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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ROCHELLE STERLING et al., Plaintiffs and Appellants, v. LAWRENCE N. TAYLOR et al., Defendants and Respondents.	B162961 (Los Angeles County Super. Ct. No. SC065807)

APPEAL from a judgment of the Los Angeles County Superior Court, Lisa Hart Cole, Judge. Reversed with instructions.

Manatt, Phelps & Phillips, Carl L. Grumer, Jeffrey A. Backhus; Barak Lurie and Dennis Tulsiak for Plaintiffs and Appellants.

Buchalter, Nemer, Fields & Younger, Geoffrey F. Bogeaus and Raquel Vallejo for Defendants and Respondents.

INTRODUCTION

Plaintiffs and appellants Rochelle Sterling et al., trustees of the Sterling Family Trust (plaintiffs), made claims, including for the ownership of three apartment buildings, based on written memoranda with defendants and respondents Lawrence N. Taylor (Taylor), Christina Development Corporation, Santa Monica Collection (SMC), Santa Monica Collection II and 1066 Corporation (collectively defendants). The trial court granted defendants' motion for summary judgment on the grounds that the writings violated the statute of frauds and were too uncertain for enforcement, and that plaintiffs' fraud claim failed as a matter of law. We hold that there are triable issues of fact as to the enforceability of the alleged agreement reflected by the writings. Even though parol evidence is necessary to clarify ambiguities in material terms in the writings, the writings, as presented by plaintiffs, comply with the statute of frauds and are not, as a matter of law, too indefinite to enforce. Therefore the summary judgment is reversed. We also hold that the fraud cause of action should be summarily adjudicated against the plaintiffs because they have not alleged sufficient facts or submitted sufficient evidence to raise a triable issue of fact with respect to the element of damages.

FACTUAL AND PROCEDURAL BACKGROUND[1]

In January 2000, Taylor, a general partner of SMC, a limited partnership, contacted Donald T. Sterling (Sterling), a trustee of the Sterling Family Trust and one of the plaintiffs, and proposed that Sterling purchase various real estate properties, including the properties involved in this action that are known as Santa Monica Collection (SMC Properties). [2]

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[1] The facts stated are uncontradicted, except where noted otherwise.

[2] Sterling had assigned any of his rights in the alleged agreement in issue to the Sterling Family Trust.

During a March 13, 2000 meeting between Taylor and Sterling, Sterling prepared in handwriting a document dated March 13, 2000 entitled "Contract for Sale of Real Property" that reads as follows:

"Seller Larry Taylor, & Christina Development, and Buyer Donald T. Sterling, Trustee of Sterling Family Trust, agree to the following terms and conditions:

		D.P.		
		3,000,000		
"1.	Fox Plaza	3,000,000	(cash to loan)	Price $31,000,000
"2.	Barrington Bldg.	2,000,000 DP		Price $12,700,000
		6,000,000 DP		
"3.	808 4th St.)	approx. 10.468 x gross income		
"4.	843 4th St. }	estimated income 1,600,000		Price $16,750.00
"5.	1251 14th St.)	escrow 30 days. Brentwood scrow [sic]		

"Cash to loan.
"Contract to be completed within 30 days.
"Date 3/13/2000 Seller _____
Buyer DTS"

The document was not signed by a "Seller." According to Sterling, the omission of Taylor's signature was inadvertent. Taylor said he refused to sign the document. Taylor claimed he told Sterling that he, Taylor, needed the approval of the limited partners of SMC.[3]

On March 14 or 15, 2000, Sterling gave an accountant for SMC three checks from "Beverly Hills Properties," each check in the amount of $500,000 and purporting to be a "deposit" on each of the three SMC Properties: 808 4th Street, 843 4th Street, and 1251 14th Street.

Following a meeting between Sterling and Taylor on March 15, 2000, Sterling delivered a typewritten letter to Taylor that reads as follows:

"This letter will confirm our contract of sale of the above buildings.

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[3] There is no explanation for the inclusion of Christina Development as a seller, except it appears to be a corporation in which Taylor was involved.

"As we discussed I am leaving for a week. In order to expedite our sale pursuant to our contract, I agreed to give you the following deposits:

"1. 3025 Barrington Ave.	$	2,000,000.00
"2. 808 4th Street		500,000.00
"3. 843 4th Street		500,000.00
"4. 1251 14th Street		500,000.00
"5. 10000 Santa Monica Blvd.		1,200,000.00.

"These deposits were given to you to enable you to have three million dollars to deposit 1/2 of the down payment of the Fox property. I agreed to pay the other 1/2 so we would have a total of 6 million, the difference between the $25,000,000 loan and the price of $31,000,000.

"I am also enclosing the 1.2 million deposit and down payment for the purchase of 10000 Santa Monica Boulevard which represents the same amount you invested in this property.

"This letter will also confirm our agreement that the depreciation allocation and tax benefits will be given to me no later than April 1, 2000, since I now have equitable tittle [sic]. Of course I will be fully responsible for all recapture liabilities.

"Darren is prepared to wire the balance of the funds needed if you will call my office. If you have any questions or your understanding is different from mine, please contact me immediately.

"Warm Personal Regards,

"Don"

Taylor wrote on the letter, "agreed, accepted and approved" and signed his name. Sterling contradicts Taylor's assertion that this notation simply reflected a receipt of the checks. Sterling states that the March 13 letter (which has "Exhibit A" written on it) was attached to the March 15 letter when Taylor signed the latter, but Taylor disagrees with this statement.

On April 4, 2001, Taylor sent to Sterling ("pursuant to our agreement") for signature proposed escrow instructions concerning the SMC Properties. Those instructions reflect that the seller was "Santa Monica Collections, a California Limited Partnership," with Taylor signing as the general partner. The documents provided for a $16,750,000 total purchase price for the SMC Properties, with a credit for the $500,000 deposit for each of the properties. Sterling said he had examined the rent rolls that reported rent as of March, 2000 and determined that the rental income was $1,375,404, instead of the $1.6 million that was on the March 13 writing. Sterling took the position that the March 13

writing contained a price formula of 10.468 multiplied by the actual rental income, and calculated the price to be $14,404,841, instead of the $16,750,000 shown in the March 13 writing. Accordingly, Sterling did not sign the proposed escrow instructions sent by Taylor.

The parties continued to negotiate, but ultimately did not complete the transaction. On May 23, 2000, Taylor returned Sterling's "deposits"—the actual checks referred to in the March 15 letter, which checks had not been cashed. Taylor sent Sterling more rent rolls, but the parties did not communicate further until near the end of the year. On December 8, 2000, Sterling wrote in a letter to Taylor, "I desparately need your help in closing the escrow of the three properties that constitute the Santa Monica collection [sic] before the end of the year. . . . As you know, we agreed on 10.46 times the gross annual income on each of the three buildings as of April 2000. . . . If you now believe there has to be a slight modification of the price or some other term, please tell me what you need. . . . Please call me immediately with the amount that you need to close this transaction . . . ."

Taylor responded in writing to Sterling on January 8, 2001, "I am focused now and will be responding to you this week on all open items." In a January 19, 2001 letter to Sterling, Taylor referred to a conversation with Sterling about the properties and sent him updated rent rolls and a copy of a written offer from another potential purchaser. Taylor apparently was willing to proceed at a price that exceeded the amount reflected in the March 13 writing. Sterling insisted on a sales price based on his computation of 10.46 times the actual gross annual income reflected in earlier rent rolls.

On March 22, 2001, plaintiffs filed an action asserting that the March 15 writing with the attached March 13 writing constituted an enforceable agreement for the sale of the SMC Properties by SMC for $14,404,841 and that defendants breached the agreement by

refusing to sell those properties to plaintiffs. [4] Plaintiffs asserted that they have been ready, willing and able to perform their obligations under what they claim is the contract. Based on the purported agreement, plaintiffs alleged causes of action for breach of the implied covenant of good faith and fair dealing, specific performance, declaratory relief, an accounting, and imposition of a constructive trust. Plaintiffs also alleged that defendants had committed fraud in that they had not intended to perform the promise to convey the properties at the agreed-upon price. Plaintiffs recorded a lis pendens that the trial court later expunged.

Defendants filed a motion for summary judgment and summary adjudication as to each cause of action, contending that the writings were too uncertain to be enforced as a contract and constituted an insufficient memorialization of any alleged agreement to comply with the statute of frauds, and that as a matter of law there was no fraud. The trial court granted the motion for summary judgment on the grounds that the contract for the sale of the SMC Properties was unenforceable under the statute of frauds and that it was too uncertain as to the price and description of the properties. The trial court held that plaintiffs could not prevail on any of the causes of action—the fraud cause of action because plaintiffs could not establish the requisite elements and the remaining causes of action because there was no enforceable contract.

This appeal followed.

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[4] The other properties referred to in the writings are not involved in this action. Sterling does point to the closings on the sale of those properties as evidence of contractual intent with respect to the properties in issue in this case.

DISCUSSION

A. *Standard of Review*

Code of Civil Procedure section 437c, subdivision (c) states that a "motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) If the evidence shows a triable issue of a material fact, the trial court must deny the motion for summary judgment. (*Inter Mountain Mortgage, Inc. v. Sulimen* (2000) 78 Cal.App.4th 1434, 1442.) On appeal from a summary judgment, we make "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) "In performing our de novo review, we must view the evidence in a light favorable to plaintiff[s] as the losing part[ies] [citation], liberally construing [plaintiffs'] evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in [plaintiffs'] favor. [Citations.]" (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768-769.)

B. *Statute of Frauds*

The statute of frauds provides that certain contracts "are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent." (Civ. Code, § 1624, subd. (a).) The statute of frauds applies to agreements for the sale of real property or real property interests. (Civ. Code, §§ 1624, subd. (a)(3), 1091; Code Civ. Proc., § 1971.) To satisfy the statute of frauds, the writing must be signed by the party to be charged and contain the names of the parties to the agreement, the price to be paid, the terms and manner of payment, and a description of the property. (*Fritz v. Mills* (1915) 170 Cal. 449, 458; *Gaggero v. Yura* (2003) 108

Cal.App.4th 884, 894; *Dennis v. Overholtzer* (1960) 178 Cal.App.2d 766, 774 [disapproved on other grounds by *Ellis v. Mihelis* (1963) 60 Cal.2d 206, 221].)

This case illustrates the relationship between the parol evidence rule and the statute of frauds. It has been said that in order to comply with the statute of frauds, the writing must contain the essential terms with sufficient certainty (see *Breckinridge v. Crocker* (1889) 78 Cal. 529, 535) and that parol evidence may not be used to supply the missing elements. (*Riley v. Bear Creek Planning Committee* (1976) 17 Cal.3d 500, 509; see *Seymour v. Oelrichs* (1909) 156 Cal. 782, 787; *Gaggero v. Yura, supra,* 108 Cal.App.4th at p. 894; *Ellis v. Klaff* (1950) 96 Cal.App.2d 471, 477.) "The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence." (*Craig v. Zelian* (1902) 137 Cal. 105, 106.)

If, however, the writing contains the essential elements but requires parol evidence to interpret them, the statute of frauds does not preclude enforcement of the agreement. Thus, the Supreme Court in *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 763, fn. 2, said that "the fact that a term in a contract is susceptible of two interpretations does not make the contract invalid under the statute of frauds. Extrinsic evidence is always admissible to resolve ambiguities on the face of a contract." And, in *Franklin v. Hansen* (1963) 59 Cal.2d 570, 574, the Supreme Court said, "But where it [the writing] imports the essentials of a contractual obligation although it fails to do so in an explicit, definite or complete manner, it is always permissible to show the circumstances which attended its making." The court cited *Gibson v. De La Salle Institute* (1944) 66 Cal.App.2d 609, *Brewer v. Horst and Lachmund Co.* (1900) 127 Cal. 643, *Balfour v. Fresno C. & I. Co.* (1895) 109 Cal. 221, 225-226, and *Searles v. Gonzalez* (1923) 191 Cal. 426, and noted that "in each of the foregoing instances the memorandum itself demonstrated the existence of a contractual intent on the part of the one to be charged, and extrinsic evidence was necessary only to define the limits thereof." (*Franklin v. Hansen, supra,* 59 Cal.2d at p. 574.) Other authorities have confirmed that "'[i]t is well established that where the meaning of language used in a note or memorandum under the statute of frauds is uncertain or ambiguous, parol evidence is admissible to show the

circumstances surrounding the transaction for the purpose of arriving at a determination of the meaning intended and understood by the parties.'" (*Brookes v. Adolph's Ltd.* (1959) 170 Cal.App.2d 740, 746, quoting *Gibson v. De La Salle Institute, supra,* 66 Cal.App.2d at p. 619 [held that even though a writing required parol evidence to ascertain the meaning of certain terms, the writing was not insufficient to satisfy the requirements of the statute of frauds]; see *Bettancourt v. Gilroy Theatre Co., Inc.* (1953) 120 Cal.App.2d 364, 375; 2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, § 63, pp. 183-184; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 274, p. 269; 1 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 1.73, pp. 215-216 (Miller & Starr).

The liberalization of the rules concerning the sufficiency of a memorandum under the statute of frauds (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 274, p. 269) is supported by leading national authorities. Corbin provides, "The latter half of this century has seen a discernable trend toward a less mechanical application of the statute of frauds, favoring the admission of extrinsic evidence wherever its exclusion is not necessary to preserve the statute's essential purposes." (4 Corbin on Contracts (Rev. ed. 1997) § 22.2, p. 709, fn. omitted (Corbin).) According to Williston, "if after a consideration of the surrounding circumstances, the pertinent facts and all the evidence in a particular case, the court concludes that enforcement of the agreement will not subject the defendant to fraudulent claims, the purpose of the Statute will best be served by holding the note or memorandum sufficient even though it is ambiguous or incomplete." (10 Williston on Contracts (4th ed. 1999) § 29:4, p. 438, fn. omitted (Williston).)

Even if the statute of frauds "has fallen into disfavor" (1 Witkin, Summary of Cal. Law, *supra,* Contracts, § 261, p. 259),[5] we may not treat it as if it does not exist. The statute of frauds is part of California's statutory law and is widely adopted in other states.

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[5] *Sunset-Sternau Food Co. v. Bonzi* (1964) 60 Cal.2d 834, 838, fn. 3 (maj. opn. of Tobriner, J.) ["The commentators almost unanimously urge that considerations of policy indicate a restricted application of the statute of frauds, if not its total abolition."]; *Ripani v. Liberty Loan Corp.* (1979) 95 Cal.App.3d 603, 610 ["It is the policy of California courts to construe the statute of frauds restrictively."].

(See Corbin, *supra*, § 12.1, p. 5.) Its purpose is to prevent fraud, perjury and litigation over the existence of an agreement. (*Id.* at p. 12.) It may seem anomalous to allow parol evidence to assist in the determination of the existence and nature of the agreement, because that invites the very consequences that the statute of frauds was intended to prevent. But recognizing an agreement based on a written document that—even if ambiguous—at least indicates that the parties agreed on essential terms and were sufficiently serious to reflect their agreement in writing, is consistent with the purposes of the statute of frauds.

The statute of frauds is based on the concept that even when there is an agreement, it is not enforceable under some circumstances if it is not in writing. But, even though a writing satisfies the statute of frauds requirements, if the parol evidence ultimately shows a lack of such contractual intent or that the terms are too indefinite, then there is no contract. (*Franklin v. Hansen, supra,* 59 Cal.2d at p. 574 ["While a telegram, sufficient in content, may satisfy the statute [citations], still it must contain the essential elements of a specific, consummated agreement. [Citations.]"]; see *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811.) Thus the issues of lack of certainty and the application of the statute of frauds are distinct.

We analyze the written memoranda in this case and determine that under the evidence submitted by plaintiffs, the required elements are sufficiently included so as to comply with the statute of frauds[6]. We then discuss our conclusion that plaintiffs' parol evidence is adequate to render the written memoranda sufficiently certain to be enforceable.

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[6] See *Garter-Bare Co. v. Munsingwear, Inc.* (9th Cir. 1980) 650 F.2d 975, 981 ["under California law the application of the statute of frauds raised fact issues that must be determined by the jury unless only one inference can be drawn from the evidence"]; *Landes Constr. Co., Inc. v. Royal Bank of Canada* (9th Cir. 1987) 833 F.2d 1365, 1370 ["When the material facts are not in dispute, the question of whether a contract is within the statute of frauds is a question of law . . . ."].)

1. Identification of the Parties.

In the operative writings, the "Seller" is identified as Larry Taylor and Christina Development. Taylor is the general partner of SMC, which is a limited partnership, and there is evidence he had authority on its behalf to sell its properties. Here, the document only identifies and is signed by the partner; according to some evidence, he did so on behalf of the partnership that owns the properties. There is no dispute over the identification of plaintiffs, the buyers. Taylor contended that because the memorandum was not executed by the party to be charged and did not sufficiently identify the seller, any agreement was unenforceable.

There is little authority on whether the identification of only the person who is the general partner of a limited partnership, without any indication of his status or that the limited partnership is a party**,** is sufficient to satisfy the statute of frauds requirements that the document identify the parties and be subscribed by the party to be charged. When a contract is covered by the statute of frauds, an executing agent's authority must be in writing under the equal dignities rule. (Civ. Code, § 2309; Code Civ. Proc., § 1971.) But "this requirement does not necessarily apply when the contract is executed on behalf of an entity by a duly authorized representative of the entity." (Miller & Starr, *supra,* § 1.85, p. 263; see *Ellis v. Mihelis*, *supra,* 60 Cal.2d at pp. 216-217 [written authorization of partner in connection with purchase and sale of real estate is not necessary if the transaction is in usual course of partnership business].) Moreover, neither party has raised any issue concerning a requirement of written authorization.

If an agent signs a contract in writing on behalf of an undisclosed principal, parol evidence is admissible to prove that the undisclosed principal is a party to the contract. (*Geary St. etc. R. R. Co. v. Rolph* (1922) 189 Cal. 59, 64 (*Geary*); see *Curran v. Holland* (1903) 141 Cal. 437, 440; 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 107, p. 104.) If the principal is disclosed but not referred to in the contract, parol evidence may be used to determine the liability of the principal. (See *Clifton Cattle Co. v. Thompson* (1974) 43 Cal.App.3d 11, 16; 2 Witkin, Summary of Cal. Law, *supra*,

Agency and Employment, §§ 108-110, pp. 104-106.) The authorities supporting these propositions were primarily concerned with the liability of a principal not specified in the contract and did not deal explicitly with the statute of frauds issue.

There are cases holding a memorandum to be insufficient under the statute of frauds if it is signed by the agent but does not identify the principal. (See *Breckinridge v. Crocker, supra,* 78 Cal. 529; cf. *Sayre v. Nichols* (1857) 7 Cal. 535, 539; *Moriconi v. Flemming* (1954) 125 Cal.App.2d 742, 745 [agent of undisclosed principal liable on a note]; *Malerbi & Associates v. Seivert* (1961) 191 Cal.App.2d 760, 762, quoting 50 Cal.Jur.2d, Vendor and Purchaser, § 28, p. 55 [“‘A contract for the purchase and sale of real property is required to name the parties thereto with reasonable certainty’”].) On the other hand, in another old case, the Supreme Court appears to have held that the signature of a partner for an unidentified partnership complies with the statute of frauds. (See *Cal. Canneries Co. v. Scatena* (1897) 117 Cal. 447.)

There is no logical reason why parol evidence should not be admissible here to satisfy the statute of frauds. By signing on behalf of someone else not referred to in the agreement, Taylor either obligated himself personally or his principal (*Geary, supra,* 189 Cal. at p. 64; *Luce v. Sutton* (1953) 115 Cal.App.2d 428, 433; 2 Witkin, Summary of Cal. Law, *supra,* Agency and Employment, § 108, p. 104), and, acting as a general partner of a partnership, he bound himself and the partnership. (Corp. Code, § 15643, subd. (b).) Thus, a party to be bound has executed the agreement.

Modern authorities support the proposition that when an agent signs a writing for an undisclosed principal, there is compliance with the statute of frauds even though parol evidence is necessary to establish that the principal is the actual party. Corbin points out that many cases hold, as they do in California, when a memorandum is signed by an agent, even though the contract does not identify the principal, the principal can sue and be sued on the contract. (Corbin, *supra,* § 22.3, at p. 715.) Corbin then states, “Such a signed memorandum satisfies the statutory requirements without any written identification of the undisclosed principal. These decisions indicate that the courts are not particularly fearful of parol evidence as to identity, since it is only by such evidence that the undisclosed

principal establishes its connection with the transaction." (*Ibid.,* fn. omitted; see also *id.,* § 23.6, at p. 812 ["The signature of the agent is sufficient [for the statute of frauds] even though it is made as if the agent were the principal and fails to disclose that the signer is acting for any other person."].)

Corbin, noting that "a memorandum has been held insufficient which fails to identify the principal, although it indicates the representative capacity of the signing agent," (Corbin, *supra,* § 22.3, at p. 715, fn. omitted [citing, inter alia, *Breckinridge v. Crocker, supra,* 78 Cal. 529]) states, "The present author **[**Brown**]** has little sympathy with such a decision" (*id.* at pp. 715-716, fn. omitted) and adds that "Professor Corbin originally expressed this opinion . . . ." (*Id.* at p. 716, fn. 9.) Corbin continues, "A contract was made, and it is in writing and signed by an authorized agent. The testimony of the comparatively disinterested executing agent is available. The surrounding circumstances will corroborate or rebut. If the court still feels substantial doubt as to the truth on this issue, its judgment can still easily attain the purpose of the statute." (*Id.* at pp. 716-717; see also Williston, *supra*, § 29:9, pp. 492-493, fns. omitted ["By a liberal application of the legal rule identifying the principal with his or her agent, the name of one or both of the principal contracting parties may be represented by that of an agent, and such a memorandum will bind them as principals. But it is essential that, by the terms of the memorandum, either the principal or the agent be named as a party. If the agent by the terms of the memorandum is contracting in such terms as exclude him from personal liability, and the principal is not made a party to the memorandum, it will generally be held insufficient"]; *id.* at § 29.19, pp. 548-549, fn. omitted, quoting *Dodge v. Blood* (Mich. 1941) 300 N.W. 121 ["'For the purpose of satisfying the provisions of a statute requiring a note or memorandum to be signed by the party to be charged or by his agent, a memorandum signed by a properly authorized agent with or without indication of the existence or identity of the principal is sufficient to charge the principal.'"].)

Normally the issue of whether the partner's signature binds a partnership has been determined after a trial and not as a matter of law. (*Refinite Sales Co. v. Fred R. Bright Co.* (1953) 119 Cal.App.2d 56 [whether partner's signature binds partnership is a question

of fact].) The writings contain the signature and identity of Taylor, an undisputed general partner of SMC. Whether the evidence ultimately shows that SMC is bound, the fact that there is a signature and identification of someone that are binding either on Taylor, SMC, or both is sufficient to satisfy the requirements of the statute of frauds. Thus, the omission in the writings of the partnership name of the sellers, does not, as a matter of law, violate the statute of frauds.

2. Description of the Properties.

Taylor contends that the description in the writings of the SMC Properties—"808 4th Street," "843 4th Street" and "1251 14th Street"—was insufficient to satisfy the statute of frauds. Early authorities might support this position.

The Supreme Court stated in *Craig v. Zelian, supra,* 137 Cal. 105, "An agreement for the sale of real property must not only be in writing and subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold, either in terms or by reference, that it can be ascertained without resort to parol evidence. Parol evidence may be resorted to for the purpose of identifying the description contained in the writing with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated and supplying a description thereof which they have omitted from the writing."

In that case, the parties signed a contract for "a strip of land in front of Golden Rule Store and Stent Market." (*Craig v. Zelian, supra,* 137 Cal. at p. 106.) The court held this property description to be insufficient: "The land was not inclosed or in any mode designated upon the ground. How far it is located from the Golden Rule Store, or the width of the 'strip,' or its length, is not given . . . ." (*Ibid.*) The court continued that "it must be held that there is no description of the land intended to be conveyed. This defect in the description is not aided by the fact that the parties consulted a map at the time of their negotiations, since the map is not referred to in the writing. Whatever aid to the description of the land might be given by the map, can be had only by parol evidence, and

it is only by such evidence that it is shown that a map was referred to. Moreover, this map was not itself introduced in evidence. The statute of frauds was originally enacted 'for the prevention of frauds and perjuries,' and an agreement for the sale of land is required to be in writing in order that this purpose may be accomplished. The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence. A description of the land intended to be conveyed is one of the most essential parts of the agreement, and must be contained in the writing." (*Ibid.*)

But the Supreme Court acknowledged the relaxation of this rule in *Johnson v. Schimpf* (1925) 197 Cal. 43, 48, by stating, "It is now the general and well-established rule that less strictness in the description of property is demanded in a contract than in a deed of conveyance. In the construction of executory contracts of sale of real estate, courts have been most liberal and have sought, as far as consistent with established rules, to give effect to the intention of the parties in applying descriptions of property. The usual rigid construction given to deeds has not been adhered to in the character of contracts under consideration here. The description may be supplemented by extrinsic evidence showing its application to particular property to the exclusion of all other property. Parol evidence is ordinarily admissible to show what property the parties intended to convey and it will be deemed that a contract adequately describes the property if it refers to something which is certain or provides a means of ascertaining and identifying the property which is the subject matter of the contract. [Citations.]" The court added that "a scrutiny of the description of the land in the instant case shows that the property in controversy is sufficiently identified by occupancy, viz., that portion occupied and upon which is located the slaughter-house, sheds, corrals, and appurtenances. This description could be made more certain, if need be, by the introduction of parol evidence to show what portion the parties intended to be embraced in the parcel to be conveyed." (*Id.* at p. 49.)

Nevertheless, relying on *Craig v. Zelian, supra,* 137 Cal. 105, the court in *Roberts v. Lebrain* (1952) 113 Cal.App.2d 712, 715, held that a description of property in a deposit receipt to satisfy the statute of frauds, "must be such, either in terms or by reference, that the property can be identified without resort to parol evidence." Later, in *Beverage v.*

Canton Placer Mining Co. (1955) 43 Cal.2d 769 (*Beverage*), the writing in issue was a deposit receipt describing the property as "seven and one-half (7-1/2) acres, more or less, to south of State Highway at Chambers Creek (between highway Engineer Stations 561 + 58.51±; to 577±;) being part of Canton Placer Claim." (*Id.* at p. 773.) In connection with the requirements for the description of the property, the Supreme Court said, "Preferably, the writing should disclose a description which is itself definite and certain. Alternatively, however, a description fulfills the test of reasonable certainty if it furnishes the 'means or key' by which the description may be made certain and identified with its location on the ground. [Citation.] [¶] It is obvious in the instant case that the description in the deposit receipt is not a preferred description; by itself it is not definite and certain. [Citation.] However, it may not be concluded that the description does not furnish a 'means or key' to identification. [Citation.] The applicable principle is that that is certain which can be made certain (Civ. Code, § 3538; [citations]) by additional allegations [citations] and parol evidence in proof thereof, admitted not for the purpose of furnishing or supplying a description [citation] but for the purpose of applying the given description to the earth's surface, thereby identifying the property. [Citations.] Courts have been most liberal in construing executory contracts for the sale of real estate and have sought, as far as is consistent with the above established rules, to give effect to the intention of the parties in applying descriptions to property. [Citations.]" (*Id*. at pp. 774-775.)

Similar to the instant case, the court in *Beverage* noted that the deposit receipt "fails to locate the property in any particular state or county." (*Beverage, supra,* 43 Cal.2d at p. 775.) "Although such omission has been regarded as fatal in some instances [citations], such is not the invariable rule." (*Ibid.*) The court said that evidence could "be admissible to explain the description according to 'the situation of the parties and the surrounding circumstances' when the deposit receipt was given and so identify with reasonable certainty the particular property intended. [Citations.]" (*Ibid.*) Thus, the court held that extrinsic evidence could show that the description applied to a particular piece of property to the exclusion of all other property. That the owner "owned premises answering to its terms and owned at that place no other such property" could be sufficient. (*Id.* at p. 776.)

Also, reference to a well-known physical place "has been held to render unimportant the failure to specify the city or county." (*Ibid.*; see also *United Truckmen, Inc. v. Lorentz* (1952) 114 Cal.App.2d 26, 30, quoting *Johnson v. Schimpf, supra,* 197 Cal. at p. 48 ["'[p]arol evidence is ordinarily admissible to show what property the parties intended to convey and it will be deemed that a contract adequately describes the property if it refers to something which is certain or provides a means of ascertaining and identifying the property which is the subject of the contract'"]; see generally Miller & Starr, *supra,* § 1.23, p. 67.)

Recently, the court in *Alameda Belt Line v. City of Alameda* (2003) ___ Cal.App.4th ___ (2003 Daily Journal D.A.R. 12109, 12110) confirmed that parol evidence is admissible to identify the property mentioned in a written agreement, but not admissible to supply a description that the parties entirely omitted from the writing. (See also *Ganiats Construction, Inc. v. Hesse* (1960) 180 Cal.App.2d 377, 384.) Whether this means any description of a property can be made certain by parol evidence for purposes of the statute of frauds is not clear. One authority has written, "A contract that omits an adequate description of the property is not enforceable under the statute of frauds, but a written contract for the sale of real property that contains a *defective* description of the property to be sold may be enforceable if the defect can be cured by oral evidence. Parol evidence may be introduced for the purpose of explaining and clarifying the ambiguous terms, thereby identifying the property as described in order to determine its physical location, but *not* for the purpose of furnishing or supplying its description." (Miller & Starr, *supra*, § 1.23, p. 67, original italics, fn. omitted; see also *Corona Unified School Dist. v. Vejar* (1958) 165 Cal.App.2d 561, 564-566.)

The distinction between an inadequate description and defective description or between terms that are ambiguous and the lack of a description is not easily ascertainable. As Corbin states, "A study of the almost innumerable cases that have passed upon the sufficiency of a description will make it apparent that a description regarded as sufficient by one court has often been held insufficient by another." (Corbin, *supra,* § 22.12, p. 754.) Corbin goes on, "it is agreed by all that there must be some descriptive identification of the

particular tract of land. But if the court is convinced that no fraudulent substitution of property is being attempted and that the land actually agreed upon has been clearly established by all the evidence, including the written memorandum, the surrounding circumstances, and the oral testimony, little time should be wasted in listening to argument that the written description is inadequate." (*Id*. at § 22.12, pp. 754-755.)

Similarly, Williston refers to *Wozniak v. Kuszinski* (Mich. 1958) 90 N.W.2d 456 that "declared that this disposition 'to liberalize its interpretation of the statute of frauds' is quite consistent with the trend of modern authority. Concluding, the court observed, 'we are constrained that the description given in the memorandum was appropriately supplemented,' and laid down the following test to determine the sufficiency of description: [¶] 'A description is sufficient if when read in the light of the circumstances of possession, ownership, situation of the parties, and their relation to each other and to the property, as they were when the negotiations took place and the writing was made, it identifies the property.' [¶] This case indicates the trend towards a more realistic interpretation of what is meant by 'some note or memorandum in writing' and commends itself as more in keeping with the purpose and spirit of the Statute as having been designed 'for the purpose of preventing fraud or the opportunity for fraud,' than some of the opinions which will be reviewed subsequently." (Williston, *supra*, § 29:20, p. 558, fns. omitted.)

It is not necessary to define precisely the identification of property necessary to satisfy the statute of frauds, for the descriptions in the writings in this case, lacking only the city and state, are adequate. Sterling has proffered parol evidence to specify the city in which the properties are located. Corbin states, "A tract of land can be sufficiently described by street and number or by a special name conferred upon the place by its owner or by the community. Oral evidence is admissible to prove ownership of the tract and also to show its location in a particular city or county." (Corbin, *supra*, § 27.12, p. 759, fns. omitted.) And Williston says, "'Descriptions of real property, omitting the town, county, or state where the property is situated, have been held sufficient where the deed or writing

provides other means of identification.'" (Williston, *supra*, § 29:20, pp. 574-575, fn. omitted, quoting *Flegel v. Dowling* (Or. 1909) 102 P. 178.)

Based on the descriptions of the properties in the writings, the location of the parties, the place of the transaction and the name of the seller (Santa Monica Collection), it is reasonable to assume that the properties in question were located in Santa Monica, California. Under these circumstances, and under the modern authorities, the description is sufficient to comply with the statute of frauds, and parol evidence is admissible to assist in the necessary identification of the properties and specifically, the city and state in which the properties are located. The writings, along with the parol evidence, constitute sufficient identification of the properties to avoid summary judgment.

3. The Purchase Price.

The writings contain the following language for the purchase price: "approx. 10.468 x gross income" with an "estimated income" of "$1,600,000" and a "Price" of "$16,750.00." Taylor contends that this written description of the price term did not satisfy the requirements of the statute of frauds.

Although the memorandum specifies a purchase price by providing a multiplier of gross income, the modifier "approx." before the multiplier, the omitted zero in the price ("$16,750.00 rather than $16,750,000") and the uncertainty over the term "gross income" all create ambiguities. But, as noted above, even though an essential term in a memorandum is ambiguous and requires parol evidence to clarify any ambiguities, the writings are not insufficient to satisfy the statute of frauds. Plaintiffs have submitted parol evidence that is sufficient to raise a triable issue as to the meaning of the terms and as to whether there was an agreement on the purchase price. Plaintiffs' evidence is that the word "approx." modified the total price and not the multiplier; that the omitted zero is an obvious error; and that "gross income" is a term that was used by the parties to refer to actual annual gross rental income as of April 2000. If accepted, this parol evidence establishes that the parties agreed upon a definite formula that determined the purchase

price, and thus is sufficient to establish a binding contract. (See *Carver v. Teitsworth* (1991) 1 Cal.App.4th 845, 852-853.) The purchase price, even though ambiguous, is included in the memoranda. Accordingly, the statute of frauds does not, as a matter of law, preclude enforcing the alleged agreement based on the description of the purchase price.

4. Conclusion As To The Statute Of Frauds.

The terms of the writings as presented by plaintiffs suggest that the parties reached an agreement. The writings "import[] the essentials of a contractual obligation although [they fail] to do so in an explicit, definite or complete manner . . . ." (*Franklin v. Hansen, supra,* 59 Cal.2d at p. 574; see also *House of Prayer: Renewal and Healing Center of Yuba City v. Evangelical Assn. for India* (2003) ___ Cal.App.4th ___ (2003 Daily Journal D.A.R. 12127, 12128) [time of performance not an essential term under the statute of frauds].) Parol evidence ultimately may show that the parties did not agree on material terms, but the statute of frauds does not, as a matter of law, preclude the enforcement of the alleged agreement. The writings have sufficient elements so that "by reasonable implication" (*Seck v. Foulks* (1972) 25 Cal.App.3d 556, 567) they "demonstrate[] the existence of a contractual intent on the part of the one to be charged, and extrinsic evidence was necessary to define the limits thereof." (*Franklin v. Hansen, supra,* 59 Cal.2d at p. 574; see also Corbin, *supra,* § 23.8, p. 820 [parol evidence admissible "to explain or to supplement a cryptic or incomplete memorandum"].)

C. *Indefiniteness*

Taylor contends that, as a matter of law, any agreement was too indefinite to be enforced. As noted above, a memorandum, without parol evidence, may contain enough description of terms to avoid the statute of frauds by demonstrating contractual intent, but may be too indefinite or uncertain to enforce.

The Civil Code provides that "obligations" that "cannot be specifically enforced" include "[a]n agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable." (Civ. Code, § 3390, subd. 5; see *Buckmaster v. Bertram* (1921) 186 Cal. 673, 676.) "'That a greater degree or amount of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is the basis of an action at law for damages' has often been declared. [Citations.] The contract may be valid and yet because of its inherent nature or because it lacks the necessary degree of definiteness may be unenforceable . . . by a direct decree of specific performance . . . ." (*Long Beach Drug Co. v. United Drug Co.* (1939) 13 Cal.2d 158, 164.)

Bernard Witkin stated, "courts sometimes say that more certainty is required in a suit for specific performance than in an action for damages," but "[i]t has been suggested, however, that this rule is of doubtful practical significance, for in the large majority of California cases in which it is invoked, the contract was also too uncertain to support an action for damages." (11 Witkin, Summary of Cal. Law (9th ed. 1990) Equity, § 52, p. 731; *Hennefer v. Butcher* (1986) 182 Cal.App.3d 492, 500, fn. 4.) "The law does not favor but leans against the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained." (*McIllmoil v. Frawley Motor Co.* (1923) 190 Cal. 546, 549.) In this regard, parol evidence may be utilized to make a choice among conflicting meanings and to fill gaps when the parties entered an agreement. (*Okun v. Morton* (1988) 203 Cal.App.3d 805, 817.) "Even when the uncertainty of a written contract goes to '"the precise act which is to be done" (Civ. Code, § 3390), extrinsic evidence is admissible to determine what the parties intended. [Citations.] It is only when the extrinsic evidence fails to remove the ambiguity that specific performance must be refused.'" (*Id.* at p. 819; see Miller & Starr, *supra,* § 1.20, p. 53.)

The court in *Hennefer v. Butcher, supra,* 182 Cal.App.3d at page 500, in concluding that properly admitted extrinsic evidence rendered "the material contract provisions [therein] sufficiently definite for enforcement," stated that "[t]he defense of uncertainty has

validity only when the uncertainty or incompleteness of the contract prevents the court from knowing what to enforce." This is consistent with the "modern trend of the law" favoring "carrying out the parties' intention through the enforcement of contracts" and disfavoring holding them unenforceable because of uncertainty. (*Ibid.*; see also *Alameda Belt Line v. City of Alameda, supra,* ___ Cal.App.4th ___ (2003 Daily Journal D.A.R. at p. 12110.)

Here, if the parol evidence submitted by plaintiffs—Sterling's testimony and correspondence—were believed, a court would know what to enforce in an action either for breach of contract or for specific performance. The clarification of the terms identifying the parties, the properties and the price may be ascertained through parol evidence. Taylor does not contend that any other essential term is missing. Taylor points to some ambiguities and discrepancies in plaintiffs' evidence. Sterling's reference to a multiplier is slightly different than that contained in the memorandum, but the figure in the memorandum should govern. Sterling refers to March rent rolls and April rent rolls. Sterling, however, specifically attached to his declaration March rent rolls that he apparently received in April. Their evidence, while possibly reflecting some discrepancies, is not such as to conclude that there is no triable issue of fact on the issue of certainty. Thus, the agreement is not**,** as a matter of law, too indefinite to be enforceable.

D. *Fraud Claim*

The only cause of action that is not dependent upon the enforceability of the alleged contract is the fraud claim.[7] Plaintiffs alleged that Taylor committed fraud by falsely promising to sell the SMC Properties at a specified price without intending to perform this

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[7] Because all the causes of action except the fraud cause of action are dependent upon the enforceability of the alleged contract, those non-fraud causes of action may not be summarily adjudicated in favor of the defendants.

promise. Sterling alleged that Taylor made this promise to obtain the $1.5 million deposits for the properties and that he did obtain those deposits.

"Generally, '[f]raud actions are subject to strict requirements of particularity in pleading.' [Citation.] Every fact constituting the fraud must be alleged, and the policy of liberal construction will not ordinarily be invoked to sustain a defective pleading. [Citation.] '[F]raud without damage is not actionable' because it fails to state a cause of action. [Citation.]" (*Furia v. Helm* (2003) 111 Cal.App.4th 945, 956-957.) "'Whatever form it takes, the injury or damage must not only be distinctly alleged but its causal connection with the reliance on the representations must be shown.'" (*Service By Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818, quoting 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 680, p. 131.) No facts suggest that Taylor made representations to obtain the deposits. Indeed the evidence is undisputed that he returned the checks for the deposits uncashed. Moreover, Sterling has not pleaded any facts showing any damage that he might have suffered in relying on the alleged promise.

Plaintiffs' complaint gives no indication of how they could have been damaged. There is no allegation "by which the amount of plaintiffs' damage may be determined." (*Westerfield v. New York Life Ins. Co.* (1910) 157 Cal. 339, 345.) Plaintiffs argue that Taylor's acceptance of the checks caused a "lost opportunity"—i.e., during the period that Taylor had the checks, plaintiffs could have used the money for something else. Plaintiffs did not allege this theory or facts supporting it in their complaint, and they provided no evidence of such a lost opportunity. In addition, it is problematic whether under such a lost opportunity theory, Sterling could establish the specific out-of-pocket losses, plus consequential damages, to which he would be limited in a fraud claim. (*Michelson v. Camp* (1999) 72 Cal.App.4th 955, 971-973.) Accordingly, defendants were entitled to summary adjudication as to the sixth cause of action for fraud.

DISPOSITION

The summary judgment is reversed. The trial court is ordered to vacate its order granting summary judgment and enter a new and different order denying the motion for summary judgment but granting defendants' motion for summary adjudication of the sixth cause of action. Each party shall bear his, her, or its own costs.

CERTIFIED FOR PUBLICATION

MOSK, J.

We concur:

TURNER, P.J.

GRIGNON, J.