“It’s Always Best to Start at the Beginning”: Determining Contract Terms Where Breach is Alleged

It is not uncommon for me to answer calls from judicial officials grappling with breach of contract cases where the official believes there has likely been a breach, but they are unsure which specific term has been breached. Breach of contract cases can be intimidating because they often involve large volumes of conflicting evidence. The judicial official must decide what evidence to exclude, what evidence to admit, and how much weight to give admitted evidence. In cases involving oral contracts, determining the parties’ agreement becomes even more difficult, putting a stronger emphasis on assessing the credibility of witness testimony. However, a lot of the angst over breach of contracts cases can be alleviated by developing a comprehensive, step-by-step approach to analyzing the evidence, in much the same way that judicial officials evaluate evidence to determine if a crime has been committed and that the person arrested committed it.

Framework for a breach of contract claim.

A claim for breach of contract requires proof of the

1. Existence of a valid contract between the plaintiff and the defendant,
2. Specific terms breached,
3. Facts constituting the breach, and
4. Amount of damages suffered by the plaintiff as a result.

Cantrell v. Woodhill Enterprises, Inc., 273 N.C. 490 (1968).

When my predecessor, Dona Lewandowski, taught contracts law to magistrates, she proposed the following framework which I still use:

1. Is there a contract?
2. Who are the parties?
3. What are the terms?
4. Did the defendant breach the contract?
5. What damages is the plaintiff entitled to recover?

Dona believed, and I agree, that by working through these questions in sequential order, judicial officials increase the chance of getting to the right outcome. Focusing on whether a breach occurred before establishing the existence of a contract, and its terms and parties, increases the likelihood of a wrong result. Without a determination of what the parties agreed to, it is impossible for a judicial official to determine if a breach has occurred. For example, if a landlord files a summary ejectment action against the tenant for breach of the lease agreement alleging the breach was a pet on the property, the judicial official cannot determine if a breach has occurred without

first finding there was a provision in the lease prohibiting the tenant from having a pet.

You cannot determine whether a breach has occurred without first determining what the terms are.

If you are a judicial official who has called me with a question about a breach of contract case, I have likely raised this point with you. Once you determine that the parties have a valid contract and that the parties in front of you are the ones bound by the contract, then you ascertain the terms of the contract. For the remainder of this post, I am going to focus on question #3: what are the contract terms?

A valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement. *Chaisson v. Simpson*, 195 N.C. App. 463 (2009). The mechanism of offer and acceptance normally evinces this mutual assent and the parties' intent. *Id*. Questions about whether the parties agreed to terms and what constitutes those terms are for the finder of facts to decide. *Id*. For magistrates in small claims and judges conducting bench trials, this means that the judicial official is tasked with determining whether the parties reached an agreement as to all the essential terms of the contract.

The starting point to determine contract terms.

For contracts purposes, the beginning is the written contract between the parties, if one exists. "As a general rule, whenever the contents of a writing are to be proved, the best evidence rule requires a party to produce the original writing, unless nonproduction is excused." *Sutton v. Sutton*, 35 N.C. App. 670, 674 (1978). *See also* (rules of evidence setting out the requirement for the original writing, recording, or photograph and exceptions to that requirement). Generally, the meaning of a contract is gathered from its four corners. *McLean v. Spaulding*, 273 N.C. App. 434 (2020) (citations omitted). The court should look to the plain meaning of the written terms in a contract to determine the intent of the parties. *Id*.

When considering a written contract, it is important to be aware of the parol evidence rule and its impact on the admissibility of certain evidence. The parol evidence rule "prohibits the consideration of evidence as to anything which happened prior to or simultaneously with the making of a contract which would vary the terms of the agreement." *Harrell v. First Union Nat. Bank*, 76 N.C. App. 666, 667 (1985). Testimony that varies, adds to, or contradicts the written terms of the contract is not admissible, and objections to admitting it should be sustained. In small claims court where objections are unlikely, the magistrate should not give any weight to testimony that violates the parol evidence rule.

Two common situations where the parol evidence rule does not bar admission of extrinsic evidence are to explain ambiguous terms and to show subsequent modifications. When the terms of the written contract are susceptible to more than one interpretation, or an ambiguity arises, or the intent

and object of the written contract cannot be ascertained from the plain language of the contract, parol evidence may be introduced to show what the parties meant at the time they made the contract. *Root v. Allstate Ins. Co*., 272 N.C. 580 (1968). In the *Root* case, it was unclear from the lease whether the tenant was entitled to use the basement. This ambiguity opened the door for the introduction of parol evidence to aid in determining what property the parties intended to include in the written lease. *Id*.

The parol evidence rule has no application to agreements, whether oral or written, made subsequent to the execution of the written contract. *Hanover Co. v. Twisdale*, 42 N.C. App. 472, 476 (1979). In *Hanover*, the parties entered into a written contract for the plaintiff to provide labor and materials for work done on the defendants' property. *Id*. The defendants' agent authorized the use of additional equipment that was necessary for extra work that had to be done over and above the contract. *Id*. At trial, the defendants objected to the admission of evidence of the contract modifications on the basis of the parol evidence rule. *Id*. The Court of Appeals held that the challenged testimony was not barred by the parol evidence rule because it dealt with modifications subsequent to the making of the written contract. *Id*. Subsequent modifications to the original written contract are themselves new agreements which must contain the essential elements of a contract. Parties are free to modify their agreements, and the court should be able to hear evidence about these new agreements to determine what terms the parties were operating under at the time of the alleged breach.

Techniques for analyzing oral contracts.

If the contract at issue is an oral agreement, then the judicial official must rely on witness testimony as to the contents of the contract. There is no rule that requires judicial officials to give oral testimony less weight than documentary evidence. In practice, however, judicial officials often feel less comfortable determining the terms of an oral agreement. Some judicial officials will refer to the evidence as "he said-she said" and wonder how they are supposed to determine who is telling the truth.

There are several ways to evaluate oral testimony that may help in determining who is telling the truth. First, the judicial official can review the evidence for corroboration. For example, if the plaintiff sues the defendant for money owed on a contract to purchase a television set, and the plaintiff testifies that they agreed the defendant would make six payments of $20 each, receipts and bank records showing the defendant did make some payments are helpful to corroborate the plaintiff's testimony. Even the slightest bit of corroboration increases the credibility of the witness.

Second, listen for consistency in the testimony. Questions to consider include:

- Does the testimony stay the same each time the party tells it?
- Are the party's responses consistent with previous testimony?
- Is the party's testimony consistent with documentary evidence or other witness accounts?

Finally, consider the vantage point of the party testifying. Questions to consider include:

- Was the party in a position to observe relevant facts?
- Did the party have a reason to pay close attention to the facts that form the substance of the testimony?
- Was the party under the influence of any impairing substances, or does the party have any conditions affecting his or her memory?
- Does the party have a motive to lie?

Often, we think that demeanor is the best indicator of whether someone is being honest. However, social science has produced evidence that behavioral cues relied upon by finders of fact to assess credibility (e.g., averting the gaze, stammering) are unhelpful and may be misleading. Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Credibility*, 72 Neb. L. Rev. 1157 (1993). Additionally, it is not necessarily a witness's confidence that tells us that the testimony is accurate, rather it is the witness's ability to testify consistently. Mark Bennett, *The Changing Science on Memory and Demeanor - and What it Means for Trial Judges*, 101 Judicature 60 (2017).

Final Thoughts

While analyzing a breach of contract case is not simple, using the framework suggested above will help judicial officials reach fair results. It is tempting to start with breach (after all it's right there in the name of the claim), but it is impossible to know whether there has been a breach without first determining the terms of the contract. Determining the terms of the contract requires judicial officials to make hard calls about the admissibility and weight of the evidence presented. When judicial officials feel like the evidence does not clearly show who is right, I remind them that if they are not persuaded by the party with the burden of proof, the party with the burden of proof loses.