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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RIVERISLAND COLD STORAGE, INC. et al., Plaintiffs and Appellants, v. FRESNO-MADERA PRODUCTION CREDIT ASSOCIATION, Defendant and Respondent.	F058434 (Super. Ct. No. 08CECG01416) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Adolfo M. Corona, Judge.

Wild, Carter & Tipton and Steven E. Paganetti for Plaintiffs and Appellants.

Lang, Richert & Patch, Scott J. Ivy and Ana de Alba for Defendant and Respondent.

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Plaintiffs appeal from a judgment entered against them after defendant's motion for summary judgment was granted. Plaintiffs' complaint alleged causes of action including fraud, negligent misrepresentation, rescission and reformation; plaintiffs alleged they signed a written agreement with defendant, but they were induced to do so by defendant's oral misrepresentations of the terms contained in the written agreement,

made at the time of execution of the agreement. The court granted defendant's motion for summary judgment after ruling that plaintiffs' evidence of misrepresentations was inadmissible pursuant to the parol evidence rule, and therefore plaintiffs had not presented admissible evidence raising a triable issue of material fact that would prevent entry of judgment against them. We find the evidence fell within the fraud exception to the parol evidence rule and should have been admitted to raise a triable issue of material fact in opposition to defendant's motion. Accordingly, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On January 1, 2007, plaintiffs' operating loan from defendant went into default when they failed to make a required payment. On March 26, 2007, plaintiffs and defendant entered into a written forbearance agreement, in which defendant agreed to temporarily forbear from pursuing collection and plaintiffs agreed to make specified payments and provide additional security for the debt. The written agreement provided that defendant would forbear from collection until July 1, 2007, and plaintiffs would pledge as additional collateral certain real property, which included plaintiffs' residence and a truck yard. Plaintiffs failed to make the payments required by the March 26, 2007, agreement and defendant recorded a notice of default. Plaintiffs subsequently repaid the loan.

On April 2, 2008, plaintiffs filed their complaint, alleging causes of action including fraud, negligent misrepresentation, rescission, and reformation. They alleged that, two weeks prior to their execution of the written forbearance agreement, defendant's senior vice president, David Ylarregui, met with them and represented defendant would agree to forbear from collection for two years if plaintiffs would pledge two orchards as additional security. On March 26, 2007, at the time of execution of the written agreement, Ylarregui told plaintiffs the agreement would be for two years and would include as security only the two orchards, and not plaintiffs' residence or the truck yard.

Plaintiffs alleged they did not read the written agreement, but relied on Ylarregui's representations of its terms in executing the written agreement. They alleged defendant's fraud and misrepresentation damaged plaintiffs' credit, and defendant's notice of foreclosure interfered with plaintiffs' ability to sell their real property.

Defendant moved for summary judgment, asserting it was entitled to judgment on plaintiffs' first four causes of action because plaintiffs failed to perform in accordance with the written forbearance agreement, and they were barred by the parol evidence rule from presenting evidence of any prior or contemporaneous oral agreement that contradicted the terms of the written agreement. Plaintiffs opposed the motion, presenting evidence that, at the time of execution of the forbearance agreement, Ylarregui gave them the agreement to sign and stated that it contained a forbearance of two years and only included the two orchards as additional security. They asserted the fraud exception to the parol evidence rule applied, making the parol evidence of defendant's factual misrepresentations admissible. The trial court granted defendant's motion, concluding the parol evidence rule barred admission of evidence of an oral agreement that directly contradicted the terms of the written agreement, and therefore plaintiffs had failed to raise a triable issue of material fact to prevent entry of judgment in defendant's favor. Plaintiffs appeal.

DISCUSSION

I. Standard of Review

"We review the trial court's decision [on a motion for summary judgment] de novo, considering all of the evidence the parties offered in connection with the motion[,] except that which the court properly excluded." (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476.) Plaintiffs challenge the ruling on the summary judgment motion only as to the first four causes of action: fraud, negligent misrepresentation, rescission, and

reformation.[1] Those causes of action were all dependent on the existence of oral agreements or representations made by defendant that were materially different from the provisions of the written contract. In support of its motion for summary judgment, defendant presented evidence that it entered into a written forbearance agreement with plaintiffs on specified terms, and plaintiffs breached that agreement by failing to make payments as required. In opposition, plaintiffs offered evidence of oral statements made by Ylarregui before or at the time plaintiffs executed the written agreement, which they assert misrepresented the terms of the written agreement. The trial court excluded evidence of the oral statements based on the parol evidence rule, and plaintiffs presented no other evidence with which to raise a triable issue of material fact. Thus, the only issue presented by this appeal is whether the evidence of defendant's oral statements, proffered by plaintiffs in opposition to the motion, was properly excluded by the trial court. "Whether the parol evidence rule applies in a given set of circumstances is a question of law, which we consider de novo to the extent that no evidentiary conflict exists. [Citations.]" (*EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 176.)

II. Parol Evidence Rule

The parol evidence rule is codified at Civil Code section 1625 and Code of Civil Procedure section 1856.[2] It generally prohibits the introduction of extrinsic evidence,

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[1] The trial court found defendant was entitled to summary judgment on the other causes of action on other grounds, and the appeal does not challenge the disposition of those causes of action.

[2] The basic rule is stated in Code of Civil Procedure section 1856, subdivision (a), as follows: "Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." Civil Code section 1625 provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

including evidence of any prior or contemporaneous oral agreement, to vary, alter or add to the terms of an integrated written instrument. (*Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1433 (*Alling*).) "Although the rule results in the exclusion of evidence, it 'is not a rule of evidence *but is one of substantive law*.' [Citation.]" (*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 343 (*Casa Herrera*).) "The rule derives from the concept of an integrated contract, and is based on the principle that when the parties to an agreement incorporate the complete and final terms of the agreement in a writing, such an 'integration' in fact becomes the complete and final contract between the parties, which may not be contradicted by evidence of purportedly collateral agreements.… 'Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself.'" (*Alling, supra,* 5 Cal.App.4th at pp. 1433-1434.) "'[T]he act of executing a written contract … *supersedes* all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.' [Citation.]" (*Casa Herrera, supra,* 32 Cal.4th at p. 344.)

A. Integration

An integrated contract is "a complete and final embodiment of the terms of an agreement." (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225.) "The crucial issue in determining whether there has been an integration is whether the parties intended their writing to serve as the exclusive embodiment of their agreement." (*Id*. at pp. 225-226.) In making this determination, "the court may consider all the surrounding circumstances, including the prior negotiations of the parties. [Citation.]" (*Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1002 (*Banco do Brasil*).) The forbearance agreement contains detailed terms and appears to be a complete agreement. It also contains an integration clause providing that "this agreement constitutes the entire agreement between the parties with respect to the matters covered in this agreement."

The trial court found the forbearance agreement is integrated, and neither party challenges that finding on appeal. Whether a writing is an integration is a question of law, which we review de novo. (Code Civ. Proc., § 1856, subd. (d); *Wagner v. Glendale Adventist Medical Center* (1989) 216 Cal.App.3d 1379, 1386.) We agree that the forbearance agreement is an integrated agreement, to which the parol evidence rule applies.

B. Fraud exception

Because the written forbearance agreement is integrated, the parol evidence rule makes extrinsic evidence that would vary, alter, or add to the terms of the writing inadmissible, absent some exception to the rule. Plaintiffs contend the fraud exception applies and the extrinsic evidence they offered should have been admitted. The statutory exception provides: "This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or *to establish illegality or fraud*." (Code Civ. Proc., § 1856, subd. (g), italics added.) "[P]arol evidence of fraudulent representations is admissible as an exception to the parol evidence rule to show that a contract was induced by fraud. [Citations.]" (*Richard v. Baker* (1956) 141 Cal.App.2d 857, 863.)

In *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258 (*Pendergrass*), the court limited application of the fraud exception, concluding it did not authorize admission of parol evidence to prove an oral promise made without intent to perform it, where the promise directly contradicted the provisions of the written agreement. In *Pendergrass*, plaintiff sued to recover on a promissory note. Defendants asserted fraud in the inducement; they contended they executed the note based on plaintiff's representation that, if they did so, plaintiff "would 'extend' or 'postpone' all payments for the period of one year." (*Id*. at p. 263.) Defendants alleged this representation was a promise made by

plaintiff without any intention of performing it. The alleged promise was, however, "in direct contravention of the unconditional promise contained in the note to pay the money on demand." (*Ibid.*) The court concluded evidence of the oral promise was inadmissible.

> "Our conception of the rule which permits parol evidence of fraud to establish the invalidity of the instrument is that it must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing." (*Pendergrass, supra*, 4 Cal.2d at p. 263.)

The court explained:

> "'It is reasoning in a circle, to argue that fraud is made out, when it is shown by oral testimony that the obligee contemporaneously with the execution of a bond, promised not to enforce it. Such a principle would nullify the rule: for conceding that such an agreement is proved, or any other contradicting the written instrument, the party seeking to enforce the written agreement according to its terms, would always be guilty of fraud.'" (*Pendergrass, supra*, 4 Cal.2d at p. 263.)

The rule has been criticized, but it continues to be applied in cases of promissory fraud. In *Price v. Wells Fargo Bank* (1989) 213 Cal.App.3d 465, plaintiffs alleged they entered into a loan agreement with defendant after defendant promised to make the loan with an interest rate less than that being offered by another bank. By the time the promissory note was ready for signing, however, interest rates had risen and both banks were demanding a higher rate. After noting that *Pendergrass, supra,* "perceived a conflict between the [parol evidence] rule and promissory fraud relating to the principal terms of an agreement" (4 Cal.2d at pp. 483-484), the court discussed that decision at length:

> "The *Pendergrass* decision has been severely criticized by scholarly commentators. [Citations.] While applying the decision, the court in *Coast Bank v. Holmes* (1971) 19 Cal.App.3d 581, 591, termed the *Pendergrass* distinction between different forms of promissory fraud as being 'tenuous' and 'inconsistent' with tort principles. The court opined, '[t]he recent

decisions liberalizing the parol evidence rule cast some doubt on the continued vitality of the distinction.' [Citations.]

"We must accept *Pendergrass*, however, as the governing law. The first (and sufficient) reason is that, since the decision has never been overruled, it may not be challenged by an appellate court. [Citation.] … Moreover, despite scholarly criticisms, the decision is based on an entirely defensible decision favoring the policy considerations underlying the parol evidence rule over those supporting a fraud cause of action.

"The scholarly commentators correctly point out that there is no conceptual inconsistency between promissory fraud and the parol evidence rule. Promissory fraud requires a showing of tortious intent and reliance in addition to proof of an oral promise; the parol evidence rule is concerned only with proof of an oral promise. The two legal concepts can logically coexist. The policy considerations underlying promissory fraud apply fully when the promise relates to the main terms of the agreement. By limiting promissory fraud to promises relating to collateral matters, not at variance with the principal obligations, *Pendergrass* compromises the objectives of tort law in a manner that is not strictly necessary to give effect to the parol evidence rule.

"On the other hand, if loosely construed, the concept of promissory fraud may encourage attempts to convert contractual disputes into litigation over alleged fraud. To be sure, fraud requires proof of the additional elements of intent and reliance. But these can so easily be inferred from any broken promise that promissory fraud may in fact open the door to attempts to enforce oral promises through tort causes of action under the guise of a promise made without intention to perform. A broad doctrine of promissory fraud may allow parties to litigate disputes over the meaning of contract terms armed with an arsenal of tort remedies inappropriate to the resolution of commercial disputes. Thus, the practical impact of alleged promissory fraud may in fact undermine the policies of the parol evidence rule.

"In short, *Pendergrass* compromises the policies of tort law, but a contrary rule would compromise those of the parol evidence rule. How one weighs the conflicting considerations will depend largely on the importance one attaches to the respective policies. In *Pendergrass*, the Supreme Court gave priority to the policies of the parol evidence rule. While the decision was by no means logically inevitable, it represents a rational policy choice

> that should be reconsidered only by the Supreme Court itself." (*Price v. Wells Fargo Bank, supra,* 213 Cal.App.3d at pp. 484-486.)

In *Banco Do Brasil*, the bank sued defendants to recover on promissory notes and a written guaranty. (*Banco do Brasil, supra,* 234 Cal.App.3d at p. 981.) Defendants cross-complained against the bank, asserting fraud and claiming the bank orally promised to extend them a $2 million line of credit, which it failed to do. (*Id*. at pp. 982-983.) The bank's request for exclusion of parol evidence of the alleged line of credit agreement was denied, and defendants prevailed on their cross-complaint. (*Id*. at pp. 983-984.) The appellate court reversed. It concluded evidence of the alleged oral agreement was not admissible as evidence of a false promise made to induce defendants to enter into the agreement. "While it is true that a recognized exception to the parol evidence rule permits evidence of fraud in order to nullify the main agreement [citation], that rule has no application where '"promissory fraud" is alleged, unless the false promise is independent of or consistent with the written instrument. [Citations.] It does not apply where, as here, parol evidence is offered to show a fraudulent promise directly at variance with the terms of the written agreement. [Citations.]' [Citations.]" (*Id.* at p. 1009, fn. omitted.) The court observed that *Pendergrass* "made a very defensible policy choice which favored the considerations underlying the parol evidence rule over those supporting a fraud cause of action." (*Banco do Brasil,* at p. 1010.) It added:

> "While [the *Pendergrass*] rule has been subjected to some scholarly criticism, we believe that the policy decision made by the court in *Pendergrass* is the better one. In explaining how a broad application of the concept of promissory fraud would undermine the policies of the parol evidence rule and encourage attempts to convert contractual disputes into fraud litigation, one court commented, 'A broad doctrine of promissory fraud may allow parties to litigate disputes over the meaning of contract terms armed with an arsenal of tort remedies inappropriate to the resolution of commercial disputes.' [Citation.] We concur with that view." (*Banco do Brasil, supra,* 234 Cal.App.3d at p. 1010, fn. omitted.)

In *Bank of America v. Lamb Finance Co.* (1960) 179 Cal.App.2d 498 (*Lamb Finance*) and *Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856 (*Wang*), the court followed the *Pendergrass* rule where the party seeking admission of the parol evidence alleged the other party induced execution of the written agreement by misrepresenting the terms it contained. In both cases, the court applied the rule without distinguishing between promises made without intent to perform and factual misrepresentations as to the content of the written contract. The parties did not raise, and the court did not discuss, this issue.

In *Lamb Finance*, defendant signed a guarantee of a promissory note. She testified a representative of plaintiff bank represented at the time she signed that she was not guaranteeing the note with any of her personal property and it was only a corporate note. The court observed that, "if, to induce one to enter into an agreement, a party makes an independent promise without intention of performing it, this separate false promise constitutes fraud which may be proven to nullify the main agreement; but if the false promise relates to the matter covered by the main agreement and contradicts or varies the terms thereof, any evidence of the false promise directly violates the parol evidence rule and is inadmissible." (*Lamb Finance*, *supra*, 179 Cal.App.2d at p. 502.) Parol evidence of promissory fraud is "'only permissible in the case of a promise to do some additional act which was not covered by the terms of the contract.'" (*Ibid*.) Because the alleged false promise related to the identical matter covered by the written agreement and directly contradicted the plain language of the guarantee, evidence of the oral statements was properly stricken as incompetent under the parol evidence rule. (*Id*. at pp. 502-503.)

In *Wang*, plaintiffs sued for damages for fraud in the purchase of a vehicle from defendant. Plaintiffs had gone to defendant intending to purchase a vehicle with a down payment and the balance ($15,000) to be financed through a short-term (two month) loan.

Instead, defendant prepared a lease agreement which required plaintiffs to pay the balance in 60 monthly payments with a final payment of $15,000 to purchase the vehicle at the end of the lease. (*Wang, supra,* 97 Cal.App.4th at p. 863.) The lease required plaintiffs to pay $22,000 more than if they had purchased the vehicle with the short-term loan. Defendant induced plaintiffs to sign the lease by misrepresenting that they could pay off the contract in two months or at any time without a prepayment penalty and there were no contractual differences between a loan and a lease. (*Ibid*.) The trial court granted defendant's summary judgment motion, on the ground the parol evidence rule precluded admission of evidence of the defendant's alleged oral misrepresentations. Following the *Pendergrass* rule, the appellate court agreed, concluding the fraud exception did not apply because the alleged oral representations directly contradicted the terms of the written agreement.[3] (*Wang,* at pp. 873, 876.)

Just two years after *Pendergrass* was decided, the California Supreme Court issued its decision in *Fleury v. Ramacciotti* (1937) 8 Cal.2d 660 (*Fleury*), indicating admissibility of parol evidence to prove that fraudulent representations as to the content of a written agreement induced its execution survived *Pendergrass*. In that case, defendant Ramacciotti executed a promissory note and mortgage. Babin, the executor of the estate of the payee, allowed the statute of limitations to run on his action on the note. Babin discussed the matter with his friend, Ramacciotti, and Ramacciotti offered to waive the defense of the statute of limitations provided no deficiency judgment would be entered against him. Ramacciotti signed a renewal note and mortgage on which he later defaulted. After Babin's death, Ramacciotti discovered Babin had obtained a decree of foreclosure and deficiency judgment against him. He had the judgment set aside and

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3 The court reversed the judgment on causes of action alleging violation of the Consumers Legal Remedies Act and the unfair business practices law, finding they were not barred by the parol evidence rule. (*Wang, supra,* 97 Cal.App.4th at pp. 869-871.)

defended, alleging he signed the new note without reading it, in reliance on Babin's representation that it contained provisions preventing a deficiency judgment from being entered against him. The trial court found in Ramacciotti's favor and the appellate court affirmed.

The evidence supporting the trial court's judgment was "largely the testimony of defendant Ramacciotti as to conversations between himself and Babin." (*Fleury, supra*, 8 Cal.2d at p. 661.) Nonetheless, it was not barred by the parol evidence rule. "Plaintiff's contention that the evidence was admitted in violation of the parol evidence rule is of course untenable, for although a written instrument may supersede prior negotiations and understandings leading up to it, fraud may always be shown to defeat the effect of an agreement." (*Id*. at p. 662.) The court also rejected plaintiff's claim that Ramacciotti could not prove fraud "because of his carelessness in failing to read the renewal note." (*Ibid*.) "[W]here failure to read an instrument is induced by fraud of the other party, the fraud is a defense even in the absence of fiduciary or confidential relations." (*Ibid*.)

Plaintiffs cite *Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375 (*Greene*) in support of their contention that the *Pendergrass* rule does not apply to exclude parol evidence that execution of a written agreement was induced by a misrepresentation of the content of the written agreement, which was made at the time the written agreement was executed. In *Greene,* the defendant claimed she agreed to guarantee a single loan. On the day she signed the guarantee agreement, the bank's representative stated the guarantee related only to that loan; that loan's number and amount were specified at the top of the guarantee agreement. (*Greene, supra,* at p. 378.) In the fine print of the written agreement, however, the "'Indebtedness'" to be guaranteed was defined as "'all of Borrower's liabilities, obligations, debts, and indebtedness to Lender,'" which included four loans. (*Id*. at pp. 380-381.) The trial court granted summary judgment in

favor of the plaintiff, after sustaining the plaintiff's objections to the defendants' parol evidence of the misrepresentation. The appellate court reversed.

The court held that, even though the bank's alleged misrepresentation was directly contrary to the express terms of the contract, the evidence was admissible under the statutory exception for fraud. (*Greene, supra*, 110 Cal.App.4th at pp. 385-387; Code Civ. Proc., § 1856, subd. (g).) "'It is … settled that parol evidence of fraudulent representations is admissible as an exception to the parol evidence rule to show that a contract was induced by fraud.' [Citations.]" (*Greene,* at p. 389.) Although *Pendergrass* limited the fraud exception, making it inapplicable when the evidence is offered to show a promise contradicting the written agreement, the *Greene* court declined to extend that limitation to include evidence of a misrepresentation of fact. (*Greene*, at pp. 389-390, 396.) It discussed the *Pendergrass* rule:

> "In short, the perceived necessity for this promissory fraud limitation lies in the recognition that without it, the fraud exception could swallow the rule. Any party who claimed a promise contrary to that contained in the contract could claim that the contrary contract constituted proof of promissory fraud—that is, that the earlier or contemporaneous promise was false and made without any intention of performing it, as evidenced by its absence in the subsequent agreement. Although this judicial rule has been criticized as inconsistent with the unqualified language in the statutory exception for fraud [citation], we are bound by the California Supreme Court's ruling. [Citation.]
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> "But we disagree that the *promissory* fraud limitation precludes admission of a misrepresentation of *fact* over the content of a physical document at the time of execution. '"Promissory fraud" is a promise made without any intention of performing it.' [Citation.] The Supreme Court's limitation on the fraud exception expressly bars 'a promise directly at variance with the promise of the writing' [citation], not a misrepresentation of fact. [Citations.]" (*Greene, supra,* 110 Cal.App.4th at pp. 390-391.)

The *Greene* court believed "a distinction between promissory fraud and misrepresentations of fact over the content of an agreement at the time of execution is a

valid one." (*Greene, supra*, 110 Cal.App.4th at p. 392.) It posited three justifications for holding the fraud exception applicable to such misrepresentations of fact: "The language of the statutory exception is unqualified and does not limit the misrepresentations covered; it is not necessary to extend *Pendergrass* to cover factual misrepresentations over the content of the writing in order to safeguard the vitality of the parol evidence rule; and a further extension of *Pendergrass* would unduly restrict the statutory exception for fraud." (*Greene,* at p. 392.) It explained: "In the case of promissory fraud, an earlier or contemporaneous promise is proffered in variance with the promises in the agreement; evidence of such a contrary promise goes to the heart of that which the parol evidence rule is intended to protect against. But a claim of a mischaracterization of the content of the physical document to be signed is more narrow in time and circumstance: It can only occur at the time of signing …. And the need to prove the element of reasonable reliance in order to successfully make out a misrepresentation claim also protects against abuse: In light of the general principle that a party who signs a contract 'cannot complain of unfamiliarity with the language of the instrument' [citation], the defrauded party must show a reasonable reliance on the misrepresentation that excuses the failure to familiarize himself or herself with the contents of the document." (*Id*. at p. 393.) The court acknowledged "there can occasionally be a fine line between a *promise* that induces an agreement and a misrepresented *fact* concerning the physical content of an agreement at the time of signing" (*id.* at p. 392), but concluded the *Pendergrass* limitation on the fraud exception "must not be expanded so as to undermine the vitality of statutory fraud exception itself." (*Greene,* at p. 396.)

The court in *Continental Airlines, Inc. v. McDonnell Douglas Corp*. (1989) 216 Cal.App.3d 388 (*Continental*) also distinguished between precontract oral promises and statements of fact. It applied the *Pendergrass* exclusion only to promises made prior to execution of the written contract and not to factual misrepresentations that were contrary

to the provisions of the written contract. It concluded statements made orally and in precontract promotional sales brochures that "'[t]he fuel tank will not rupture under crash load conditions'" were promises that contradicted the language of the contract. (*Continental, supra,* at p. 418, italics omitted.) In light of *Pendergrass*, those statements were inadmissible to prove promissory fraud. (*Continental,* at p. 421.)

Statements made in the promotional sales brochures that "'[t]he landing gear, flaps and wing engines/pylons are designed for wipe-off without rupturing the wing fuel tank'" and "the main landing gear is designed to break away from the wing structure without rupturing fuel lines or the integral wing fuel tank" were properly admitted. (*Continental, supra,* 216 Cal.App.3d at p. 422, italics omitted.) They were analyzed as factual misrepresentations which were admissible pursuant to the fraud exception to the parol evidence rule even if they contradicted the provisions of the contract. (*Id.* at pp. 422-424.) Although the agreement was integrated, factual representations at variance with the written agreement were not barred, because to do so would nullify the fraud exception. (*Id*. at p. 424.) "[T]he clear mandate of our [L]egislature [is] that, when fraud is alleged, the parol evidence rule does not apply, and evidence of precontract representations which vary or contradict the terms of an integrated contract [is] admissible. [Citations.] [¶] The theory of the exception is that such evidence does not contradict the terms of an effective integration, since it shows the purported instrument has no legal effect. [Citation.]" (*Id.* at pp. 427-428.)

We agree with *Greene* and *Continental* that parol evidence of a prior promise made without any intention of performing it that directly contradicts the provisions of the written contract must be distinguished from parol evidence of a contemporaneous factual misrepresentation of the terms contained in a written agreement submitted for signing. *Pendergrass* stated that, to come within the fraud exception, parol evidence "must tend to establish some independent fact or representation, *some fraud in the procurement of the*

instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing." (*Pendergrass*, *supra*, 4 Cal.2d at p. 263, italics added.) Misrepresentation of the terms of the written contract, in order to induce the other party to sign it, constitutes "fraud in the procurement of the instrument" (*ibid.*), which *Pendergrass* and *Fleury* recognized as an appropriate circumstance for application of the fraud exception to the parol evidence rule.

The *Pendergrass* court's rationale for excluding evidence of a prior oral promise that directly contradicts the promises contained in the written agreement depended on the nature of promissory fraud. The court was concerned that, if evidence of a prior oral promise contrary to the promises made in the written agreement were admissible as an exception to the parol evidence rule, such oral promises would be admissible in every case where an oral agreement preceded the final written contract, thereby nullifying the parol evidence rule. This would be so because the party seeking to admit the evidence could always argue that the failure to include the prior oral promise in the written contract was evidence of an intention not to perform it. (*Pendergrass*, *supra*, 4 Cal.2d at p. 264.)

The Supreme Court has not extended the *Pendergrass* rule to fraud committed by misrepresenting the content of a written agreement in order to induce another to sign it. Relief based on this type of fraud would not be available in every case. It would be available only when one party made a false statement about the terms contained in the contract after the written contract was prepared, and the other party reasonably relied on that statement and was thereby induced to sign the written contract without discovering that the actual provisions were not as represented. As pointed out in *Continental*, the evidence would not be admitted to alter, vary or add to the provisions of an integrated agreement; rather, it would be admitted to prove the written contract was not the actual, integrated agreement of the parties.

We conclude that the *Pendergrass* court did not intend its limitation on the fraud exception to the parol evidence rule to extend beyond evidence of promissory fraud. Like the *Greene* court, we decline to apply its limits where the party seeking admission of the parol evidence has alleged that the other party misrepresented the content of the written contract and thereby induced execution of the contract. Plaintiffs' extrinsic evidence of the alleged misrepresentations made by defendant's representative should have been admitted in opposition to defendant's motion for summary judgment. That evidence raised a triable issue of material fact that prevented entry of summary judgment in favor of defendant on the first four causes of action of the complaint.

DISPOSITION

The judgment is reversed with directions to vacate the order granting summary judgment and to enter a new order denying summary judgment, and granting defendant summary adjudication of the fifth, sixth, and seventh causes of action only. Plaintiffs are entitled to their costs on appeal.

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HILL, J.

WE CONCUR:

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LEVY, Acting P.J.

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KANE, J.