreements between the parties prior to the written agreement are so merged therein that they cannot be given in evidence for the purpose of changing the contract or showing an intention or understanding different from that expressed in the written agreement. [Citation.]

Armstrong Paint & Varnish Works v. Continental Can Co., 301 Ill. at 106, 133 N.E. at 713.

As the *Armstrong* court further noted:

> [T]he contentions of the parties to the contract are not the criteri[a] which should guide the court in determining whether the written contract is a full expression of the agreement of the parties. The court must determine this from the writing itself. If it imports on its face to be a complete expression of the whole agreement — that is, contains such language as imports a complete legal obligation — it is to be presumed that the parties introduced into it every material item and term, and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular term to which the parol evidence is directed.

need merger clause

Armstrong Paint & Varnish Works v. Continental Can Co., 301 Ill. at 106, 133 N.E. at 713.

3. The court noted, however, that this rule applied in those cases which were not governed by the Uniform Commercial Code (UCC) (810 ILCS 5/1-101 et seq. (West 1994)). *J & B Steel Contractors*, 162 Ill. 2d at 271, 205 Ill. Dec. 98, 642 N.E.2d at 1218.

The *J & B Steel Contractors* court, after stating that generally, a writing's completeness as measured against it remains a legal question to be determined by the trial judge (*J & B Steel Contractors*, 162 Ill. 2d at 272, 205 Ill. Dec. 98, 642 N.E.2d at 1219) went on to determine the integration question. The court noted that the contract in question, the purchase order, specifically referred to a telephone proposal that was to be incorporated into the contract and therefore determined that the contract was clearly, on its face, incomplete. *J & B Steel Contractors*, 162 Ill. 2d at 274-75, 205 Ill. Dec. 98, 642 N.E.2d at 1220-21. Thus, the parol evidence rule did not preclude the plaintiff "from offering proof of terms allegedly agreed to during the telephone proposal that [were] consistent with and would supplement, but not contradict, the purchase order." *J & B Steel Contractors*, 162 Ill. 2d at 275, 205 Ill. Dec. 98, 642 N.E.2d at 1221.

Thus, our assessment of whether the parol evidence rule applies so as to exclude any extrinsic evidence depends upon a preliminary determination that the August 16, 1988 letter was a complete integration of the parties' agreement. See *J & B Steel Contractors*, 162 Ill. 2d 265, 270, 205 Ill. Dec. 98, 642 N.E.2d 1215, 1218 (1994); see also Pecora v. Szabo, 94 Ill. App. 3d 57, 63, 49 Ill. Dec. 577, 418 N.E.2d 431 (1981) (noting that the threshold question for the application of the parol evidence rule is whether a writing is integrated, *i.e.,* whether it was intended by the parties to be a final and complete expression of the entire agreement); accord Oldenburg v. Hagemann, 207 Ill. App. 3d 315, 326, 152 Ill. Dec. 339, 565 N.E.2d 1021 (1991). The terms contained within the four corners of the August 16, 1988 letter indicate that the parties intended that defendant provide the specifically enumerated services for the stated price as proposed by the plaintiff. Unlike the purchase order in *J & B Steel Contractors,* the letter makes no mention of any outside proposal nor does it contain any references whatsoever to any additional discussions. The contract contains a list of particular items to be replaced or added to an existing security system. The contract contains no provision that required defendant to place heat sensors or smoke detectors specifically within the bath house or to provide security for the entire premises. The contract contains no reference at all to the provision of protection of plaintiff's entire premises. We conclude that the written contract here, on its face, constituted a final and complete integration of the parties' agreement. Thus, the August 16, 1988 letter is the only and entire agreement between the parties. Any particular interpretation that only the plaintiff may have envisioned at the time a contract is executed is immaterial. American States Insurance Co. v. A.J. Maggio Co., 229 Ill. App. 3d 422, 427, 171 Ill. Dec. 263, 593 N.E.2d 1083, 1086 (1992). This court will not add another term about which an agreement is silent. *American States Insurance Co.*, 229 Ill. App. 3d at 427, 171 Ill. Dec. 263, 593 N.E.2d at 1086.

Plaintiff has failed to present any evidence that defendant breached the contract. Defendant complied with the written contract terms by providing to plaintiff the system that was outlined in the letter. The system in place at the time of the fire worked properly and as it was designed to