2019 IL App (2d) 180417-U
No. 2-18-0417
Order filed June 13, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TWIN FASTENERS & SUPPLY, INC., Plaintiff-Appellant, v. POWER SOLUTIONS, INC., f/k/a Power Production, Inc., and FABRICATING MACHINE SALES, INC., Defendants (Fabricating Machine Sales, Inc., Appellee; Power Solutions, Inc., Counter-Plaintiff; Twin Fasteners & Supply, Inc., Counter-Defendant).	)	Appeal from the Circuit Court of Du Page County. No. 13-L-981 Honorable Ronald D. Sutter, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff could not maintain specific product liability action where no damages occurred beyond pure economic loss but plaintiff could maintain action on alleged oral contract in the face of the statute of frauds to the extent that the existence of the contract was admitted by defendant during the course of litigation and to the extent the merchant's exception to statute of frauds applied.

¶ 2 I. INTRODUCTION

¶ 3 Plaintiff, Twin Fasteners & Supply, Inc., appeals the judgment of the circuit court of Du Page County granting summary judgment as to two counts of its complaint directed against defendant, Fabricating Machine Sales, Inc. For the reasons that follow, we affirm in part, reverse in part, and remand.

¶ 4 II. BACKGROUND

¶ 5 The instant litigation arises out of a business transaction involving the parties and a number of other entities. NACCO is a company that manufactures forklifts. NACCO needed an engine for a forklift it was building. Defendant, Power Solutions, Inc. (PSI), was to build that engine.[1] PSI contracted with plaintiff to provide parts for the build. One part needed was a spacer, which resembled a washer, but needed to be built to exacting tolerances (plus or minus .08 millimeter). Plaintiff sought to procure the spacer from defendant Fabricating Machine Sales, Inc. (FMS). FMS had two batches of spacers made by two companies—Chicago Tube & Iron and Central Steel & Wire. The spacers were incorporated into engines used in the forklifts produced by NACCO and sold to customers. Eventually, the engines were damaged from excessive vibration. It was determined that the spacer was improperly sized.

¶ 6 Plaintiff initiated this action on October 17, 2013 when it filed a four-count complaint. The first two counts were directed against PSI and are not at issue here. Count III was directed against FMS and was based on a strict product liability theory. Count IV alleged breach of contract by FMS. FMS moved for summary judgment as to both counts. Regarding Count III, it argued that plaintiff was not entitled to recover in tort as it had not suffered any damages beyond pure economic loss. Count IV, it argued, was barred by the statute of frauds (810 ILCS 5/2-201

[1] PSI is named in counts of plaintiff's complaint not at issue here and is not a party to this appeal.

(West 2010)). In response to FMS's argument on Count IV, plaintiff sought to amend the complaint to add a count of breach of a written contract, relying on supporting documentation (purchase orders and invoices).

¶ 7 The trial court granted summary judgment in favor of FMS on both counts directed against it. Regarding the product liability count, FMS asserted that plaintiff's action was improper as plaintiff was attempting to recover for pure economic loss. See *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69 (1982).[2] Plaintiff countered that property damage had occurred, specifically, the nonconforming spacer caused damage to other components of the forklift. FMS asserted that even if NACCO sustained property damage, plaintiff did not (FMS further pointed out that NACCO had not filed a lawsuit). Plaintiff countered that there was no requirement that it be the party that sustained the property damage, so long as it occurred. The trial court held that plaintiff could not maintain a tort-based theory as any property damage occurring in this case was not suffered by plaintiff.

¶ 8 As for plaintiff's contract claim, FMS interposed the statute of frauds (810 ILCS 5/2-201 (West 2010)). FMS asserts that purchases orders and invoices "confirmed" the quantity and price of the spacers plaintiff was ordering from it as 1500 and $1.85. This, FMS points out, translates to $2775, which brings the contract within the statute of frauds.[3] Instead of responding

[2] Alternatively, FMS argued that plaintiff's action was barred by the "Distributor Statute," as it was not the actual producer of the product in question (it purchased and resold them to plaintiff). See 735 ILCS 5/2-621 (West 2010). Given our resolution of the *Moorman* issue, this contention is moot.

[3] Here, FMS argues, in the alternative, that plaintiff has not established a breach of the terms of the contract.

to the merits of FMS's argument, plaintiff asserted: "FMS argues that [plaintiff] cannot amend its pleading to cure its breach of an oral claim against FMS. FMS is simply wrong on this issue." Pointing to the invoices and purchase orders memorializing certain transactions, plaintiff then sought leave to amend this count to allege a breach of a written contract rather than a breach of an oral contract. The trial court denied plaintiff's request. It found that an amendment could not cure the defect, stating "the contract needs to be signed, and clearly here it's not." Citing the extensive discovery that had already occurred and finding it likely that further discovery would be needed, the trial court found allowing the amendment would prejudice FMS and others. It also stated that "the timeliness *** weighs against allowing the amendment as well." It then entered summary judgment in FMS's favor.

¶ 9 Plaintiff moved for reconsideration, seeking to amend its complaint. Plaintiff argued that FMS did not plead the statute of frauds in its answer to plaintiff's complaint. It also cited the merchant's exception. See 810 ILCS 5/2-201(2) (West 2010). Finally, it asserted that FMS admitted the existence of a contract in its pleadings. See 810 ILCS 5/2-201(3)(b) (West 2010). Regarding the products liability count, plaintiff argued that it was being held vicariously liable by PSI for damages to the forklift engines beyond damage to the spacer itself. It characterized its claim as one for implied indemnity. See *American National Bank & Trust Co. v. Columbus-Cueno-Cabrini Medical Center*, 154 Ill. 2d 347 (1992). Plaintiff argued that any prejudice accruing to FMS was a result of its failure to raise the statute-of-frauds defense earlier in the proceedings rather than its belated response to that defense. The trial court denied plaintiff's motions to reconsider and its request to amend its complaint. This appeal followed.

¶ 10 III. ANALYSIS

¶ 11 On appeal, plaintiff raises a number of issues contesting the trial court's grant of summary judgment on the products liability count and also on the contract count. Plaintiff further contests the trial court's denial of leave to amend its complaint. Plaintiff begins its brief by setting forth a number of questions of fact that do not directly relate to the statute-of-frauds issue. We will not discuss them in detail. We do, however, note that some are relevant to defendant's short, alternate argument that even if the statue of frauds was not a bar, the contract is too indefinite to be enforced—an issue we will address, briefly, after we resolve the statute-of-frauds issue. We begin, however, with a brief discussion of waiver, forfeiture, and the relative lack of diligence by the parties.

¶ 12 This case comes to us following a grant of summary judgment, so review is *de novo*. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Thus, we must determine whether any genuine issue of material fact exists, necessitating a trial. *Id*. All pleadings, depositions, affidavits, and admissions must be construed strictly against the movant and liberally in favor of the party opposing the motion. *Id*. Summary judgment is a drastic remedy; therefore, it should be allowed only if the movant's right to prevail is clear and free from doubt. *Id*. Discretionary decisions of the trial court will be disturbed only if no reasonable person could agree with the trial court. *Romack v. R. Gingerich Co.*, 314 Ill. App. 3d 1065, 1067 (2000). With these standards in mind, we now turn to plaintiff's arguments.

¶ 13 A. DILIGENCE, WAIVER, AND AMENDING THE PLEADINGS

¶ 14 During proceedings below, the question of the relative diligence of the parties arose. FMS argues and the trial court agreed that plaintiff lacked diligence in attempting to amend the complaint to switch from an oral-contract theory to a written-contract theory after FMS's assertion of the statute of frauds in its motion for summary judgment. By this time, the parties

had conducted extensive discovery and the trial court found that allowing an amendment would be prejudicial. Additionally, plaintiff raised various theories for the first time in its motion to reconsider the trial court's grant of summary judgment. However, it is also true that FMS did not interpose the statute-of-frauds defense until after discovery was closed when it moved for summary judgment. Thus, prior to the motion for summary judgment, plaintiff had no reason to respond to this defense.

¶ 15 Indeed, it is quite plausible that until FMS's motion for summary judgment, plaintiff did not suspect that FMS would attempt to interpose this defense. After all, rather than raising the issue in its answer, FMS admitted the existence of a contract. This would typically satisfy the statute of frauds. See 810 ILCS 5/2-201(3)(b) (West 2010). We further note that plaintiff alleged and FMS admitted that FMS delivered 1,500 spacers to plaintiff and plaintiff paid FMS $2,775 "for the delivered spacers." The statute of frauds makes enforceable a contract otherwise barred by it "with respect to goods for which payment has been made and accepted or which have been received and accepted." 810 ILCS 5/2-201(3)(c) (West 2010). Hence, plaintiff had ample reason to believe that FMS's decision to not assert the statute of frauds in its answer to plaintiff's complaint was a deliberate decision based on the merits of the issue.

¶ 16 In any event, we are actually presented with two preliminary issues here. First, we must consider the trial court's denial of plaintiff's request to amend the complaint. Second, we must consider whether plaintiff's arguments as to why the statute of frauds does not apply are forfeited.

¶ 17 Regarding the proposed amendment, we first note that whether to grant such a request is a matter within the discretion of the trial court. See *Muirfield Village-Vernon Hills, LLC v. Reinke Jr. & Co.*, 349 Ill. App. 3d 178, 195 (2004). We will reverse only if no reasonable person

could agree with the trial court. *Romack*, 314 Ill. App. 3d at 1067. In *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992), the supreme court set forth the following four factors to guide this inquiry: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." The trial court found the first factor weighed against plaintiff, reasoning that since there was no signed contract, an attempt to amend and assert the existence of a written contract would be futile. The trial court found that both FMS and other parties would be prejudiced, as they had conducted extensive discovery, which was already closed, without being aware that plaintiff would assert such a theory. The trial court also found that, as the case had been filed in 2013 and summary judgment was first sought in 2017, the proposed amendment was not timely. We simply cannot find that no reasonable person could agree with the trial court here. Plaintiff does not explain why it could not have advanced a written contract theory at the commencement of litigation. Even if defendant did not interpose the statute of frauds, plaintiff could have sought recovery, in the alternative, on this basis. Moreover, the trial court's observation about the absence of a signed document is sound.

¶ 18 We now turn to the question of whether plaintiff has forfeited its arguments concerning defendant's admission of the existence of an oral contract and further whether the merchant's exception applies here. We note that rules of waiver and forfeiture are the prerogative of the court; they do not create substantive rights for the parties to assert. *City of Wyoming v. Liquor Comm'n of Illinois*, 48 Ill. App. 3d 404, 407 (1977). They do not limit a reviewing court's jurisdiction. *Id.* A reviewing court may " 'in the exercise of its responsibility for a just result, ignore consideration of waiver and decide a case on grounds not properly raised or not raised at

all by the parties.' " *Id.* at 407-08 (quoting *Occidental Chemical Co. v. Agri Profit Systems, Inc.*, 37 Ill. App. 3d 599, 603 (1975)).

¶ 19 Here, we see little difference in the relative diligence of the parties in handling the statute-of-frauds issue. Plaintiff certainly could have responded more diligently when the issue ultimately arose. Some arguments it now seeks to rely on were not raised until its motion for reconsideration. However, defendant did not raise the statute of frauds until after discovery closed and as the scheduled trial approached. Generally, the statue of frauds should be pleaded as an affirmative defense. *Haas v. Cravatta*, 71 Ill. App. 3d 325, 328 (1979). In *Mapes v Kalva Corp.*, 68 Ill. App. 3d 362, 366 (1979), the court held as follows:

> "[The defendant] had no duty to raise the [statute-of-frauds] defense before trial because plaintiff's verified complaint alleged facts to which the statute of frauds would not apply. Defendant cannot be required to devise some new method of pleading the statute, or to plead in response to something other than the complaint. Because it was not until after plaintiff had put on his case that defendant was in any position to raise the statute of frauds defense, defendant must be allowed to amend his answer at that point."

Such is not the case here, as plaintiff clearly relied on an oral contract in the original complaint, defendant was in a position to raise the defense from the start of this case. In other words, defendant's lack of diligence here is significant. Defendant delayed asserting the defense for four years; plaintiff, by comparison, simply delayed responding to the defense from its initial response to defendant's summary-judgment motion until it filed its motion to reconsider (a matter of a few months). In such circumstances, it would be just as reasonable to strike the defense as to strike plaintiff's response to it. In any event, we will do neither and address this issue on its merits.

¶ 20 B. PRODUCTS LIABILITY

¶ 21 Plaintiff's third count alleged strict products liability against FMS. FMS moved for summary judgment based on the *Moorman* doctrine. See *Moorman Manufacturing Co.*, 91 Ill. 2d 69. This doctrine holds that a plaintiff may not seek recovery for pure economic loss in tort. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 198 (1997). That is, tort recovery is limited to cases involving property damage or personal injury. *Moorman Manufacturing Co.*, 91 Ill. 2d at 86. It is undisputed that plaintiff suffered neither. Plaintiff claims that it can maintain this theory because the spacers caused property damage, specifically to the forklift engines into which they were incorporated. Plaintiff asserts that it can proceed under an implied indemnity theory for property damage suffered by the end users of the forklifts produced by NACCO. See *American National Bank & Trust Co.*, 154 Ill. 2d 347.

¶ 22 Assuming that this theory was otherwise sound, it would seem to require the end users of the product to actually suffer damages beyond pure economic loss (*i.e.*, personal injury or property damage). However, a review of the case law indicates that these entities did not suffer property damage within the meaning of the *Moorman* doctrine.

¶ 23 Generally, when a product damages itself, it has not resulted in property damage that would allow a tort action to be maintained. *Trans State Airlines v. Pratt & Whitney Canada, Inc.*, 177 Ill. 2d 21, 42 (1997). The question then becomes whether we are dealing with one product or two. That is, does this inquiry focus on the spacer itself or would the engine or the forklift be the relevant item. It is true that a product and one of its component parts can be deemed to be two separate products. *Id.* at 51. To determine whether this is the case here, we apply the " 'product bargained for' approach." *Id.* at 49. This approach focuses on "the injured

party's bargained-for expectations." *Id.* at 46. Thus, in discussing precedent, our supreme court explained:

> "The court held that had the parties bargained for separate components making up the aircraft, then the individual defective component parts could be perceived as having caused damage to the whole. However, there was no evidence that the parties had bargained separately for individual components. Consequently, the aircraft hull did not qualify as 'other property' damaged by the defective engine component." *Id.* at 47.

We must therefore examine the commercial expectations of the end users of the forklifts, as plaintiff's contention is they suffered property damage and the damage they suffered allows this count to proceed.

¶ 24 The end users, however, were buying forklifts rather than spacers. Accordingly, they did not suffer damage beyond their disappointed expectations in the product they purchased. In other words, they suffered no property damage for *Moorman* purposes. Thus, assuming plaintiff's implied indemnity argument is otherwise correct, there is no underlying property damage that would allow plaintiff to avoid the bar erected by *Moorman*. Quite simply, plaintiff cannot maintain a strict liability action here, and we affirm the trial court's grant of summary judgment as to this count.

¶ 25 C. CONTRACT

¶ 26 Plaintiff also argued that it was entitled to prevail based on an oral contract between it and FMS. As noted above, the trial court did not abuse its discretion in denying plaintiff's request to alter its theory of recovery to written contract. Plaintiff advanced two other arguments as to why its oral-contract count should be allowed to proceed. Though plaintiff was somewhat tardy in asserting them, we will, for reasons already discussed, consider them.

¶ 27 Before turning to plaintiff's particular arguments, we emphasize that "[t]he purpose of the statute [of frauds] is not to enable contractors to repudiate contracts that they have in fact made; it is only to prevent the fraudulent enforcement of asserted contracts that were in fact not made." *Haas*, 71 Ill. App. 3d at 328-29 (1979) (quoting Corbin, Contracts, §§ 317-320 at 393 (1952)). That is, "the purpose of a Statute of Frauds is to protect a party from the fraudulent and perjurious claim of another that an oral contract was made and not to prevent an oral contract admittedly made from enforcement." *URSA Farmers Cooperative Co. v. Trent*, 58 Ill. App. 3d 930, 932-33 (1978) (citing *Cohn v. Fisher*, 287 A.2d 222, 227 (N.J. Super. 1972)).

¶ 28 Plaintiff makes two main arguments here. First, it asserts that the merchant's exception applies in this case. See 810 ILCS 5/2-201(2) (West 2010). Second, it argues that defendant admitted the existence of the oral contract. See 810 ILCS 5/2-201(3)(b) (West 2010). We will address these arguments *seriatim*.

¶ 29 At oral argument, defendant's attorney stated, "The merchant's exception may well apply, I will concede that." The merchant's exception is codified as follows: "Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection [2-201(1)] against such party unless written notice of objection to its contents is given within 10 days after it is received." 810 ILCS 5/2-201(2) (West 2010). Plaintiff contends that purchase orders and invoices exchanged between the parties constitute such confirmations. Strictly speaking, it is the purchase orders that are relevant here, as the applicability to the exception turns on whether a written confirmation is sufficient *against the sender*. *Id.* In any event, the only real question regarding this point is whether the purchase

orders were "sufficient against the sender"—the remaining conditions of this subsection are not in dispute.

¶ 30 In ascertaining the meaning of "sufficient against the sender," we first look to section 2-201(1), which contains some similar language:

> "Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing *sufficient to indicate that a contract for sale has been made between the parties* and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing." (Emphasis added.) 810 ILCS 5/2-201(1) (West 2010).

The Committee Comments confirm the requirements of this relatively straight forward passage:

> "Only three definite and invariable requirements as to the memorandum are made by this subsection. First, it must evidence a contract for the sale of goods; second, it must be 'signed,' a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity." 810 ILCS 5/2-201(2), Cmt. 1 (West 2010).

We must further consider the relationship between these requirements and the merchant's exception's mandate that the confirmation be "sufficient against the sender."

¶ 31 We have not located an Illinois case directly addressing the issue; however, the weight of authority holds that a confirmation is sufficient against the sender for the purpose of subsection (2) if it is satisfies the requirements of subsection (1). See, *e.g.*, *Bazak International Corp. v. Mast Industries, Inc.*, 535 N.E.2d 633, 638 (N.Y. 1989) ("We therefore conclude that, in

determining whether writings are confirmatory documents within UCC 2-201(2), neither explicit words of confirmation nor express references to the prior agreement are required, and the writings are sufficient so long as they afford a basis for believing that they reflect a real transaction between the parties."); *Perdue Farms, Inc. v. Motts, Inc. of Mississippi*, 459 F. Supp. 7, 16 (N.D. Miss. 1978) ("In order for a writing to be 'sufficient against the sender' it must satisfy the requirements of UCC's 2-201(1) so that the sending merchant cannot invoke the statute of frauds as a defense."); *Ace Concrete Products Co. v. Charles J. Rogers Construction Co.*, 245 N.W.2d 353, 355 (Mich. App. 1976) ("A written confirmation pursuant to 2201(2) must satisfy the requirements of a writing under 2201(1)."). Hence, for plaintiff to successfully invoke the merchant's exception, the documents it asserts constitute a confirmation must meet the requirements of section 2-201(1) relative to plaintiff—that is, as explained above, it must be signed, indicate a contract exists, and specify a contract.

¶ 32 Plaintiff relies on the purchase orders it sent to defendant and the invoices defendant sent back in attempting to establish this exception applies. For the purposes of the merchant's exception, the purchase orders are the relevant document. This exception requires that the party asserting the statute of frauds had failed to object to a document sent by the party asserting the existence of the contract. See 810 ILCS 5/2-201(2) (West 2010). Indeed, if defendant had sent plaintiff a document sufficient against defendant, there would be no statute of frauds issue and plaintiff could simply sue on the written contract (of course, the trial court denied plaintiff's request to amend its complaint to assert such a theory). Thus, we confine our analysis to the purchase orders.

¶ 33 As these documents satisfy the three requirements set forth in 2-201(1), they are "sufficient against the sender" for the purposes of 2-201(2). First, they are signed as

contemplated by section 2-201(1). A handwritten signature is not required. *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 296 (7th Cir. 2002) ("Neither the common law nor the UCC requires a *handwritten* signature." (Emphasis in original.)) It has been explained that "[m]arks of many different sorts may qualify as signatures, as long as the mark 'manifests that the instrument has been executed or adopted by the party to be charged by it.' " *Roti v. Roti*, 364 Ill. App. 3d 191, 196 (2006) (quoting *Just Pants v. Wagner*, 247 Ill. App. 3d 166, 178 (1993)). Here, the purchase orders clearly state that they originated from Twin Fasteners & Supply. There is a header, identifying plaintiff, separate from a shipping address, which is listed below. Second, they provide evidence that a contract exists in that they list defendant as vendor, identify the product purchased, and list a price. While defendant contends that some material terms are missing, the absence of such terms, though it may be relevant to issues that arise later in this action, does not prevent plaintiff from relying on these documents to avoid the statute of frauds. 810 ILCS 5/2-201(1) (West 2010) ("A writing is not insufficient because it omits or incorrectly states a term agreed upon."). Third, they state a quantity.

¶ 34 Quite simply, the purchase orders meet the requirements of section 2-201(1). See 810 ILCS 5/2-201(1) (West 2010). As such, they are "sufficient against the sender" as contemplated by section 2-201(2). In other words, plaintiff has successfully invoked the merchant's exception.

¶ 35 Plaintiff also argues that FMS admitted the existence of a contract. Section 2-201(3)(b) provides as follows: "A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable *** if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted." 810 ILCS 5/2-201(3)(b) (West 2010). For example, an admission in a discovery deposition has

been held sufficient to satisfy the statute of frauds. See *URSA Farmers Cooperative Co. v. Trent*, 58 Ill. App. 3d 930, 932-33 (1978).

¶ 36 Here, FMS admitted the following allegations in its answer to plaintiff's complaint. First, FMS admitted that "[o]n or about September 1, 2011, Twin Fasteners made an oral agreement with FMS (the "Oral Contract") to provided Spacers to Twin Fasteners." Second, it admitted, "Some of the relevant terms of the contract were as follows: (a) Twin Fasteners was to provide FMS with a physical exemplar of the Spacers to be replicated by FMS; (b) FMS was to create exact replicas of the sample of the Spacers; (c) FMS was to deliver the replications of the Spacers to Twin Fasteners for delivery to PSI; (d) Twin Fasteners was to pay FMS $1.85 each for the Spacers." Thus, FMS admitted the existence of the contract as well as various terms, including price. Furthermore, FMS admitted that "[o]n or about December 1, 2011, FMS produced and delivered 1,500 spacers to Twin Fasteners" and that "[o]n or about December 9, 2011, Twin Fasteners paid FMS $2775.00 for the delivered spacers." Thus, at the very least, FMS admitted the contract was for 1500 spacers. We note parenthetically that the mere fact that these spacers were delivered and paid for would take that portion of the transaction outside the statute of frauds. See 810 ILCS 5/2-201(3)(c) (West 2010); see also *Hodgman, Inc. v. Feld*, 113 Ill. App. 3d 423, 431–32 (1983); C*ity of Chicago v. Reliable Truck Parts Co., Inc.*, 822 F. Supp 1288, 1300 (N.D. Ill. 1993) (applying Illinois law and holding contract for sale of goods enforceable despite not specifying quantity to the extent the plaintiff had accepted and paid for the goods).

¶ 37 Quite obviously, a transaction took place between the parties. They entered into some sort of agreement and engaged in substantial performance pursuant to it. Generally, contracts that are no longer executory are not within the statute of frauds. *Mapes v. Kalva Corp*. 68 Ill.

App. 3d 362, 386 (1979). Once the statute of frauds is overcome, its terms can be proven by other evidence. See *Guel v. Bullock*, 127 Ill. App. 3d 36, 40 (1984). For example, the purchase orders or invoices may very well be relevant here. See *Central Illinois Light Co. v. Consolidated Coal Co.*, 349 F.3d 488, 490-91 (7th Cir. 2003) ("The documentation must enable an inference to be drawn that there *was* a contract, though *once that has been established the parties are free to present oral evidence of the contract's terms*, [citations]—all but the quantity term, which must be stated in the writing[4] that establishes compliance with the statute of frauds." (Emphasis added.) (Applying Illinois law.)). We emphasize that the mere fact that plaintiff has successfully overcome, to a degree, the statute of frauds does not satisfy plaintiff's burden of otherwise proving its case. See *Kaiser Agricultural Chemicals v. Rice*, 138 Ill. App. 3d 706, 711 (1985) ("This statute, however, merely serves to remove a claim from the Statute of Frauds and does not establish the terms of an oral contract.").

¶ 38 In sum, from the record, it is clear that plaintiff and FMS entered into an agreement for plaintiff to purchase a number of spacers and the parties performed pursuant to it. Whether plaintiff will be able to sufficiently establish the terms of any agreement remains to be seen; however, the statute of frauds is no bar here.

¶ 39 Before closing, we will comment briefly on FMS's alternative arguments. We are unpersuaded by defendant's assertion that plaintiff's president admitted that no contract existed. There is ample evidence to the contrary; therefore, this, at most, creates a question of fact. As to whether plaintiff can establish a breach of the terms of the agreement, a question of fact exists as well. FMS asserts that there is no evidence that the parties incorporated the specifications for the spacers into the agreement. However, FMS admitted that "Twin Fasteners [was] to provide FMS

[4] Or it must otherwise comply with the statute of frauds.

with a physical exemplar of the Spacers to be replicated by FMS" and "FMS was to create exact replicas of the sample of the Spacers." While there may be evidence to the contrary, at the very least, we cannot say that no question of fact exists and FMS is entitled to judgment as a matter of law.

¶ 40 IV. CONCLUSION

¶ 41 In light of the foregoing, we affirm the judgment of the trial court granting summary judgment on Count III, reverse the grant of summary judgment on Count IV, and remand for further proceedings consistent with this order.

¶ 42 Affirmed in part and reversed in part; cause remanded.