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CPLR 3211: Admission that Contract Existed Does Not Defeat Defendant's Motion to Dismiss Based on Statute of Frauds Defense

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submitted that the third-party defendant's subjective knowledge, coupled with the notice received through disclosure devices such as the discovery proceeding and the bill of particulars, should have precluded a claim of prejudice, and that the third-party complaint should have been amended to conform to the evidence provided at trial.

It is suggested that an amendment of the pleadings under section 3025(c) should be barred only by the existence of actual and substantial prejudice incapable of remedy by the imposition of costs and continuances,[40] and should not be precluded by a mere technical defect in the pleading.[41] Such a standard would further the purpose of the CPLR while diminishing the importance of pleadings to underscore the substantive rights involved,[42] and the merits.[43]

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CPLR 3211: Admission that contract existed does not defeat defendant's motion to dismiss based on a statute of frauds defense

Section 3211(a)(5) of the CPLR permits a defendant to move to dismiss a cause of action on the ground that the plaintiff has failed to satisfy the statute of frauds.[1] For purposes of the motion,

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preclude once the third-party plaintiff had failed to timely serve the particulars, the bill should be treated as if it had been served in a timely manner and should be deemed sufficient notice of the defective seat belt.

[40] *See supra* note 5 and accompanying text; *see also* CPLR 3025, commentary at 487 (McKinney 1974) (irremediable prejudice main barrier to amendment under 3025(c)).

It is suggested that in *DiMauro*, no actual or substantial prejudice existed because any adverse effect on the third-party defendant resulting from the interjection of the seat belt issue at trial could have been alleviated by the granting of a continuance. This would have provided additional time for the third-party defendant to prepare to address this new issue by securing the services of a seat belt expert who could have testified on her behalf. *See DiMauro*, 105 App. Div. 2d at 241, 483 N.Y.S.2d at 389.

[41] *See* Forman v. Davidson, 74 App. Div. 2d 505, 506, 424 N.Y.S.2d 711, 713 (1st Dep't 1980) (Fein, J., dissenting) ("the plea of surprise should be based on actual surprise, not merely deficiencies in pleading").

[42] *See* CPLR 3025, commentary at 486 (McKinney 1974).

[43] *See supra* note 2 and accompanying text.

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[1] CPLR 3211(a)(5) (1970). Section 3211(a)(5) provides that "[a] party may move for

the facts alleged in the plaintiff's complaint are deemed admitted as true.[2] It has been unclear, however, whether this procedural admission is sufficient to satisfy the judicial-admissions exception to the statute of frauds set forth in section 8-319 of the Uniform Commercial Code.[3] Recently, in *Boylan v. G.L. Morrow Co.*,[4] the

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judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . [the] statute of frauds." *Id.* 3211(a)(5); *see* H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 220 (5th ed. 1976); Long Island Pen Corp. v. Shatsky Metal Stamping Co., 94 App. Div. 2d 788, 789, 463 N.Y.S.2d 39, 40 (2d Dep't 1983).

"CPLR 3211 is the mechanical device by which dismissals on a variety of grounds are sought before service of the answer." CPLR 3211, commentary at 9 (McKinney 1970). Although primarily employed by a defendant desiring to dismiss a case commenced against him, the statute is equally available for use by a plaintiff. *See* SIEGEL § 257, at 317; WK&M ¶ 3211.02, at 32-18. Section 3211(a) motions can be made only on the grounds enumerated by the statute. CPLR 3211, commentary at 12 (McKinney 1970); *see, e.g.*, CPLR 3211(a)(1) (1970) (defense founded upon documentary evidence); *id.* 3211(a)(2) (lack of subject-matter jurisdiction); *id.* 3211(a)(7) (failure to state a cause of action). Alleging the wrong grounds for the dismissal, however, is not fatal provided that other 3211(a) grounds are applicable and amendment of the motion will not result in prejudice to the opposing party. *See* SIEGEL § 258, at 319; Salwen Paper Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 72 App. Div. 2d 385, 388, 424 N.Y.S.2d 918, 920 (2d Dep't 1980); Yorkshire House Assocs. v. Lulkin, 114 Misc. 2d 40, 46, 450 N.Y.S.2d 962, 966 (N.Y.C. Civ. Ct. N.Y. County 1982). Section (e) of CPLR 3211 provides that all 3211(a) motions must be made "before service of the responsive pleading . . . ." CPLR 3211(e) (1970); *see* WK&M ¶ 3211.02, at 32-19. "With the exception of the trio of objections in paragraphs 2, 7 and 10 of subdivision (a), which may be taken at any time, any subdivision (a) objection is waived if it is not taken either by 3211 motion or as a defense in the answer." SIEGEL § 274, at 331.

[2] *See, e.g.*, Sanders v. Winship, 57 N.Y.2d 391, 394, 442 N.E.2d 1231, 1233, 456 N.Y.S.2d 720, 722 (1982) (for purpose of 3211 motion to dismiss, court should accept allegation as true, notwithstanding determination at trial); Morone v. Morone, 50 N.Y.2d 481, 484, 413 N.E.2d 1154, 1155, 429 N.Y.S.2d 592, 593 (1980) (for purpose of motion to dismiss court must accept facts alleged as true); Crawford v. Cantor, 82 App. Div. 2d 791, 792, 440 N.Y.S.2d 661, 662 (1st Dep't 1981) (allegation accepted as true for purpose of motion to dismiss), *aff'd*, 56 N.Y.2d 529, 434 N.E.2d 1342, 449 N.Y.S.2d 964 (1982). Courts have drawn a distinction between a 3211 motion to dismiss and a pure attack on the pleadings supported by extrinsic evidence. *See* WK&M ¶ 3211.36, at 32-113 to 32-114. In the latter situation, the court need not accept the allegations in the pleadings as true. *Id.* at 32-114; *see* Rapport v. International Playtex Corp., 43 App. Div. 2d 393, 395, 352 N.Y.S.2d 241, 243 (3d Dep't 1974). "In such case the criterion to be applied is whether the opposing party actually has a cause of action or defense, not whether he has properly stated one." WK&M ¶ 3211.36, at 32-114; *see, e.g.*, New York Tel. Co. v. Mobil Oil Co., 99 App. Div. 2d 185, 192-93, 473 N.Y.S.2d 172, 176-77 (1st Dep't 1984) (evidence of tests performed, introduced on motion to dismiss, does not have to be accepted as true, but may undermine truthfulness of pleadings); Kaufman v. International Business Machs. Corp., 97 App. Div. 2d 925, 926-27, 470 N.Y.S.2d 720, 722-23 (3d Dep't 1983) (evidence introduced on motion to dismiss must be sufficient to establish that plaintiff has no cause of action), *aff'd*, 61 N.Y.2d 930, 463 N.E.2d 37, 474 N.Y.S.2d 721 (1984).

[3] N.Y. U.C.C. § 8-319 (McKinney Supp. 1984-1985). Section 8-319 (d) provides in pertinent part:

Court of Appeals held that in a motion to dismiss, a defendant's concession of an oral agreement with the plaintiff did not constitute an affirmative admission sufficient to defeat the statute of frauds defense.[5]

In *Boylan*, the plaintiff, an employee of the defendant corporation, had decided to terminate his employment and start his own business.[6] To dissuade the plaintiff from leaving, the defendant of-

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A contract for the sale of securities is not enforceable by way of action or defense unless

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(d) the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price.

Id. § 8-319(d). Section 2-201 of the Uniform Commercial Code contains a similar provision relating to the the sale of goods. *See* N.Y. U.C.C. § 2-201(3)(b) (McKinney 1964).

While the language of the judicial-admissions exception of § 8-319 differs from that of § 2-201, there should be no difference in its construction. *See* 3 R. ANDERSON, UNIFORM COMMERCIAL CODE § 8-319:6, at 790 (3d ed. 1985); Burns v. Gould, 172 Conn. 210, 217-18, 374 A.2d 193, 199 (1977); *cf.* Gross v. Vogel, 81 App. Div. 2d 576, 576, 437 N.Y.S.2d 431, 432 (2d Dep't 1981) (when determining whether "sale of securities" is involved, § 8-319 should be read in conformity with § 2-201). The purpose of the judicial admissions exception is to prevent a party from admitting the existence of an oral agreement in his pleadings, while at the same time relying on the statute of frauds as a defense. N.Y. U.C.C. § 2-201, commentary at 119 (McKinney 1964). "Under this section it is no longer possible to admit the contract in court and still treat the Statute as a defense." *Id.*; *see* Note, *The Application of the Oral Admissions Exception to the Uniform Commercial Code's Statute of Frauds*, 32 U. FLA. L. REV. 486, 499 (1980); 3 R. ANDERSON, *supra*, § 8-319:14, at 795; *compare* Kristinus v. H. Stern Com. E. Ind. S. A., 466 F. Supp. 903, 904-05 (S.D.N.Y. 1979) (defendant's admission of oral contract in motion to dismiss takes case out of statute of frauds) *and* St. Mary & Co. v. Halberstadt, 61 App. Div. 2d 1105, 1105, 403 N.Y.S.2d 367, 368 (3d Dep't 1978) (pre-answer motion to dismiss on grounds of statute of frauds denied; plaintiff entitled to have evidence of oral contract developed) *with* Freeman v. Applied Digital Data Sys., Inc., 7 UCC REP. SERV. (CALLAGHAN) 1052, 1054-55 (Sup. Ct. Queens County 1970) (defendant's motion to dismiss under 3211(a)(5) prior to interposition of answer denied; whether U.C.C. § 8-319(d) could cure insufficiency of writing can be ascertained only as action progresses) *and* Reissman Int'l Corp. v. J. S. O. Wood Prods., Inc., 10 UCC REP. SERV. (CALLAGHAN) 1165, 1168 (N.Y.C. Civ. Ct. N.Y. County 1972) (impossible to determine whether defendant will admit existence of oral contract through discovery or at trial when motion to dismiss brought prior to discovery proceedings).

In Radix Org., Inc. v. Mack Trucks, Inc., 602 F.2d 45 (2d Cir. 1979), the Second Circuit rejected the appellant's argument that the oral contract between itself and the appellees should be enforceable pursuant to the judicial admissions exception of U.C.C. § 2-201(3)(b). *Id.* at 48. The appellees in *Radix* moved for summary judgment on the ground that there was no writing satisfying the statute of frauds. *Id.* at 47. The court granted the motion for summary judgment, reasoning that the appellees' admission in its Rule 9(g) statement assumed the truth of the appellant's allegations of the oral contract only for the purposes of the motion. *Id.* at 48.

[4] 63 N.Y.2d 616, 468 N.E.2d 681, 479 N.Y.S.2d 499 (1984).

[5] *Id.* at 618-19, 468 N.E.2d at 682, 479 N.Y.S.2d at 500.

[6] *Id.* at 620, 468 N.E.2d at 683, 479 N.Y.S.2d at 501 (Meyer, J., dissenting).

fered him a raise, certain benefits, and a ten-percent interest in the corporation.[7] When the plaintiff failed to receive the promised stock certificates that were to evidence his ownership in the corporation, he commenced an action seeking the value of his ten-percent interest.[8] Pursuant to section 3211(a) of the CPLR, the defendant moved to dismiss on the ground that the oral agreement was barred by the statute of frauds.[9] The Supreme Court, Special Term, Albany County, denied the motion,[10] and the Appellate Division, Third Department, affirmed.[11]

The Court of Appeals reversed in a memorandum decision, reasoning that the judicial-admissions exception to section 8-319 requires an "affirmative admission that a contract was made for the sale of a stated quantity of described securities at a defined or stated price."[12] The Court determined that the defendant's concession with respect to the existence of the oral agreement lacked the requisite affirmation and certainty.[13] The majority concluded that the admission was merely a "recognition of the procedural context in which the motion arose."[14]

In an exhaustive dissent, Judge Meyer maintained that neither the language of section 8-319, the legislative history, nor the judicial interpretation of the section are supportive of the ma-

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[7] *Id.* (Meyer, J., dissenting).

[8] *Id.* (Meyer, J., dissenting). The plaintiff stated that he received all the perquisites promised to him except the stock certificates. Boylan v. G.L. Morrow Co., 96 App. Div. 2d 983, 984, 466 N.Y.S.2d 832, 833 (3d Dep't 1983), *rev'd*, 63 N.Y.2d 616, 468 N.E.2d 681, 479 N.Y.S.2d 499 (1984).

[9] 63 N.Y.2d at 620, 468 N.E.2d at 683, 479 N.Y.S.2d at 501 (Meyer, J., dissenting); *see supra* note 1 and accompanying text.

[10] 63 N.Y.2d at 620, 468 N.E.2d at 683, 479 N.Y.S.2d at 501 (Meyer, J., dissenting). Special Term denied the dismissal based on the statute of frauds, reasoning that the defendant had conceded the offer and acceptance of ten-percent ownership in the corporation. *Id.* (Meyer, J., dissenting).

[11] Boylan v. G.L. Morrow Co., 96 App. Div. 2d 983, 984, 466 N.Y.S.2d 832, 833 (3d Dep't 1983), *rev'd*, 63 N.Y.2d 616, 468 N.E.2d 681, 479 N.Y.S.2d 499 (1984). Both Special Term and the Appellate Division relied on Gross v. Vogel, 81 App. Div. 2d 576, 577, 437 N.Y.S.2d 431, 432 (2d Dep't 1981). In *Gross*, a pre-answer motion to dismiss under CPLR 3211(a)(5) was held improper because the complaint, accepted as true for the motion to dismiss, adequately pleaded a cause of action for breach of contract. *See id.* at 577, 437 N.Y.S.2d at 433.

[12] 63 N.Y.2d at 619, 468 N.E.2d at 682, 479 N.Y.S.2d at 500; *see* N.Y. U.C.C. § 8-319 (McKinney Supp. 1984-1985); *supra* note 3.

[13] 63 N.Y.2d at 619, 468 N.E.2d at 682, 479 N.Y.S.2d at 500. *But see id.* at 621, 468 N.E.2d at 683-84, 479 N.Y.S.2d at 500-01 (Meyer, J., dissenting) (quantity of securities is ten percent of corporate stock and price is employee's continued employment).

[14] *Id.* at 618, 468 N.E.2d at 682, 479 N.Y.S.2d at 500.

jority's holding.[15] The dissent asserted that the concession made by the defendant for purposes of the motion to dismiss was an admission "otherwise in court," and as such should operate to remove the contract from the statute of frauds.[16] Any other conclusion, Judge Meyer argued, would render the admissions exception meaningless.[17] The dissent discussed the history of the statute of frauds at length, noting that defendants have always been required to deny the alleged oral contract before raising the statute as a defense.[18] The dissent noted that "denial of the existence of an oral agreement is a *sine qua non* of reliance on the . . . Statute of Frauds."[19] Urging the Court to adopt this interpretation, Judge Meyer contended that such a construction would be in accord with the decisions of a majority of the states that have interpreted the judicial admissions exception of the Code,[20] and would therefore be

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[15] *Id.* at 619, 468 N.E.2d at 682, 479 N.Y.S.2d at 500 (Meyer, J., dissenting).

[16] *Id.* at 622, 468 N.E.2d at 684, 479 N.Y.S.2d at 502 (Meyer, J., dissenting).

[17] *Id.* at 623, 468 N.E.2d at 684-85, 479 N.Y.S.2d at 502-03 (Meyer, J., dissenting). Section 8-319(d) provides that the admission must be made in the pleadings, testimony, or otherwise in court to defeat the statute of frauds defense. N.Y. U.C.C. § 8-319(d) (McKinney Supp. 1984-1985); *see supra* note 3. The dissent contended that a motion to dismiss deprives the plaintiff of the opportunity to have the defendant make such an admission. 63 N.Y.2d at 623, 468 N.E.2d at 685, 479 N.Y.S.2d at 503 (Meyer, J., dissenting). Judge Meyer argued that the Court's holding defeated the purpose of the judicial admissions exception:

> If a prepleading motion to dismiss is permitted to defeat a cause of action on an oral sales contract before plaintiff has had an opportuntiy to elicit from defendant a statement in court of any kind, only malpractice by defendant's attorney would subject the defendant to the statute's ameliorative purpose.

Id. (Meyer, J., dissenting).

[18] 63 N.Y.2d at 624, 468 N.E.2d at 685, 479 N.Y.S.2d at 503 (Meyer, J., dissenting). For a discussion of the history of the statute of frauds see Stevens, *Ethics and the Statute of Frauds*, 37 CORNELL L.Q. 355, 381 (1952). Dean Stevens suggests that the statute of frauds should be interpreted as it was in the seventeenth and eighteenth centuries: "[t]he statute should not be recognized as a defense except where the defendant can and does deny the contracting." *Id.* at 381.

[19] 63 N.Y.2d at 627, 468 N.E.2d at 687, 479 N.Y.S.2d at 505 (Meyer, J., dissenting). Professor Corbin has suggested that the statute of frauds defense should only be available to those defendants who deny the making of the contract under oath. *See* 2 A. CORBIN, CONTRACTS § 275, at 13 (1950); *see also* Yonge, *The Unheralded Demise of the Statute of Frauds Welsher in Oral Contracts for the Sale of Goods and Investment Securities*, 33 WASH. & LEE L. REV. 1, 5 (1976) (quoting Corbin).

[20] 63 N.Y.2d at 627, 468 N.E.2d at 687, 479 N.Y.S.2d at 505 (Meyer, J., dissenting); *see, e.g.*, Hale v. Higginbotham, 228 Ga. 823, 825, 188 S.E.2d 515, 517 (1972) (statute of frauds not bar to action when defendant admitted existence of oral contract in testimony); Packwood Elevator Co. v. Heisdorffer, 260 N.W.2d 543, 547 (Iowa 1977) (admission takes oral contract out of statute of frauds); Dehahn v. Innes, 356 A.2d 711, 718 (Me. 1976) (defendant bound by admission of existence of oral contract).

consistent with the policy of uniformity underlying the Code. [21]

It is suggested that by granting a pre-answer motion to dismiss that admits the existence of an oral contract, the Court of Appeals has undermined the purpose of the statute of frauds, allowing it to be used to perpetrate fraud, rather than to prevent it.[22] The judicial admissions exception to the statute of frauds is intended to prevent a party from simultaneously admitting an oral contract and relying on the statute as a defense.[23] Once a defendant concedes the existence of an oral agreement, the purpose of the statute has been satisfied, and the danger of fraud is reduced significantly.[24] This reasoning is supported in decisions of the

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[21] 63 N.Y.2d at 627, 468 N.E.2d at 687, 479 N.Y.S.2d at 505 (Meyer, J., dissenting); *see* N.Y. U.C.C. § 1-102(2)(c) (McKinney 1964). Section 1-102(2)(c) provides that one of the "[u]nderlying purposes and policies of this Act [is] . . . to make uniform the law among the various jurisdictions." *Id.* "This Act shall be liberally construed and applied to promote its underlying purposes and policies." *Id.* § 1-102(1).

[22] Originally, the statute of frauds was enacted to protect parties from fraudulent claims based on perjured testimony. *See* 2 A. CORBIN, *supra* note 19, at 360. Clearly, the "statute was intended to be used as a shield, not a sword." Stevens, *supra* note 18, at 360. That purpose is retained in the New York statute. *See* Intercontinental Planning, Ltd. v. Daystrom, Inc., 24 N.Y.2d 372, 385, 248 N.E.2d 576, 583, 300 N.Y.S.2d 817, 828 (1969); Morris Cohen & Co. v. Russell, 23 N.Y.2d 569, 574, 245 N.E.2d 712, 715, 297 N.Y.S.2d 947, 952 (1969).

[23] *See* New York Law Revision Commission Study of the Uniform Commercial Code, [1955] 3 N.Y. LAW REV. COMM'N REP. 1980; N.Y. U.C.C. § 2-201, official comment 7, at 119 (McKinney 1964). The Law Revision Commission stated specifically that the judicial admissions exception prevents a party from admitting an oral contract and pleading the statute of frauds. *See* New York Law Revision Commission Study of the Uniform Commercial Code, [1955] 3 N.Y. LAW REV. COMM'N REP. 1980; Boylan v. G.L. Morrow Co., 63 N.Y.2d 616, 626, 468 N.E.2d 681, 686, 479 N.Y.S.2d 499, 504 (Meyer, J., dissenting) (involuntary as well as voluntary admissions covered by statutory exception). The Official Comment to § 2-201 of the Code states that, "[u]nder this section it is no longer possible to admit the contract in court and still treat the Statute as a defense." N.Y. U.C.C. § 2-201, official comment 7, at 119 (McKinney 1964).

Referring to the judicial admissions exception, the Court of Appeals of Georgia, in Garrison v. Piatt, 113 Ga. App. 94, 94, 147 S.E.2d 374, 375 (1966), stated that "[t]his provision was designed to prevent the statute of frauds itself from becoming an aid to fraud, by prohibiting one [from] claiming the benefit of the statute who admits in the case the oral contract sued upon." *Id.* at 94, 147 S.E.2d at 375. In Cargill Inc., Commodity Mktg. Div. v. Hale, 537 S.W.2d 667, 669 (Mo. Ct. App. 1976), the Court of Appeals of Missouri held that the defendant's admission of a contract prevented the defendant from raising the statute of frauds as a defense. *See id.* Similarly, the Supreme Court of Montana has stated that to permit a defendant to rely on the statute of frauds as a defense to avoid an admitted obligation is to perpetrate a fraud. *See* Farmers Elevator Co. v. Anderson, 170 Mont. 175, 179, 552 P.2d 63, 65 (1976).

[24] *See* 2 A. CORBIN, *supra* note 19, at 681. A purpose of the statute of frauds is to prevent the enforcement of fraudulent claims against innocent parties. *See id.* It is submitted that if the defendant admits to the contract that the plaintiff seeks to enforce, there is

lower courts of New York[25] and in the case law of other states.[26] To distinguish, as the *Boylan* Court did, between a procedural admission for the purposes of a motion to dismiss and other admissions made in the context of a judicial proceeding, frustrates the policies underlying the judicial admissions exception of the Code.[27] This is especially true, it is suggested, when a defendant satisfies the requirements of section 8-319(d), as did the defendant in *Boylan*, by admitting the making of a contract for a defined amount of securities at a stated price.[28]

The *Boylan* decision, it is further suggested, unnecessarily protects a defendant's right to use the statute of frauds as a defense. A balance must be reached between preserving the availability of the defense and maintaining the integrity of the judicial system.[29] Once a defendant admits an obligation, even in a procedural

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no longer any danger that the plaintiff's claim is fraudulent. *See* Shedd, *Statute of Frauds: Judicial Admissions Exception—Where Has it Gone? Is It Coming Back?*, 6 WHITTIER L. REV. 1, 6 (1984).

[25] *See, e.g.*, St. Mary & Co. v. Halberstadt, 61 App. Div. 2d 1105, 1105, 403 N.Y.S.2d 367, 367 (3d Dep't 1978); Weiss v. Wolin, 60 Misc. 2d 750, 753, 303 N.Y.S.2d 940, 943 (Sup. Ct. Nassau County 1969). After reviewing the legislative history of the statute of frauds as evidenced by the report of the Law Revision Commission, the *Weiss* court determined that a pre-answer motion based on the statute is premature because the contract is enforceable if the defendant admits that it exists. 60 Misc. 2d at 753, 303 N.Y.S.2d at 943. The court emphasized the language of the statute that indicated that oral contracts are no longer void, but only unenforceable under the statute. *Id.* The court concluded that to grant a pre-answer motion to dismiss would deny the plaintiff the opportunity to have the contract enforced. *Id.*

In *Halberstadt*, the defendant's failure to deny the existence of the contract caused the Appellate Division, Third Department, to rule that the motion to dismiss was premature. 61 App. Div. 2d at 1105, 403 N.Y.S.2d at 367. The court held that the plaintiff was entitled to an opportunity for the development of facts sufficient to determine if the alleged contract actually existed. *See id.*

[26] *See supra* notes 20 & 23.

[27] *See* N.Y. U.C.C. § 8-319, commentary at 277 (McKinney 1964); N.Y. U.C.C. § 2-201, commentary at 119 (McKinney 1964); 3 R. DUESENBERG & L. KING, SALES AND BULK SALES UNDER THE UNIFORM COMMERCIAL CODE § 2.04[3], at 2-78 to 2-82 (1982); *see also supra* note 23 and accompanying text (purpose of statute of frauds is to prevent fraud). If the defendant admits that a contract exists, he cannot be defrauded by the plaintiff, and there is no reason to allow the defendant to escape the contract. *See* Shedd, *supra* note 24, at 29. *But see* Radix Org., Inc. v. Mack Trucks, Inc., 602 F.2d 45, 48 (2d Cir. 1979) ("[t]he assertion of [the statute of frauds] defense would be somewhat meaningless in the absence of an assumed-for-the-argument oral agreement").

[28] *See* N.Y. U.C.C. § 8-319(d) (McKinney Supp. 1983-1984); Boylan v. G.L. Morrow Co., 63 N.Y.2d 616, 620-21, 468 N.E.2d 681, 683, 479 N.Y.S.2d 499, 501 (1984) (Meyer, J., dissenting).

[29] *See* Shedd, *supra* note 24, at 3-4; Stevens, *supra* note 18, at 378. The judicial-admissions exception is the proper vehicle with which to ensure that the statute does not prevent the judicial system from reaching an unjust result. *See* Stevens, *supra* note 18, at 378; Car-

context, the need to protect his right to rely on the statute of frauds as a defense is eliminated, because neither the defendant nor the court can be defrauded by the plaintiff.[30] Moreover, a judicial admission does not bar the defendant from contesting the validity or terms of the contract on other grounds.[31] It is submitted that the purposes of the statute would be better served, and judicial efficiency more effectively promoted, by giving full effect to the judicial admissions exception to the statute of frauds.[32]

Colleen M. McIntosh

CPLR 4111: Special verdict answers do not require concurrence by the same five jurors

Since 1937, New York has permitted verdicts in civil trials to be rendered by five-sixths of the jury.[1] The authorizing statute

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gill Inc., Commodity Mktg. Div. v. Hale, 537 S.W.2d 667, 669 (Mo. Ct. App. 1976). Defendants should not be allowed to avoid admitted obligations in the name of preventing plaintiffs from perpetrating non-existent frauds. *See* Stevens, *supra* note 18, at 378.

[30] *See supra* note 24 and accompanying text. "Undeniably, the purpose of the statute was to give assured protection against the risk . . . of convincing proof through perjured testimony of an agreement that had never actually been entered into." Stevens, *supra* note 18, at 360. A defendant will not admit the existence of a contract that he did not make, and, therefore, it is suggested, once the contract is admitted the defendant should not be protected by the statute.

[31] *See* N.Y. U.C.C. § 2-201, official comment 7, at 119 (McKinney 1964); Comment, *U.C.C. 2-201(3)(b): The Search for the "Bargain-in-Fact" Through the Use of the Oral Admissions Exception of the U.C.C. and its Impact on Other Contract Areas*, 3 J. L. & COM. 167, 176 (1983); *see also* Packwood Elevator Co. v. Heisdorffer, 260 N.W.2d 543, 547 (Iowa 1977) (plaintiff has burden of proving contract actually exists); Dehahn v. Innes, 356 A.2d 711, 719-23 (Me. 1976) (litigating tender of delivery, acceptance, revocation, and damages); Oregon Ridge Dinner Theatre, Inc. v. Hamlin, 253 Md. 462, 467-68, 253 A.2d 382, 384 (1969) (litigating validity of transfer of assets).

[32] The history of the statute of frauds clearly indicates that its purpose was to prevent the enforcement of fraudulent claims. *See* Stevens, *supra* note 18, at 355-71. It is suggested that because a party does not ordinarily admit a contractual obligation to which he was not a party, it is reasonable to hold the party bound, to the extent that he admits the obligation. "[S]ince the statute of frauds was intended to provide justice by reducing frauds, doing away with the judicial admission exception to discourage perjury achieves justice in the same way as legalizing criminal activities in order to reduce crime." Shedd, *supra* note 24, at 28 n.144.

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[1] *See* CPLR 4113(a) (1963). The statute provides: "A verdict may be rendered by not