COURT OF APPEALS
DECISION
DATED AND RELEASED

April 11, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-0947

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

HAMILTON BEACH/PROCTOR-SILEX, INC., a foreign corporation,

Plaintiff-Respondent-Cross Appellant,

v.

MARVELLE ENTERPRISES OF AMERICA, INC., a Wisconsin corporation,

Defendant,

MARVELLE WORLDWIDE, INC., a California corporation,

Defendant-Appellant-Cross Respondent.

APPEAL from an order of the circuit court for Dane County: Angela B. Bartell, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

EICH, C.J. Hamilton Beach/Proctor-Silex, Inc., a manufacturer of kitchen appliances, sued Marvelle Worldwide, Inc., a marketing company, for sums allegedly owing on a contract for the purchase of blenders. Marvelle

counterclaimed, asserting that Hamilton Beach had breached the contract by delivering blenders different from those agreed upon--in particular, blenders with a brown base, rather than a blue base. The underlying action was settled, and Marvelle's counterclaim went to trial. The jury returned a verdict in Marvelle's favor, but the trial court granted judgment notwithstanding the verdict, dismissing the counterclaim on grounds that the alleged "blue-blender" contract did not comply with the statute of frauds.

The issues are: (1) whether Hamilton Beach waived a statute of frauds defense by failing to assert it in its reply to Marvelle's counterclaim; and, if not, (2) whether the agreement was unenforceable for failure to comply with the Uniform Commercial Code statute of frauds, § 402.201(1), STATS., which requires certain contracts for the sale of goods to be in writing.

We conclude that Hamilton Beach did not waive its statute of frauds defense and that enforcement of the purported agreement is barred by § 402.201(1), STATS.[1]

The facts are not in serious dispute. Marvelle distributes and sells goods by "direct marketing"--demonstrations at fairs, home shows and retail stores-- and through "infomercials," which are half-hour or longer product advertisements in the guise of legitimate television programs. In late 1989, prior to Hamilton Beach's merger with Proctor-Silex, two Hamilton Beach representatives, Steve McLain and William Parks, began to discuss with Marvelle president Larry Martony the possibility of marketing Hamilton Beach blenders through Marvelle's direct marketing network. After several months of negotiations, they arrived at a "deal" in which Hamilton Beach would produce a line of blenders, designated the "Model 981," which Marvelle would purchase and sell to the public. The deal was not memorialized in any writing at that time.

[1] The trial court concluded that the general statute of frauds, § 241.02, STATS., also barred enforcement of the agreement claimed by Marvelle. Because the purported agreement was for the sale of goods, we believe the U.C.C. statute applies, and because we affirm the trial court's ruling that § 402.201(1), STATS., requires dismissal of Marvelle's counterclaim, we need not consider the application of § 241.02.

According to Marvelle, the agreement was that Hamilton Beach would manufacture Model 981 blenders with a blue/black base. The blenders Hamilton Beach began shipping to Marvelle in early 1990, however, had a brown base. Marvelle accepted the brown blenders and attempted to sell them, but sales were minimal.

Several months later, when Hamilton Beach was about to merge with another appliance manufacturer, Proctor-Silex, Marvelle requested written confirmation of their agreement. In a letter dated October 8, 1990, Parks stated that Marvelle had been given exclusive rights to distribute Hamilton Beach Model 981 blenders, with the proviso that Hamilton Beach reserved the right to terminate the agreement if, in any twelve-month period, Marvelle purchased less than $500,000 worth of the blenders. The letter did not refer to the blenders' price, color or other attributes.

In February 1991, after the Hamilton Beach/Proctor-Silex merger had been completed and Marvelle was about to film its first infomercial, Martony asked Parks for another letter describing their agreement. Parks responded with a second letter, backdated to October 8, 1990, acknowledging Martony as the sole agent for producing infomercials for the Model 981, and stating that their agreement would be terminated if the infomercial had not been produced by the end of June 1991. Marvelle filmed the infomercial using the brown blenders.

In the summer of 1991, after a dispute arose between the parties over pricing the blenders and Marvelle's failure to pay for the brown blenders it had received, Hamilton Beach wrote to Marvelle stating that it was terminating the agreement outlined in its original letter of October 8, 1990, which, according to Hamilton Beach, had "expired according to its terms."

Hamilton Beach then sued Marvelle to collect amounts allegedly due and owing for the unpaid-for brown blenders. Marvelle counterclaimed, alleging that Hamilton Beach had breached its agreement to supply blue blenders. Hamilton Beach's reply to Marvelle's counterclaim interposed a general denial and raised several affirmative defenses, but it did not plead the statute of frauds as a defense. As we have noted above, the principal action was resolved by stipulation, leaving only the counterclaim to be decided at trial.

Prior to trial, Hamilton Beach filed a motion *in limine* to exclude any evidence of a purported oral agreement for blue blenders on grounds that the statute of frauds barred its enforcement.

The trial court initially denied Hamilton Beach's motion, ruling that Marvelle had shown the existence of writings which were sufficient under the statute to indicate that a contract for the sale of blenders had been made. At the trial's conclusion, however, the trial court reversed itself, concluding that the writings put forth by Marvelle in support of its counterclaim were insufficient to satisfy the statute of frauds and overturning the jury verdict in Marvelle's favor. Other facts will be discussed in the body of the opinion.

When a trial court enters judgment notwithstanding a jury's verdict, it concedes the propriety of the verdict but determines that, "for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment." Section 805.14(5)(b), STATS. The issue is not the sufficiency of the evidence to support the verdict but "whether the facts found are sufficient to permit recovery as a matter of law." ***Logterman v. Dawson***, 190 Wis.2d 90, 101, 526 N.W.2d 768, 771 (Ct. App. 1994). In this case, the underlying legal issue is the applicability of the statute of frauds. We review a trial court's legal conclusions de novo, ***Chevron Chemical Co. v. Deloitte & Touche***, 168 Wis.2d 323, 331, 483 N.W.2d 314, 317 (Ct. App. 1992), *aff'd,* 176 Wis.2d 935, 501 N.W.2d 15 (1993), although we have often recognized that in such cases we may nonetheless "benefit ... from the analys[i]s of the circuit court ...." ***State v. Eison***, 194 Wis.2d 160, 178, 533 N.W.2d 738, 745 (1995).

I. Did Hamilton Beach Waive the Statute of Frauds Defense?

Marvelle argues that by failing to raise the statute of frauds as an affirmative defense in its reply to the counterclaim, Hamilton Beach has waived any such challenge to the parties' contract.

It is true, as Marvelle asserts, that, under § 802.02(3), STATS., the statute of frauds is an affirmative defense which generally must be raised in the pleadings. *See* ***Weber v. Weber***, 176 Wis.2d 1085, 1093, 501 N.W.2d 413, 416 (1993). It is also true that failure to do so generally waives reliance on the

defense. ***Robinson v. Mount Sinai Medical Ctr.***, 137 Wis.2d 1, 16-17, 402 N.W.2d 711, 717 (1987).

There is an exception, however. Under § 802.09(2), STATS., a trial court may entertain an issue not raised in pleadings with the opposing party's express or implicit consent:

> If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.

There is no question that Marvelle did not expressly consent to trial of the statute of frauds defense. The question thus becomes whether, as the trial court held, Marvelle impliedly consented to trial of that issue.

Before a party will be held to have impliedly consented to trial of an issue not raised in the pleadings, that party must have "actual notice" of the issue. ***State v. Peterson***, 104 Wis.2d 616, 631, 312 N.W.2d 784, 791 (1981). A party has actual notice when he or she "ha[s] [a] reason to understand that th[e] issue was in the process of being tried." ***Jakobsen v. Massachusetts Port Auth.***, 520 F.2d 810, 813 (5th Cir. 1975) (construing the federal counterpart to § 802.09(2), STATS.);[2] *see also* ***Peterson***, 104 Wis.2d at 630, 312 N.W.2d at 791. If the party has actual notice of the issue's existence in the case, and the issue is tried, the complaint is deemed amended to raise the issue--even in a case where the complaining party has not so requested. ***Peterson***, 104 Wis.2d at 631, 312 N.W.2d at 791.

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[2] The supreme court has said that, because § 802.09(2), STATS., "is in all material respects identical" to the federal rule, we may "look to the cases and commentary relating to [the federal rule] for guidance in interpreting sec. 802.09(2)." ***State v. Peterson***, 104 Wis.2d 616, 628-29, 312 N.W.2d 784, 790 (1981).

Marvelle raises several separate arguments as to why the statute of frauds should not be considered. We think they may be fairly summarized as follows: (1) Marvelle cannot be held to have consented to trial of the issue because (a) Hamilton Beach's motion *in limine* gave insufficient notice of its existence, and (b) the hearing on the motion did not constitute a "trial" of the issue as required by ***Jakobsen*** and similar cases; and (2) allowing the issue to be raised despite Hamilton Beach's failure to include it in its pleadings prejudiced Marvelle's case. We consider them *seriatim*.

Hamilton Beach's pretrial motion sought to exclude "any evidence of an oral agreement of the parties" under both the statute of frauds and the parol evidence rule. Hamilton Beach claimed that Marvelle's counterclaim was based on a purported oral agreement to supply blue, rather than brown, blenders, and "that no writing exists to confirm Marvelle's [blue-blender] specifications, and that the alleged agreement itself is at best an `implied' `understanding.'" The motion quotes the applicable statute of frauds, § 402.201, STATS., which states that any contract for the sale of goods for $500 or more "is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract of sale has been made between the parties and signed by the party against whom enforcement is sought." Hamilton Beach's motion states that, "[u]nder the statute of frauds," any such oral agreement "is not enforceable," citing a case to that effect,[3] and it asks the court to exclude all evidence thereof.

In its decision on Hamilton Beach's post-trial motion for judgment notwithstanding the verdict, the trial court determined that Hamilton Beach had "affirmatively raised the issue of statute of frauds ... in a motion *in limine* prior to trial," and that the issue "was determined by the court with the implied consent of [Marvelle] by virtue of [its] failure to object that no [such] defense ... had been pleaded by [Hamilton Beach]." Thus, concluded the court, "[b]y operation of § 802.09(2), the issue of the applicability of the statute of frauds and the enforceability of the writings evidencing the agreement herein relied on by defendants is therefore treated in all respects as if it had been raised in the pleadings."

[3] ***Wamser v. Bamberger***, 101 Wis.2d 637, 305 N.W.2d 158 (Ct. App. 1981).

We think that Hamilton Beach's raising and quoting from the statute of frauds in its pretrial motion, and its argument at that time that Marvelle's purported blue-blender agreement was unenforceable under the statute--and Marvelle's failure to challenge such a contention as unraised in the pleadings--supports the trial court's determination that the issue was appropriately raised under § 802.09(2).

Marvelle disagrees. It argues first that because the pretrial motion hearing did not constitute a "trial" on the merits of Hamilton Beach's statute of frauds defense, the court erred in ruling that the issue was "tried" with its consent within the meaning of ***Peterson*** and similar cases. It maintains that the only issues "tried" at that hearing were evidentiary issues. Citing a federal case, ***Fort Howard Paper Co. v. Standard Havens, Inc.***, 901 F.2d 1373 (7th Cir. 1990), for the proposition that the primary purpose of requiring affirmative defenses to be raised in pleadings is to "guarantee that the opposing party has notice of [the] ... issue," it claims that the general statements put forth by Hamilton Beach in its motion--and the hearing on that motion--were insufficient to provide such notice. Finally, Marvelle contends that this is a case like ***Jakobsen***, where the issue purported to have been raised in the pretrial hearing was "of such complexity and fundamental importance to the conduct of the litigation that ... [it] could not, in fairness, be forced to forego the advance notice [it was] entitled to ...." ***Jakobsen***, 520 F.2d at 813-14. We are not persuaded that either case mandates the result urged by Marvelle.

Taking the latter case first, ***Jakobsen*** was an action for personal injuries sustained by the plaintiff when he fell on an icy sidewalk at Boston's Logan Airport. The Port Authority, the operator of the airport, raised for the first time in a motion at the close of the evidence a defense that because the sidewalk was a "way" within the meaning of a statute making it liable for "defect or want of repair of ways" to the same extent as a municipal corporation, the Authority could only be liable for "defect[s]" in the sidewalk and not for its negligence, as the plaintiff's complaint had alleged. Emphasizing the legal uncertainty and factual complexity of the statutory "defense" attempted to be raised by the Port Authority for the first time after trial, the ***Jakobsen*** court declined to apply the federal equivalent of § 802.09(2), STATS., to the particular fact situation raised. ***Id***. at 814. In so ruling, the court spent two full pages pointing out the "lack of clarity" of the law on the subject, and "difficult" legal and factual questions raised by the Port Authority's "eleventh hour claim," in order to "illustrate the unreasonableness of presenting [the defense] for the first time when the trial was virtually over." ***Jakobsen***, 520 F.2d at 814, 815. In this

case, the issue--a plain statutory requirement that contracts for the sale of goods of a value exceeding $500 must be in writing--is neither unduly complex, nor was it raised for the first time after trial, as in ***Jakobsen***.

In ***Fort Howard***, the paper company sued Standard Havens, the manufacturer of a filtration system installed in its plant, for breach of a warranty in the construction contract. Prior to trial, a dispute arose over whether Standard Havens had properly raised the defenses of "misuse and hindrance," and Fort Howard filed a motion *in limine* claiming that these defenses had not been properly pleaded by Standard Havens. ***Fort Howard***, 901 F.2d at 1375. The trial court reserved a ruling on the motion and the case was tried and submitted to the jury. The jury found that, while Standard Havens had breached the warranty, Fort Howard had misused the system, thereby negating any claim to damages. The trial court refused to enter judgment on the verdict and ordered a new trial, ruling that Standard Havens's "misuse and hindrance" defenses had not been properly pleaded.

On appeal, Standard Havens argued that its failure to plead the defenses should not be fatal to its case because knowledge acquired through discovery gave Fort Howard notice that misuse was being advanced as a defense in the action. The court of appeals rejected the argument, concluding that because the only references in discovery to the defense--such as a statement "buried in a lengthy reply [to interrogatories]" to the effect that one of its witnesses "is expected to testify that the ... problems experienced by [Fort Howard] are the result of [Fort Howard's] failure to operate the [system] in accordance with the provisions of the contract"--were insufficient to put the manufacturer on notice of the defense, "the district court did not abuse its discretion" in so concluding. ***Fort Howard***, 901 F.2d at 1378.

Unlike the "vague references" in the "lengthy depositions" before the ***Fort Howard*** court, 901 F.2d at 1378, the assertions in Hamilton Beach's pretrial motion and in its arguments at the hearing--including its specific reference to, and quotation from, the statute of frauds--are sufficient, in our opinion, to raise the issue. And we believe the trial court, like the district court in ***Fort Howard***, could properly rule, on the facts and law before it, that the

pretrial motion proceedings gave Marvelle adequate notice that Hamilton Beach was raising the statute of frauds issue.[4]

We similarly reject Marvelle's argument that we should reverse because it was prejudiced by Hamilton Beach's failure to plead the statute of frauds. Marvelle claims it was prejudiced because, had it known of the defense, it would have introduced more documentary evidence in support of its claim that a contract existed. As Hamilton Beach points out, however, Marvelle's own brief on the merits of the statute of frauds claim refers to voluminous documents it placed in evidence relating to the parties' dealings--documents it claims "unambiguously indicate that a contract existed" and "outline the terms of [that] contract."

Prejudice, in the context of § 802.09(2), STATS., is not "substantive harm" that might have been suffered by the challenging party but rather deprivation of the opportunity to counter or defend against the unpled issue. ***Peterson***, 104 Wis.2d at 635, 312 N.W.2d at 793. In this case, the trial court ruled that Marvelle was put on notice of the existence of the statute of frauds issue in the pretrial proceedings, and we have indicated our agreement with that ruling. Given that holding--and given the fact that, as we have indicated, Marvelle put into evidence every conceivable written document in support of its claim that a blue-blender contract existed--its argument that it was prejudiced because it lacked notice of the existence of the issue is unavailing.

II. The Statute of Frauds

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[4] It is true, as Marvelle asserts, that the motion hearing was in large part devoted to evidentiary issues. It is also true that the statute of frauds would have been better raised by Hamilton Beach in its pleadings. Our review of the record, however, satisfies us that Marvelle had sufficient notice that Hamilton Beach, as it argued at the hearing, was taking the position that because Marvelle could not show a writing memorializing any agreement regarding blender color, the "statute of frauds preclude[d]" Marvelle from litigating any such agreement.

We note in this regard that, in addition to the statute of frauds, Hamilton Beach argued at the hearing that the parol evidence rule barred oral evidence regarding any purported agreement that it was to supply blue blenders. Marvelle did not respond to Hamilton Beach's argument, or its several references to the statute of frauds, but instead limited its argument to the parol evidence issue.

Our consideration of the merits of the statute of frauds issue begins with § 402.201, STATS., which provides:

> (1) 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 the party's 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 subsection beyond the quantity of goods shown in such writing.

Section 402.201(1), STATS., is part of the Uniform Commercial Code, as adopted in Wisconsin, and the official comment to the equivalent U.C.C. section states as follows:

> The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence [of the existence of the contract] rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which party is the seller. *The only term which must appear is the quantity term* which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.

U.C.C. § 2-201, cmt. 1, quoted in ***First Bank (N.A.) v. H.K.A. Enters.***, 183 Wis.2d 418, 422-23, 515 N.W.2d 343, 345 (Ct. App. 1994) (emphasis added). The U.C.C. comment explains that the writing must meet "three definite and invariable" requirements: (1) it must indicate that a contract for the sale of goods has been

made; (2) it must be "signed" or have authentication identifying the party against whom the contract is to be enforced; and (3) it must specify the quantity of the goods being sold. U.C.C. § 2-201, cmt. 1. If any of these requirements is not met, the agreement will not be enforced.

The trial court ruled that none of the several documents put forth by Marvelle in support of its claim, considered individually or together, meet the third requirement: that none of writings "that might arguably satisfy ... the statute[] of frauds" contained a quantity term.[5]

Marvelle argues first that its contract with Hamilton Beach was a "requirements contract"--one in which the quantity purchased is measured not by specific number but in terms of the producer's "output" or the purchaser's "requirements"--and that specific quantity terms are not necessary in such contracts in order to satisfy the statute of frauds.[6] To so qualify, however, the writing or memorandum of the agreement must itself indicate that the contract is either one for as many goods as the purchaser may require or for the seller's entire output. ***Zayre Corp. v. S.M. & R. Co.***, 882 F.2d 1145, 1155 (7th Cir. 1989). *See also* ***Cavalier Mobile Homes, Inc. v. Liberty Homes, Inc.***, 454 A.2d 367, 377 (Md. Ct. Spec. App. 1983) (in absence of a specific quantity term, statute of

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[5] Marvelle, pointing to the trial court's remark that "any [single] writing relied on [by Marvelle] to evidence the agreement must meet the ... statute of frauds," claims that the trial court's decision turned on its separate analysis of each of the offered documents; and it argues that this is improper, citing the general rule that "the memorandum required by the statute of frauds may consist of several writings." *See* ***Kovarik v. Vesely***, 3 Wis.2d 573, 580, 89 N.W.2d 279, 283 (1958). Our reading of the record satisfies us that the trial court in fact considered the several documents both individually and in combination. It concluded, for example, that "even ... read[ing] the ... documents together," the "combined writings" did not satisfy the statute because "[n]one of the ... writings evidences a current and completed agreement of a quantity of blenders that plaintiff offers to sell and defendants agree to buy."

[6] Comment 2 to U.C.C. § 2-306 states that, with respect to the "quantity term" requirement of the statute of frauds, "a contract for output or requirements is not too indefinite since [quality] is held to mean the actual good faith output [of the producer] or requirements of [the buyer.]" Accordingly, courts have held that a memorandum indicating that the contract is for the buyer's requirements, even though those requirements may be somewhat uncertain, satisfies the statute of frauds despite the absence of a precise quantity term. ***Embedded Moments, Inc. v. International Silver Co.***, 648 F. Supp. 187, 192 (E.D.N.Y. 1986).

frauds requires some writing indicating that the quantity to be delivered under the contract constitutes all such goods required by the purchaser).

The first document advanced by Marvelle in support of its claim is a letter dated October 8, 1990, from Parks to Martony confirming Hamilton Beach's "understanding that [it] will supply a commercial model blender designated as the Model 981 to Marvelle Worldwide for sales ... through infomercial marketing, fairs, shows and direct sales demo programs." The letter concludes:

> If Marvel[le] Worldwide[] purchases within any twelve month period do[] not equal $500,000 or more, this agreement can be terminated by Hamilton Beach/Proctor-Silex Inc. at the end of the twelve month period where sales do not meet or exceed $500,000. This twelve month period will begin January 1, 1991.

We agree with the trial court that this document does not indicate an agreement by either Marvelle to buy or Hamilton Beach to sell any particular quantity of blenders. Nor does it state--or even imply--that Marvelle is agreeing to purchase all of its "blender requirements" from Hamilton Beach, or to purchase Hamilton Beach's entire blender output.

The second document is a letter dated January 10, 1992, from Ronald Eksten, Hamilton Beach's general counsel, to Martony terminating the parties' "agreement." Even less persuasive than the first document, it merely notifies Martony that Hamilton Beach is terminating its agreement with Marvelle because it failed to purchase $500,000 worth of blenders prior to January 1, 1991, as stipulated in the earlier letter. The January 10 letter contains neither a promise by Hamilton Beach to sell nor a requirement for Marvelle to buy a specified number of blenders.[7]

[7] Marvelle does not contend that the January 10 letter constitutes a "requirements contract."

The third document is a Hamilton Beach interoffice memorandum dated January 3, 1991, containing the following statement: "Getting the [infomercial] program will produce the following results: 1. Sales of 150,000 minimum to 500,000 units." Again, the writing contains no agreement as to any quantity of blue blenders to be sold or purchased; it is simply a sales estimate based on the completion and airing of Marvelle's infomercial. Nor does it contain any suggestion of the existence of a "requirements" agreement.

Finally, Marvelle points to two letters written and signed by its own employees which it claims memorialize a requirements contract. Section 402.201(1), STATS., however, requires that the document be signed by the party against whom it is sought to be enforced--in this case, Hamilton Beach.[8]

Marvelle next argues that Hamilton Beach should not be permitted to raise a statute of frauds defense because it "admitted the existence of a contract with Marvelle at trial." Marvelle is correct that under § 402.201(3)(b), STATS., a "judicial admission" of the existence of an oral contract generally renders the contract enforceable despite its noncompliance with the statute of frauds. *See* ***Triangle Marketing, Inc. v. Action Indus., Inc.,*** 630 F. Supp. 1578, 1581 (N.D. Ill. 1986). The official comment to § 402.201(3)(b) explains the exception:

> If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before the court, no additional writing is necessary for protection against fraud. Under this section it is no longer possible to admit the contract in court and still treat the Statute as a defense.

U.C.C. § 2-201, cmt. 7.

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[8] Without citing any authority for the proposition, Marvelle asserts that we should not apply the signature requirements to these documents because "[i]t would be counterintuitive to require that a document signed by [Hamilton Beach] contain an affirmation of a promise on the part of Marvelle to buy exclusively from [Hamilton Beach]." As we have often said, we do not consider undeveloped arguments. ***State v. Pettit***, 171 Wis.2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992).

In Marvelle's view, the rule is that if the mere existence of a contract is conceded--even though the admission makes no reference to any contract terms--that is sufficient to take the case out of the statute. We disagree. In order for a party's in-court statement to satisfy the statute, it must constitute "an unqualified or unconditional admission" of the contract; ambiguous or unclear statements or suggestions of a contract do not suffice. *See* ***Ivey's Plumbing & Elec. Co. v. Petrochem Maintenance, Inc.***, 463 F. Supp. 543, 550 (N.D. Miss. 1978). Moreover, the purported "judicial admission" must, like the written agreement, mention the quantity of the goods contracted for in order for the exception to apply. ***Dresser Indus., Inc. v. Pyrrhus AG***, 936 F.2d 921, 928 (7th Cir. 1991).[9]

Marvelle contends that several "admissions" qualify for the exception. The first is the testimony of three Hamilton Beach employees indicating that "at some point in time a package [was] arrived at" and was "given a model number," that "a product was finally selected" and that Model 981 and 982 blenders were "promised to Larry Martony by Hamilton Beach." Because this testimony does not refer to quantity or any other agreement terms, and does not indicate in any way that the parties had concluded a "requirements" contract, it does not fit the rule.

Second, Marvelle maintains that several of Hamilton Beach's answers to interrogatories meet the "judicial admissions" exception to the statute of frauds. The interrogatories requested the names of Hamilton Beach employees with "information relating to the agreement/contract between" Hamilton Beach and Marvelle, together with all documents (a) "discussing, showing, or suggesting that" Hamilton Beach "entered into an agreement or contract with" Marvelle, or (b) relating to its decision to "terminate the contract." Hamilton Beach responded with a list of names, a general statement that any

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[9] Admissions which make no reference to quantity are insufficient because such admissions are "not enforceable beyond the quantity of goods admitted." ***Radix Org., Inc. v. Mack Trucks, Inc.***, 602 F.2d 45, 48 (2d Cir. 1979). And, even where an admission does contain a specific quantity term, "the contract [i]s only enforceable as to the quantity of goods admitted to." ***Darrow v. Spencer***, 581 P.2d 1309, 1312 (Okla. 1978).

documents could be inspected at counsel's offices, and a statement that "[t]he only document involving termination is the letter dated January 10, 1992." As before, none of the responses--including the January 10 letter, which we have discussed in some detail above--either state a quantity term or indicate the formation of a requirements contract.

Marvelle also claims that Hamilton Beach's motion *in limine* is itself an admission. This argument, too, is unavailing for Hamilton Beach never admitted to an agreement regarding a specific quantity of blenders in its motion. Indeed, it expressly denied the existence of *any* "blue-blender" contract.[10]

Finally, Marvelle argues that Hamilton Beach's general counsel admitted the existence of the contract at the hearing on its pretrial motion when he stated: "[O]ur contention is that an agreement existed, and it had to do with brown blenders." Counsel then stated that any blue-blender "agreement" between Marvelle and Hamilton Beach "[wa]s strictly oral," that it "[wa]s not an agreement," and that "[no] writing[s] ... mention anything at all about a blue agreement."

We are satisfied that counsel's statement does not approach the type of "unqualified or unconditional admission" Marvelle must show in order to prevail on its argument that Hamilton Beach breached a contract to supply it with blue blenders. *See* ***Ivey's Plumbing***, 463 F. Supp. at 550. Indeed, considered in context, the statement flatly denies the existence of any contract for blue blenders. None of the purported "admissions" offered by Marvelle satisfy § 402.201(3)(b), STATS.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

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[10] As we have noted above, Hamilton Beach's pretrial motion, commenting on Marvelle's allegation that Hamilton Beach had contracted with Marvelle to develop and produce a blue-blender package, stated: "[Marvelle] concedes that this alleged agreement is oral, that no writing exists to confirm Marvelle's specifications, and that the alleged agreement itself is at best an `implied' `understanding.'"