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The Statute of Frauds

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Sterling v Taylor (2007) 40 C4th 757, 55 CR3d 116, reported in 30 CEB RPLR 54 (Mar. 2007), was a supreme court decision reported in our last issue, but it came too close to our publication date to allow time for me to comment on it in that issue. Now that there is time, I do not think that there is any constructive way for attorneys to correct their practices based on this decision.

Essentially, Sterling wrote out a handwritten memorandum of her deal with Taylor for her to buy some of his properties for "approx 10.468 X gross income [,] estimated income 1.600.000, Price $16,750.00," and Taylor later signed another piece of paper acknowledging some of that. When Sterling later discovered that actual income from the properties was only $1,375,404 (not $1,600,000), she thought she should have to pay 10.468 times that, or $14,404,841, whereas Taylor believed she should pay $16,750,000. Sterling sued for specific performance, but the trial court rendered summary judgment against her on the ground that the memorandum did not state the price clearly enough to satisfy the Statute of Frauds. The court of appeal reversed, holding that extrinsic evidence could be admitted to clarify the price and satisfy the statute, but then the supreme court reversed the court of appeal and affirmed the trial court. In doing so, the high court unanimously said that it agreed with the intermediate court about the propriety of extrinsic evidence being used to enable an ambiguous memorandum to satisfy the Statute of Frauds, but then five justices went on to say "but not in this case." Sterling's extrinsic evidence was offered to support a $14.4 million price, which was nowhere in the contract, and did not support, for Statute of Frauds purposes, the $16.7 million price that was in the contract, a position that caused two of the justices to dissent to that conclusion and want to leave it for the trier of fact—rather than the supreme court—to decide.

I don't want to look like I'm siding with the minority, but the problem I have with Justice Corrigan's majority opinion is that it does not give any guidance to attorneys who are attempting to intelligently predict to their clients the sufficiency of the writings that they have generated. An attorney lucky enough to draft the agreement herself can naturally be expected to assure that the documents she produces will not only correctly express the terms of the deal, but will also satisfy the Statute of Frauds; so, too, when the memorandum sketched out by the clients themselves is given to her to critique or formalize. But if the fight has already started and the memorandum is all there is, and she needs to be able to tell the prospective plaintiff with some confidence whether to sue or give up (or to advise the defendant whether to fight or settle) based on that memorandum, then I fear that she will get no help from this decision. If the supreme court thought it was doing the bar a favor by giving it some guidance, I think it failed.

Some lesser parts of the decision will help practitioners. The holding that extrinsic evidence will be admitted to bolster the claim that the Statute of Frauds has been met is meaningful; an attorney no longer has to tell a plaintiff to abandon his claim because the document alone does not say enough, if there is enough additional supporting evidence to fill the gaps. Additionally, it is helpful to know that street addresses are good enough to satisfy the statute's requirement for specificity of subject matter (although I suspect that no one ever really doubted that point).

Another aspect of the case that looked like it would have been a more serious Statute of Frauds question was that Taylor never signed the memorandum as the party to be charged. He did sign and send a letter 2 days later, but that letter contained no price term (and Taylor disputed that the earlier memorandum was attached to it); he also signed escrow instructions that showed a price of $16.7 million. I wish the court had explained how that took care of the absence of his signature on the memorandum.

But what takes the helpfulness away is the majority's final point that *this* extrinsic evidence—testimony that the formula was the real deal and the estimate only an estimate—would not satisfy the statute because the memorandum contained only the estimated number and not the formulaically derived one. The dissenters' objection—that the formula was as much included in the memorandum as was the estimate—sounds equally correct to me, but more important is the fact that the majority makes it so much harder for a practitioner to predict whether his or her client has a case. Under this new standard, when the writing alone is not sufficient, we must not only decide whether there is enough supporting evidence to get past the Statute of Frauds, but also whether that supporting evidence is sufficiently consistent with the writing—which is, by itself, admittedly ambiguous.

For instance, had Sterling come to me at the outset, I would have predicted that the writing seemed to give greater support to her formula ("10.468 X gross income"), worked out to 3 decimal places, than for Taylor's number ("Price $16,750.00"), a clearly rounded out figure with its three (rather than four) zeros at the end and no decimals, especially in light of the "approx" and "estimated" in the notes. If I had the luxury of choosing my client on this issue, I would have taken Sterling over Taylor, which would have been a bad call in light of what the majority said. (I should note that my conclusion also happens to be one that none of the justices took, perhaps another argument for requiring that the writing fill in the gaps in favor of one side of the dispute.)

Luckily, we aren't asked too often whether incomplete writings satisfy the Statute of Frauds. While that issue now confronts more uncertainty than before, I daresay the bar will survive.