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

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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.[112] 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.[113] To avoid the harsh results of in-

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effect of the amendment, while "not[ing] the likelihood of disagreement as to its effect should a case arise in which its applicability may properly be considered." *Id.* As predicted by the Court, there is disagreement as to the amendment's effect in light of *Martin*, with some courts disregarding *Martin*, *see, e.g.*, Atkinson v. Ormont Mach. Co., 102 Misc. 2d 468, 469, 423 N.Y.S.2d 577, 579 (Sup. Ct. Kings County 1979); Martin v. Drackett Prods. Co., 100 Misc. 2d 728, 733, 420 N.Y.S.2d 147, 150 (Sup. Ct. Erie County 1979), and others viewing the Court of Appeal's decision as retaining the defense of privity in implied warranty actions. *See, e.g.*, Held v. 7-Eleven Food Stores, 438 N.Y.S.2d 976, 979 (Sup. Ct. Erie County 1981) (dictum).

[112] *See, e.g.*, ME. REV. STAT. ANN. tit. 11, § 2-318 (Supp. 1981-1982); MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West 1981); N.H. REV. STAT. ANN. § 382-A: 2-318 (Supp. 1979); VA. CODE § 8.2-318 (1965). Through amendments to section 2-318 of the U.C.C., several states have expressly abolished the defense of lack of privity in products liability cases. The Massachusetts provision, for example, states that "[l]ack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, lessor or supplier of goods . . . [provided the plaintiff was a foreseeable user or consumer of the goods]." MASS. GEN. LAWS ANN. ch. 106, § 2-318 (West 1981); *see* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 11-3, at 404 n.20 (2d ed. 1980).

[113] *See* Loch Sheldrake Assocs. v. Evans, 306 N.Y. 297, 305, 118 N.E.2d 444, 447 (1954); Heller v. Pope, 250 N.Y. 132, 135, 164 N.E. 881, 882 (1928); Allen v. Oneida, 210 N.Y. 496, 503, 104 N.E. 920, 922 (1914); Thomas v. Scutt, 127 N.Y. 133, 137 (1891). The parol evidence rule has been well established in New York since the 19th century. *See, e.g.*, Hutchins v. Hebbard, 34 N.Y. 24, 26 (1865); Barry v. Ransom, 12 N.Y. 462, 464 (1855). Judge Pound stated that "[p]arol evidence may not be received to vary the clear and unambiguous terms of a solemn written agreement as between the parties . . . ." Newburger v. American Sur. Co., 242 N.Y. 134, 142, 151 N.E. 155, 157 (1926). The rule has been used repeatedly by the New York courts in determining whether to admit evidence of terms other than those embodied in the language of a written contract. *See* Sabo v. Delman, 3 N.Y.2d 155, 161, 143 N.E.2d 906, 908, 164 N.Y.S.2d 714, 717 (1957); Smith v. Dotterweich, 200 N.Y. 299, 305, 93 N.E. 985, 987 (1911); Aratari v. Chrysler Corp., 35 App. Div. 2d 1077, 1077, 316 N.Y.S.2d 680, 681 (4th Dep't 1970).

The parol evidence rule was created to prevent fraud, avoid the danger of memory lapses, and minimize the effect of the death of key witnesses. Less v. Lamprecht, 196 N.Y.

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, 948 (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 948-49 (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* Mitchill 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).

Despite its name, the parol evidence rule is a rule of substantive law, not one of evidence. Higgs v. de Maziroff, 263 N.Y. 473, 477, 189 N.E. 555, 556 (1934); Lese v. Lamprecht, 196 N.Y. 32, 36, 89 N.E. 365, 366 (1909). Under the *Erie* doctrine, therefore, a federal court deciding a diversity case must apply the parol evidence rule of the applicable state. *E.g.*, Centronics Financial Corp. v. El Conquistador Hotel Corp., 573 F.2d 779, 782 (2d Cir. 1978); Lee v. Joseph E. Seagram & Sons, Inc., 413 F. Supp. 693, 700 (S.D.N.Y. 1976), *aff'd*, 552 F.2d 447 (2d Cir. 1977); *see* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). *See generally* Comment, *New York Parol Evidence Rule: Procedural or Substantive Law*, 29 CORNELL L.Q. 545 (1944).

[114] *See, e.g.*, Thomas v. Scutt, 127 N.Y. 133, 137, 27 N.E. 961, 962 (1891). 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, 1036 (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. Scutt, 127 N.Y. 133, 137, 27 N.E. 961, 962 (1891). 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.[115] Moreover, since the parol evidence rule applies only to the parties to the writing, "strangers" to the contract may contradict its terms.[116] It has been unclear, however,

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255, 258, 257 N.E.2d 890, 892, 309 N.Y.S.2d 341, 343 (1970), illegality, *see, e.g.*, 97 Fifth Ave. Corp. v. Schatzberg, 283 App. Div. 407, 409, 128 N.Y.S.2d 264, 266 (1st Dep't 1954), or the existence of a condition precedent to the effectiveness of the contract, *see, e.g.*, Reynolds v. Robinson, 110 N.Y. 654, 654, 18 N.E. 127, 128 (1888). *But cf.* Jamestown Business College Ass'n v. Allen, 172 N.Y. 291, 296, 64 N.E. 952, 956 (1902) (parol evidence may not be used to show condition subsequent to effectiveness of contract). Additionally, allegations of fraud in the execution of a contract have been allowed to show that a written contract is not binding. *See, e.g.*, Chromalloy Am. Corp. v. Universal Hous. Sys. of America, Inc., 495 F. Supp. 544, 552 (S.D.N.Y. 1980). A second class of exceptions involves cases which recognize that a valid written contract exists but regard the contract as incomplete. In such cases, courts permit the introduction of parol evidence to supply the missing material. *See, e.g.*, Fogelson v. Rackfay Constr. Co., 300 N.Y. 334, 339, 90 N.E.2d 881, 882 (1950); Thomas v. Scutt, 127 N.Y. 133, 138, 27 N.E. 961, 962-63 (1891).

Williston conceded that there is a trend towards increased liberalism in the admission of parol agreements. S. WILLISTON, *supra* note 113, § 638. California, for example, has expanded greatly the amount of extrinsic evidence allowed under the parol evidence rule. *See* Note, *The Parol Evidence Rule: Is It Necessary?*, 44 N.Y.U.L. REV. 972, 980 (1969) [hereinafter cited as Note, *Is It Necessary?*]. Chief Justice Traynor has stated that credibility and the circumstances surrounding the transaction should be the basis for determining the admissibility of parol evidence, not the apparent completeness of the written agreement. Note, *Chief Justice Traynor and the Parol Evidence Rule*, 22 STAN. L. REV. 547, 554-55 (1970). One commentator has argued that California has virtually eliminated the parol evidence rule. *See* Note, *Is It Necessary?*, *supra*, at 976 (1969). For a general criticism of the rule, see Comment, *Parol Evidence Rule—In Need of Change*, 8 GONZ. L. REV. 88 (1972).

[115] *See, e.g.*, Gallo v. Swan Optical Corp., 78 App. Div. 2d 632, 633, 432 N.Y.S.2d 108, 110 (2d Dep't 1980); Town of Oyster Bay v. Forte, 34 Misc. 2d 5, 7, 219 N.Y.S.2d 456, 459 (Sup. Ct. Nassau County 1961). Under the collateral contract doctrine, evidence of a separate and distinct agreement may be admissible. *See* Mitchill v. Lath, 247 N.Y. 377, 380-81, 160 N.E. 646, 647 (1928). In *Mitchill*, the Court of Appeals enunciated three conjunctive requirements for a finding that a collateral contract will not be subject to the parol evidence bar. *See id.* at 381, 160 N.E. at 647. The agreement must be collateral in form. *See, e.g.*, Nationwide Mut. Ins. Co. v. Timon, 9 App. Div. 2d 1018, 1018, 194 N.Y.S.2d 429, 430 (4th Dep't 1959). It must not contradict the written agreement. *See, e.g.*, 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). Finally, it must consist of terms that the parties would not ordinarily be expected to embody in the writing. *See, e.g.*, Ball v. Grady, 267 N.Y. 470, 472, 196 N.E. 402, 403 (1935). The collateral contract doctrine requires a court to determine initially the degree to which the written contract is integrated. *See* Note, *Third Parties*, *supra* note 1, at 955-56. For a discussion of the collateral contract doctrine, see Wallach, *The Declining "Sanctity" of Written Contracts—Impact of the Uniform Commercial Code on the Parol Evidence Rule*, 44 MO. L. REV. 651, 657-58; *cf.* McLauchlan, *The Inconsistent Collateral Contract*, 3 DALHOUSIE L.J. 136 (1976) (discusses Canadian law and the collateral contract doctrine).

[116] *See, e.g.*, Robert v. United States Shipping Bd. Emergency Fleet Corp., 240 N.Y. 474, 478, 148 N.E. 650, 651 (1925). When one of the parties in a suit involving a written

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.[117] Recently, in *Marine Midland Bank-Southern v. Thurlow*,[118] 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.[119]

In *Marine Midland*, the defendants obtained a loan from the plaintiff bank in order to purchase convertible debentures[120] issued by Conelec, Inc. (Conelec).[121] The debentures were pledged by the

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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.

[117] *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.

[118] 53 N.Y.2d 381, 425 N.E.2d 805, 442 N.Y.S.2d 417 (1981).

[119] 53 N.Y.2d at 388, 425 N.E.2d at 808, 442 N.Y.S.2d at 420.

[120] Convertible debentures have a dual nature. Like ordinary debentures they represent a sum to be paid at a future date with interest, but they may be converted into stock at a fixed price prior to the redemption date. Recent Decision, *Reasonable Care Under the U.C.C.: The Pledgee's Duty to Preserve Value of Convertible Debentures*, 59 GEO. L.J. 240, 240 (1970). For a description of the duties of a pledgee holding convertible debentures as security see Grace v. Sterling, Grace & Co., 30 App. Div. 2d 61, 64, 289 N.Y.S.2d 632, 637 (1st Dep't 1968).

[121] 53 N.Y.2d 381, 385, 425 N.E.2d 805, 806, 442 N.Y.S.2d 417, 418 (1981). The defen-

defendants as collateral for the loan.[122] Under the defendants' security agreement,[123] the plaintiff was entitled to take, exchange, or release additional collateral posted by any party at any time.[124] The agreement also authorized the plaintiff to direct the order or manner of disposition of any collateral upon the defendants' default.[125] To induce the plaintiff to make the loan to the defendants,[126] 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.[127] 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.[128]

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.[129] When Conelec went bankrupt, the plaintiff liquidated the equipment, applying the proceeds to satisfy the loans to Conelec.[130] After demanding payment on the defendants' notes, the plaintiff commenced an action to recover the unpaid balance.[131] 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.[132] The defendants also attempted to introduce another agreement to the same effect between the plaintiff and Conelec.[133] Special term held that the parol evidence rule barred this evidence.[134] The Appellate Division, Third Depart-

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dants signed and delivered notes totalling $100,000. *Id.*

[122] *Id.*

[123] The Marine Midland-Thurlow security agreement also included shares of stock in other corporations. *Id.*

[124] *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,[135] 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.[136]

On appeal, a divided Court of Appeals reversed.[137] Judge Jasen, writing for the majority,[138] initially considered the alleged oral agreement between the three parties.[139] 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.[140] 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.[141] These factors led the majority to find that the parol evidence rule barred evidence of the prior agreement.[142] Considering the separate agreement between Marine Midland and Conelec, Judge Jasen noted

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[135] 54 App. Div. 2d 383, 388 N.Y.S.2d 703 (3d Dep't 1976), *rev'd*, 53 N.Y.2d 381, 425 N.E.2d 805, 442 N.Y.S.2d 417 (1981). Judge Herlihy, writing for the court, was joined by Judges Greenblott, Kane, Main, and Larkin. Judge Kane dissented in part on other grounds.

[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.

[137] 53 N.Y.2d 381, 389, 425 N.E.2d 805, 808, 442 N.Y.S.2d 417, 420 (1981).

[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.[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."[144] He emphasized that the parol evidence rule applies only to prior agreements " '*between the parties.*' "[145] Viewing the facts in *Marine Midland* as involving two distinct agreements with different parties and subject matter,[146] he reasoned that the rule could not exclude the separate agreement between Conelec and the plaintiff.[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.[148]

It is submitted that the *Marine Midland* Court justifiably held that the parol evidence rule applies to cases in which an

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[143] *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. *Id.* at 388-89, 425 N.E.2d at 808, 442 N.Y.S.2d at 420.

[144] *Id.* at 389, 425 N.E.2d at 808, 442 N.Y.S.2d at 420 (Cooke, C.J., dissenting).

[145] *Id.*, 425 N.E.2d at 809, 442 N.Y.S.2d at 421 (Cooke, C.J., dissenting).

[146] *Id.* at 389-90, 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. *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. *Id.* (Cooke, C.J., dissenting).

[147] *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 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 *Traders' Nat'l Bank*, see note 117 *supra*.

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. *Id.* (Cooke, C.J., dissenting).

[148] 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." *Id.*, 425 N.E.2d at 810, 442 N.Y.S.2d at 422 (Cooke, C.J., dissenting).

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.[149] If a prior or contemporaneous agreement between the parties contradicts the written contract, however, it may not be introduced.[150] 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.[151] Indeed, the *Marine Midland* defendants attempted to benefit from the plaintiff's promise to Conelec as if they were parties to the prior agreement.[152] 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.[153]

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[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* Mitchill v. Lath, 247 N.Y. 377, 160 N.E. 646 (1928); note 115 *supra*.

[150] *See, e.g.*, 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).

[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, 282 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 29, 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.[154] In this instance, after the plaintiff allegedly had promised Conelec that it would apply the equipment to the defendants' debt before Conelec's loans,[155] the defendants authorized the plaintiff to enforce and release collateral in its discretion.[156] 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,[157] this doctrine has only limited application.[158] 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.[159] In *Marine Midland,* the defendants at-

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[154] 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.*

[155] 53 N.Y.2d at 385-86, 425 N.E.2d at 807, 442 N.Y.S.2d at 419.

[156] *Id.* at 385, 425 N.E.2d at 806, 442 N.Y.S.2d at 418.

[157] *See* note 116 and accompanying text *supra.*

[158] 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).

[159] *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.[160] 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.

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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.[161] 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.[162] 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.[163] In assessing whether such a "full

608, 326 N.Y.S.2d 293, 295 (3d Dep't 1971); County Trust Co. v. Mara, 242 App. Div. 206, 208, 273 N.Y.S. 597, 600 (1st Dep't 1934), *aff'd*, 266 N.Y. 540, 195 N.E. 190 (1935).

[160] 53 N.Y.2d at 387, 425 N.E.2d at 808, 442 N.Y.S.2d at 420.

[161] Collateral estoppel is intended to prohibit the relitigation of previously adjudicated issues, since such relitigation is considered "an unjustifiable duplication, an unwarranted burden on the courts as well as on opposing parties." SIEGEL § 442, at 585; *see* Hoag v. New Jersey, 356 U.S. 464, 470 (1958); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 144-45, 225 N.E.2d 195, 197, 278 N.Y.S.2d 596, 599 (1967); Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 18, 9 N.E.2d 758, 759 (1937); Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165, 166 (1969). The doctrine of collateral estoppel developed as a corollary to the doctrine of res judicata, Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481, 485, 386 N.E.2d 1328, 1331, 414 N.Y.S.2d 308, 311 (1979); Weiner v. Greyhound Bus Lines, Inc., 55 App. Div. 2d 189, 191, 389 N.Y.S.2d 884, 886 (2d Dep't 1976), which "requires that when a cause of action has been adjudicated on the merits, the parties to the action are bound by the judgment and may not relitigate the same cause of action between themselves." 5 WK&M ¶ 5011.24, at 50-116.2. The primary distinction between the two doctrines is that res judicata applies to entire causes of action or defenses while collateral estoppel applies to issues. SIEGEL § 457; *see* Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165, 165-69 (1969).

[162] *See* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 960 (1969); Trombley v. Malloy, 66 App. Div. 2d 1020, 1020, 412 N.Y.S.2d 62, 63 (4th Dep't 1978), *aff'd*, 50 N.Y.2d 46, 405 N.E.2d 213, 427 N.Y.S.2d 969 (1980); Hurlburt v. Chenango County Dep't of Social Servs., 63 App. Div. 2d 805, 806, 405 N.Y.S.2d 153, 155 (3d Dep't 1978).

[163] Schwartz v. Public Adm'r, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955,