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Party to Contract May Not Offer Evidence of Other Party's Prior Contradictory Agreement with Third Party

Robert J. Sorge Jr.

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states which have reworded section 2-318 to expressly abolish the defense of privity in breach of warranty causes of action. Such legislation would foster the equitable result strived for by the Schiavone court without requiring the courts to "astutely" stretch tort causes of action to redress contract damages.

Rosemary B. Boller

Party to contract may not offer evidence of other party's prior contradictory agreement with third party

The parol evidence rule prohibits parties to an integrated contract from contradicting the terms of the writing with their prior or contemporaneous agreements. To avoid the harsh results of in-
flexible application, the rule has been interpreted liberally.\(^{114}\)

32, 36, 89 N.E. 365, 366 (1909). Another purpose of the parol evidence rule was to promote stability in commercial agreements. See Note, The Parol Evidence Rule and Third Parties, 41 FORDHAM L. REV. 945, 946 (1973) [hereinafter cited as Note, Third Parties]. The rule applies to prior oral and written agreements between the parties. 4 S. WILLISTON, CONTRACTS § 631, at 946-49 (3d ed. 1961). The rule, however, does not bar their subsequent oral, Miles v. Houghtaling, 32 App. Div. 2d 714, 715, 300 N.Y.S.2d 5, 6 (3d Dep't 1969), or written agreements, Haight v. Cohen, 123 App. Div. 707, 708, 108 N.Y.S. 502, 502 (2d Dep't 1908). The major area of dispute concerning the applicability of the rule centers around the threshold question of whether an agreement is integrated. See Note, Third Parties, supra, at 952-54. This is a factual determination which must be done on a case-by-case basis. See Mitchell v. Lath, 247 N.Y. 377, 388, 160 N.E. 646, 650 (1928) (Lehman, J., dissenting). Professor Corbin would allow extrinsic evidence to show the parties' intent as to integration. 3 A. CORBIN, CONTRACTS § 573, at 360-69 & § 582, at 444-64 (1961). Professor Williston proposed a narrower approach in determining the intent of the parties concerning integration of the agreement. He placed great emphasis on the completeness of the written agreement itself. 4 S. WILLISTON, supra, § 633, at 1016. New York has been categorized as using Williston's strict interpretation to determine whether a contract is integrated. See J. CALAMARI & J. PERILLO, CONTRACTS 110-11 & n.67 (2d ed. 1977).


\(^{114}\) See, e.g., Thomas v. Scott, 127 N.Y. 133, 137, 27 N.E. 961, 962 (1901). Although the parol evidence rule had been criticized because its inflexible nature fostered unfairness, it now is denounced for the numerous exceptions which were developed to cure its inflexibility. See Sweet, Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule, 53 CORNELL L. REV. 1036, 1038 (1968). Indeed, Professor Corbin once stated that the parol evidence rule "already has so many exceptions that only with difficulty can it be correctly stated in the form of a rule." Corbin, Conditional Delivery of Written Contracts, 36 YALE L.J. 443, 456 (1927).

The parol evidence rule does not bar evidence of a prior agreement when the rule is "inapplicable" or if a "real exception" applies. See Thomas v. Scott, 127 N.Y. 133, 137, 27 N.E. 961, 962 (1901). The terms "exception" and "inapplicable," however, have been used interchangeably by the courts. Compare Bareham & McFarland, Inc. v. Kane, 228 App. Div. 396, 401, 240 N.Y.S. 123, 130 (4th Dep't 1930) (the rule is inapplicable when fraud is raised) with Cortlandt v. E.F. Hutton, Inc., 491 F. Supp. 1, 4 (S.D.N.Y. 1979) (fraud classified as exception to rule). Generally, the parol evidence rule is considered inapplicable when evidence is offered to explain ambiguities, see, e.g., M. O'Neil Supply Co. v. Petroleum Heat & Power Co., 280 N.Y. 50, 55, 19 N.E.2d 676, 678 (1939), to show the custom or usage of a term, see, e.g., B.M. Heede, Inc. v. Roberts, 303 N.Y. 385, 390, 103 N.E.2d 419, 420 (1952), or to establish the existence of a separate and distinct collateral contract, see, e.g., Mitchill v. Lath, 247 N.Y. 377, 381, 160 N.E. 646, 648 (1928); note 115 infra. One class of real exceptions to the rule permits the introduction of evidence which purports to show that a written agreement is not a binding contract. These situations involve allegations of failure or want of consideration, see, e.g., Ehrlich v. American Moninger Greenhouse Mfg. Corp., 26 N.Y.2d
Thus, the rule does not exclude evidence of an independent agreement between the parties which does not contradict the written agreement in dispute.\textsuperscript{115} Moreover, since the parol evidence rule applies only to the parties to the writing, "strangers" to the contract may contradict its terms.\textsuperscript{116} It has been unclear, however,


One commentator has argued that California has virtually eliminated the parol evidence rule. \textit{See Note, Is It Necessary?}, supra, at 976 (1969). For a general criticism of the rule, see \textit{Comment, Parol Evidence Rule—In Need of Change}, 8 Gonz. L. Rev. 88 (1972).

whether a party will be barred by the parol evidence rule from introducing evidence of a prior contradictory agreement between the other party to the contract and a third party. Recently, in *Marine Midland Bank-Southern v. Thurlow*, the Court of Appeals held that evidence of a prior agreement between one of the parties to the litigation and a third party may not be introduced if it contradicts the terms of the contract between the litigants.

In *Marine Midland*, the defendants obtained a loan from the plaintiff bank in order to purchase convertible debentures issued by Conelec, Inc. (Conelec). The debentures were pledged by the contract is not a party to the agreement, this third party or “stranger” may be allowed to contradict the writing under the stranger to the contract exception to the parol evidence rule. See id. at 478, 148 N.E. at 651; Metz v. Lane Chair Rental, Inc., 16 Misc. 2d 735, 736, 181 N.Y.S.2d 740, 742 (Sup. Ct. Nassau County 1958), aff'd, 11 App. Div. 2d 741, 204 N.Y.S.2d 636 (2d Dep't 1960); Techno-Lectric Indus. Inc. v. Mohawk Elecs. Corp., 35 Misc. 2d 45, 46, 229 N.Y.S.2d 1019, 1021 (Sup. Ct. Kings County 1962). But see notes 158-160 and accompanying text infra. The stranger exception has resulted from the general view among the courts that the parol evidence rule binds only the immediate parties to the written contract and their privies. See Note, Third Parties, supra note 113, at 959. It has been noted that third party situations present one of the greatest areas of uncertainty regarding the application of the parol evidence rule. *Id.* at 972. The courts have used the stranger to the contract exception to mitigate the harsh and unjust results of strict application of the parol evidence rule. *Id.* at 960.

See *Traders’ Nat’l Bank v. Laskin*, 238 N.Y. 535, 542, 144 N.E. 784, 785 (1924). In *Traders’* the Court of Appeals stated that “[d]ifficulties may arise in the application of the so-called parol evidence rule, but it has never been held that a written agreement between two parties excludes proof of an additional parol agreement between one of these parties and a third party.” *Id.* at 542, 144 N.E. at 785. The *Traders’* defendants delivered to the plaintiff bank two promissory notes in renewal of two notes made by a third party named Hurwitz. *Id.* at 539, 144 N.E. at 784. At the same time, the defendants delivered a mortgage executed by Hurwitz as collateral. *Id.* The defendants claimed that the plaintiff orally agreed to apply the mortgage to the defendants’ debts before those of Hurwitz. *Id.* at 540, 144 N.E. at 785. The mortgage on its face provided only for the indebtedness of Hurwitz. *Id.* at 144 N.E. at 785. The Court of Appeals held that the defendants were able to introduce evidence of the oral agreement, reasoning that it did not contradict the mortgage and therefore was not prohibited by the parol evidence rule. *Id.* at 542, 144 N.E. at 785. Notwithstanding the Court’s statement that additional third party agreements are not barred by the rule, it appears that the effect of contradictory agreements with third parties has not been squarely addressed.

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defendants as collateral for the loan. Under the defendants’ security agreement, the plaintiff was entitled to take, exchange, or release additional collateral posted by any party at any time. The agreement also authorized the plaintiff to direct the order or manner of disposition of any collateral upon the defendants’ default. To induce the plaintiff to make the loan to the defendants, Conelec also executed a security agreement in the plaintiff’s favor, pledging its equipment as security for any current and future debts of Conelec to the plaintiff. This security agreement was accompanied by a letter from Conelec stating that the pledge of equipment secured the obligation of the debentures pledged by the defendants.

The plaintiff originally credited the Conelec equipment to the pledge supporting the defendants’ loan but later changed its records to list the equipment as security for loans subsequently made to Conelec. When Conelec went bankrupt, the plaintiff liquidated the equipment, applying the proceeds to satisfy the loans to Conelec. After demanding payment on the defendants’ notes, the plaintiff commenced an action to recover the unpaid balance. As an affirmative defense, the defendants attempted to prove an oral agreement between Conelec, the plaintiff, and themselves that equipment would be applied to satisfy the defendants’ debts before those of Conelec. The defendants also attempted to introduce another agreement to the same effect between the plaintiff and Conelec. Special term held that the parol evidence rule barred this evidence.

The defendants signed and delivered notes totalling $100,000. Id. The Marine Midland-Thurlow security agreement also included shares of stock in other corporations. Id. Conelec was considering a public offering and needed interim financing. Id. As an affirmative defense, the defendants attempted to prove an oral agreement between Conelec, the plaintiff, and themselves that equipment would be applied to satisfy the defendants’ debts before those of Conelec. The defendants also attempted to introduce another agreement to the same effect between the plaintiff and Conelec. Special term held that the parol evidence rule barred this evidence. The Appellate Division, Third Depart-

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122 Id.
123 Id.
124 The Marine Midland-Thurlow security agreement also included shares of stock in other corporations. Id.
125 Id.
126 Id. Conelec was considering a public offering and needed interim financing. Id.
127 Id.
128 Id. at 385, 425 N.E.2d at 807, 442 N.Y.S.2d at 419.
129 Id. at 386, 425 N.E.2d at 807, 442 N.Y.S.2d at 419. Pursuant to the after-incurred debts provision in the Conelec-Marine Midland security agreement, the bank was entitled to apply the Conelec security to loans made directly to Conelec. Id.
130 Id.
131 Id. The unpaid balance at the time the action was commenced was $95,000 plus interest. Id.
132 Id.
133 Id. at 388, 425 N.E.2d at 808, 442 N.Y.S.2d at 420.
134 Id. at 386, 425 N.E.2d at 807, 442 N.Y.S.2d at 419.
ment, unanimously reversed, holding that the evidence in the record, including Conelec’s letter to the plaintiff, established a pledge to secure the debentures which was separate and distinct from the defendants’ agreement with the plaintiff and, therefore, not barred by the parol evidence rule.

On appeal, a divided Court of Appeals reversed. Judge Jasen, writing for the majority, initially considered the alleged oral agreement between the three parties. He noted that an agreement requiring the plaintiff to apply the equipment to the defendants’ debt before Conelec’s loans would contradict the provision of the written security agreement which entitled the plaintiff to release and apply collateral as it saw fit. Judge Jasen observed that this prior agreement was not separate and distinct from the security agreement since Conelec’s pledge was designed to induce the plaintiff to make the loan to the defendants. These factors led the majority to find that the parol evidence rule barred evidence of the prior agreement.

Considering the separate agreement between Marine Midland and Conelec, Judge Jasen noted

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136 54 App. Div. 2d at 389, 388 N.Y.S.2d at 707. The appellate division, distinguishing the defendants’ pledge of the debentures from Conelec’s pledge of equipment, id. at 388, 388 N.Y.S.2d at 707, stated that the purpose of the Conelec security agreement was to protect the debentures of the defendants. Id. at 390, 388 N.Y.S.2d at 708. Judge Herlihy noted that although the security agreement between the plaintiff and the defendants allowed the bank to exchange collateral securing the loan, neither this agreement nor Conelec’s pledge gave the plaintiff authority to exchange or release the security for the debentures. Id. at 389, 388 N.Y.S.2d at 707. Thus, he concluded, the plaintiff had no right to release the equipment securing the defendants’ rights under the debentures. Id. at 389-90, 388 N.Y.S.2d at 707.


138 Judge Jasen was joined by Judges Jones, Fuchsberg, and Meyer. Chief Judge Cooke dissented in a separate opinion in which Judges Gabrielli and Wachtler concurred.

139 53 N.Y.2d at 387-88, 425 N.E.2d at 807-08, 442 N.Y.S.2d at 419-20. Looking to the tripartite oral agreement, Judge Jasen noted that it is well established that the parol evidence rule prevents parties from contradicting or modifying their integrated written contract with evidence of prior or contemporaneous agreements between the parties. Id. at 387, 425 N.E.2d at 807, 442 N.Y.S.2d at 419.

140 Id. at 387, 425 N.E.2d at 808, 442 N.Y.S.2d at 420. The Court noted that “the agreement between [the] defendants and plaintiff [was] memorialized in their security agreement and proof of any oral promise by plaintiff as to the initial application of the Conelec collateral directly contradicts the provisions of that written contract.” Id. at 388, 425 N.E.2d at 808, 442 N.Y.S.2d at 420.

141 Id.

142 Id. at 387, 388, 425 N.E.2d at 807, 808, 442 N.Y.S.2d at 419, 420.
that since it was inconsistent with the written security agreement, it also was barred by the parol evidence rule.\textsuperscript{143}

In a vigorous dissent, Chief Judge Cooke stated that "[t]he majority . . . wholly misapplie[d] the parol evidence rule to a situation where it [was] simply not involved."\textsuperscript{144} He emphasized that the parol evidence rule applies only to prior agreements "‘between the parties.’"\textsuperscript{145} Viewing the facts in \textit{Marine Midland} as involving two distinct agreements with different parties and subject matter,\textsuperscript{146} he reasoned that the rule could not exclude the separate agreement between Conelec and the plaintiff.\textsuperscript{147} Chief Judge Cooke asserted that the majority was creating a new rule which bars evidence of a completely separate agreement between other persons on the ground that it may bear upon the rights of the parties to a written contract.\textsuperscript{148}

It is submitted that the \textit{Marine Midland} Court justifiably held that the parol evidence rule applies to cases in which an

\begin{footnotes}
\footnote{id. at 388, 425 N.E.2d at 808, 442 N.Y.S.2d at 420. The Court noted that although the rights as between the plaintiff and Conelec could be determined by reference to their oral agreement, these rights were not in issue. The rights involved in the litigation, the Court noted, were those between the plaintiff and the defendant, and thus could be determined only by looking to their written security agreement. \textit{id.} at 388-89, 425 N.E.2d at 808, 442 N.Y.S.2d at 420.}
\footnote{id. at 389, 425 N.E.2d at 808, 442 N.Y.S.2d at 420 (Cooke, C.J., dissenting).}
\footnote{id., 425 N.E.2d at 808, 442 N.Y.S.2d at 421 (Cooke, C.J., dissenting).}
\footnote{id. at 388-90, 425 N.E.2d at 809, 442 N.Y.S.2d at 421 (Cooke, C.J., dissenting). The dissent viewed the transactions as involving two distinct and separate agreements which secured different subjects. \textit{id.} (Cooke, C.J., dissenting). Chief Judge Cooke stated that while Conelec was securing the defendants’ loans and its own debentures, the defendants were securing their own loan with the bank. \textit{id.} (Cooke, C.J., dissenting).}
\footnote{id. at 389, 425 N.E.2d at 809, 442 N.Y.S.2d at 421 (Cooke, C.J., dissenting). Chief Judge Cooke relied on \textit{Traders’ Nat’l Bank} v. Laskin, 238 N.Y. 535, 542, 144 N.E. 784, 785 (1924), for the proposition that the parol evidence rule does not bar proof of a parol agreement between a third party and one of the parties to a written agreement. 53 N.Y.2d at 389, 425 N.E.2d at 809, 442 N.Y.S.2d at 421 (Cooke, C.J., dissenting). For a discussion of \textit{Traders’ Nat’l Bank}, see note 117 supra.}
\footnote{The dissent conceded that the parol evidence rule would bar evidence of a prior oral agreement between the litigants regarding the plaintiff’s use of the collateral because the written security agreement between the parties gave the plaintiff the right to accept or release additional collateral on the notes in its discretion. 53 N.Y.2d at 390, 425 N.E.2d at 809, 442 N.Y.S.2d at 421 (Cooke, C.J., dissenting). The dissent noted, however, that the existence of a separate written agreement between the plaintiff and Conelec would not bar parol evidence of a promise by the plaintiff to Conelec to apply the equipment first to the defendants’ debentures. \textit{id.} (Cooke, C.J., dissenting).}
\footnote{53 N.Y.2d at 391, 425 N.E.2d at 809-10, 442 N.Y.S.2d at 421-22 (Cooke, C.J., dissenting). Chief Judge Cooke referred to the majority’s decision as a “radical departure from well-settled rules of law.” \textit{id.}, 425 N.E.2d at 810, 442 N.Y.S.2d at 422 (Cooke, C.J., dissenting).}
\end{footnotes}
agreement with a third party is offered as evidence to contradict the terms of the contract in issue. In doing so, the Court has implicitly refused to expand the rule's collateral contract exception. Under this doctrine, a prior or contemporaneous collateral agreement between the parties is admissible if it is separate and distinct from, but consistent with, the terms of the writing, and does not pertain to something ordinarily expected to be embodied in the written contract. If a prior or contemporaneous agreement between the parties contradicts the written contract, however, it may not be introduced. It is suggested that the same result should obtain when one party attempts to assert rights under a collateral agreement as a third party beneficiary. Indeed, the Marine Midland defendants attempted to benefit from the plaintiff's promise to Conelec as if they were parties to the prior agreement. Under the collateral contract doctrine, however, the defendants could not vary the terms of their written contract with the plaintiff even if they had been parties to the prior agreement.

149 See note 115 and accompanying text supra. Although the Court did not expressly invoke the collateral contract exception, its reasoning was quite similar to that involved under this doctrine. Indeed, the majority noted that the oral agreement between Conelec and the plaintiff was separate and distinct from the written contract in issue, but did not allow its introduction because it would have contradicted the writing. 53 N.Y.2d at 389, 425 N.E.2d at 808, 442 N.Y.S.2d at 420; cf. James A. Haggerty Lumber & Mill Work, Inc. v. Thompson-Starrett Constr. Co., 22 App. Div. 2d 509, 510, 256 N.Y.S.2d 1011, 1013 (1st Dep't 1965) (to be admissible under collateral contract doctrine, separate and distinct agreement must not contradict the writing). See generally Mitchell v. Lath, 247 N.Y. 377, 160 N.E. 646 (1928); note 115 supra.


151 One of the points made by the plaintiff's counsel was that if the defendants attempted to assert rights as third-party beneficiaries, their claim would be subject to any defenses that the plaintiff could have raised against Conelec. See Points of Counsel in Marine Midland Bank-Southern v. Thurlow, 53 N.Y.2d at 383-84. For the defendants to be considered third-party beneficiaries, Conelec must have intended to benefit them. The defendants could not merely be incidental beneficiaries of the agreement. See, e.g., Associated Flour Haulers & Warehousemen, Inc. v. Hoffman, 228 N.Y. 173, 180, 26 N.E.2d 7, 10 (1940); Flemington Nat'l Bank & Trust Co. v. Domler Leasing Corp., 65 App. Div. 2d 39, 33, 410 N.Y.S.2d 75, 77 (1st Dep't 1978), aff'd, 48 N.Y.2d 678, 397 N.E.2d 393, 421 N.Y.S.2d 881 (1979). Since the Court of Appeals decided the case on parol evidence grounds, it appears to have been unnecessary for the Court to address issues concerning third-party beneficiary theory.

152 See note 40 and accompanying text supra. Under a third-party beneficiary theory, the defendants would have a claim against the plaintiff as promisor, see Lawrence v. Fox, 20 N.Y. 268, 272 (1859), and any rights they had against the promisee, Conelec, would continue. See Vulcan Iron Works v. Pittsburg-Eastern Co., 144 App. Div. 827, 831, 129 N.Y.S. 676, 679 (3d Dep't 1911). See generally J. CALAMARI & J. PERILLO, supra note 113, at 625-29.

153 See note 149 supra.
Moreover, if a party is aware of a right that he has under one contract as a third party beneficiary, any subsequent inconsistent agreements that he makes with a party to that contract can be viewed as a waiver of his rights under the prior contract. In this instance, after the plaintiff allegedly had promised Conelec that it would apply the equipment to the defendants' debt before Conelec's loans, the defendants authorized the plaintiff to enforce and release collateral in its discretion. Thus, it seems that even if parol evidence of the plaintiff's prior agreement had been introduced, the defendants may have lost the case through a waiver of their rights.

Finally, it is submitted that the Court of Appeals could have avoided its extended examination of the transactions involved in Marine Midland by prohibiting the defendants from varying the terms of the written agreement between the plaintiff and Conelec. Although it is true that a third party may sometimes contradict an integrated agreement under the stranger to the contract exception to the parol evidence rule, this doctrine has only limited application. Indeed, it has been recognized that even a stranger cannot vary the terms of an agreement if he is asserting legal rights under the written contract. In Marine Midland, the defendants at-

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1 A third-party beneficiary is said to have contract rights despite the absence of privity. 4 A. Corbin, supra note 113, § 779J, at 59. One way in which a party may “waive” his contract rights is by entering into a subsequent agreement which substitutes new terms for old ones existing under the original contract. 5 S. Williston, supra note 113, § 679. In this situation, the party is said to have rescinded the inconsistent terms of the prior agreement. Id.

53 N.Y.2d at 385-86, 425 N.E.2d at 807, 442 N.Y.S.2d at 419.

54 Id. at 385, 425 N.E.2d at 806, 442 N.Y.S.2d at 418.

55 See note 116 and accompanying text supra.

56 In Oxford Commercial Corp. v. Landau, 12 N.Y.2d 362, 190 N.E.2d 230, 239 N.Y.S.2d 865 (1963), the Court of Appeals stated that [a]lthough it is sometimes broadly observed that the parol evidence rule has no application to any except parties to the instrument, it is clear that in the case of a fully integrated agreement, where parol evidence is offered to vary its terms, the rule operates to protect all whose rights depend upon the instrument even though they were not parties to it. Id. at 365-66, 190 N.E.2d at 231, 239 N.Y.S.2d at 867 (citations omitted).

57 See, e.g., Oxford Commercial Corp. v. Landau, 12 N.Y.2d 362, 365-66, 190 N.E.2d 230, 231, 239 N.Y.S.2d 865, 867 (1963); Vinciguerra v. State, 38 App. Div. 2d 607, 608, 326 N.Y.S.2d 293, 295 (3d Dep't 1971). Some courts have noted that the stranger to the contract exception applies only when the third party is asserting “a right independent of, and not growing out of, the instrument, or when the right asserted does not originate in the relations established by the instrument.” Spingarn v. Rosenfeld, 4 Misc. 523, 527, 24 N.Y.S. 733, 736 (N.Y.C. C.P. Gen. T. N.Y. County 1893); accord, Vinciguerra v. State, 38 App. Div. 2d 607,
tempted to assert rights under the written agreement between the plaintiff and Conelec and to prove these rights through parol evidence. Thus, the defendants should not have been able to introduce this extrinsic evidence as "strangers." If the Court of Appeals had taken this approach, it seems that the defendants would not have been able to cast doubt upon the express terms of their own agreement with the plaintiff.

Robert J. Sorge, Jr.

Harassment violation conviction cannot be the basis for the use of collateral estoppel in a subsequent civil action

The doctrine of collateral estoppel fosters judicial economy by prohibiting the relitigation of previously adjudicated issues. In practice, the doctrine is not applied unless an adjudicated issue is shown to be identical to and dispositive of the issue in the instant case. Moreover, it must be established that the parties to the original action had a "full and fair opportunity to contest" the issue sought to be relitigated. In assessing whether such a "full...