

OPINION

No. 04-10-00041-CV

DYNEGY, Inc.,

Appellant

v.

Terry W. **YATES**, Individually, and Terry W. Yates, P.C.,

Appellees

From the 127th District Court, Harris County, Texas

Trial Court No. 2005-37892

Honorable Sharolyn P. Wood, Judge Presiding

Opinion by: Phylis J. Speedlin, Justice

Sitting: Catherine Stone, Chief Justice

Phylis J. Speedlin, Justice

Marialyn Barnard, Justice

Delivered and Filed: May 12, 2010

REVERSED AND RENDERED

Dynegy, Inc. appeals the trial court's judgment in favor of Terry W. Yates, Individually, and Terry W. Yates, P.C. (collectively "Yates") for fraud arising out of an oral contract for the payment of attorney's fees. Among other issues on appeal, Dynegy asserts the judgment must be reversed because Yates's claims are barred by the statute of frauds. We agree, and therefore reverse the trial court's judgment and render a take-nothing judgment in favor of Dynegy.

FACTUAL AND PROCEDURAL BACKGROUND

On June 10, 2003, Jamie Olis, a former officer of Dynegy, was indicted on multiple counts of securities fraud, mail and wire fraud, and conspiracy arising out of Olis's work on a complex financing transaction known as "Project Alpha" while he was Senior Director of Tax Planning in Dynegy's Tax Division. Pursuant to its articles of incorporation, the Dynegy Board of Directors passed a resolution in October 2002 that authorized the advancement of attorney's fees and expenses to certain officers and directors, including Jamie Olis, who were under investigation for their roles in Project Alpha. The resolution stated in relevant part that reasonable legal expenses arising out of Project Alpha were to be advanced to Olis upon receipt of (i) a signed statement that he had acted in good faith and in the corporation's best interests, with no reasonable cause to believe his conduct was unlawful, and (ii) a signed undertaking to repay the legal expenses if the Board ultimately determined he did not meet the standard of conduct required for indemnification. The Board resolution also provided, "such approval may be modified or revoked by this Board at any time as a result of changes in circumstances or further

analysis." Olis signed the written undertaking in January 2003, and agreed to repay his legal expenses if it was determined he did not meet the indemnification standard.

Ten days after his indictment, on June 20, 2003, Olis hired criminal defense attorney Terry W. Yates to defend him in the federal criminal prosecution and in the on-going civil investigation conducted by the Securities and Exchange Commission. Olis told Yates, and his associate Mark Clark, that Dynegy would be paying his legal fees. That day, Clark called Cristin Cracraft, an attorney in Dynegy's legal division, to confirm that Dynegy would pay Olis's legal fees and to discuss the payment procedure. During the phone call, Clark told Cracraft that Olis had hired Yates to represent him and asked for confirmation that Dynegy was paying Olis's legal expenses. Clark testified that Cracraft stated, "the Board has passed a resolution, so, yes, we are paying Jamie Olis's fees," and instructed Clark that the bills should be submitted to her. Cracraft stated the hourly rates, however, should be negotiated with Olis because he was Yates's client, not Dynegy. Cracraft's trial testimony about her conversation with Clark was consistent with Clark's version.

Yates testified that he made an oral agreement with Olis that he (Yates) would look solely to Dynegy for payment of his fees for representing Olis. Olis signed a written fee contract with Yates on June 20, 2003 specifying the hourly rates to be charged and agreeing that he (Olis) was financially responsible for payment of Yates's legal fees. Although Dynegy's name is not mentioned, the written contract contains a phrase stating "all fees are due when billed *unless other specific arrangements have been made.*" At trial, Yates testified this modifier was intended to refer to the fact that Dynegy was paying Olis's fees because Yates orally agreed with Olis never to look to him for payment of the legal

fees. Yates further testified that he called Cracraft on June 20, 2003, after he faxed her the written fee contract signed by Olis which showed the hourly rates to be charged. Yates stated that Cracraft confirmed that she received the fax and told him that Dynegy would pay Olis's legal fees directly to Yates through trial. Cracraft contradicted Yates's testimony about the phone call, however, stating that she never spoke to Yates on the phone that day, and in fact had never spoken to or met Yates as of the date of trial. Finally, Yates testified that he relied on Cracraft's oral promise that Dynegy would pay Olis's legal fees directly to Yates through trial.

On August 13, 2003, Dynegy hand-delivered a letter to Yates, addressed to Olis, stating that it would directly pay Yates his legal fees billed through August 17, 2003; after that date, Dynegy would pay the fees into an escrow account pursuant to a July 23, 2003 Board resolution. Dynegy paid Yates's June invoice for \$15,000 within two weeks of its submission, but then mistakenly escrowed the \$105,000 for Yates's July invoice; it was paid in November 2003 after Olis's criminal trial ended. Yates submitted a third and final invoice for \$448,556, representing all work performed from August 2003 through April 2004, including the November 2003 trial. Dynegy initially escrowed that amount, but later rejected payment of Yates's third invoice.

Yates filed suit against Dynegy to recover his unpaid attorney's fees.

Olis separately sued Dynegy in *Olis v. Dynegy Holdings, Inc., et al.*, Trial Court No. 2006-CI-12424, in the 57th Judicial District Court, Bexar County, Texas, alleging breach of contract and tort claims arising from Dynegy's alleged breach of its indemnification obligation owed to Olis. That case was transferred to Harris County.

[Close](#) Yates alleged breach

of contract and fraudulent inducement and sought benefit-of-the-bargain damages for both claims. After a three-week trial, a jury found in favor of Yates on both his breach of contract claim and his fraud claim, awarding him (a) \$448,556 in actual damages for breach of contract plus \$574,718 in attorney's fees through trial (plus appellate fees), and (b) \$500,000 in actual damages for fraud plus \$2 million in punitive damages. Yates elected to recover under his fraud claim. On May 25, 2007, the trial court entered judgment in favor of Yates for \$500,000 in actual damages, plus pre-judgment interest, and \$2 million in punitive damages, plus costs of court and post-judgment interest. Dynegy now appeals.

STATUTE OF FRAUDS

Dynegy raises several issues on appeal, including statute of frauds and sufficiency of the evidence as well as multiple trial errors. We begin by addressing the dispositive issue of statute of frauds.

Applicable Law and Standard of Review

The statute of frauds requires that certain types of promises or agreements, such as a promise by one person to pay the debt of another, be in writing and signed by the party to be charged. TEX. BUS. & COM. CODE ANN. § 26.01(a), (b)(2) (Vernon 2009). Generally, whether a contract falls within the statute of frauds is a question of law. *Bratcher v. Dozier*, 162 Tex. 319, 346 S.W.2d 795, 796 (1961); *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 149 (Tex. App.—Houston [1st] Dist. 2005, pet. denied). We review

questions of law *de novo*. *El Paso Natural Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 312 (Tex. 1999); *Rittmer v. Garza*, 65 S.W.3d 718, 722 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Whether a particular case falls within an exception to the statute of frauds, however, is generally a question of fact. *Gulf Liquid Fertilizer Co. v. Titus*, 163 Tex. 260, 354 S.W.2d 378, 384 (1962) (question of promisor's intent to be either primarily or secondarily responsible for another's debt is one for the fact finder if the words used are not clear and are susceptible to more than one meaning); *Otto Vehle & Reserve Law Officers Ass'n v. Brenner*, 590 S.W.2d 147, 152 (Tex. Civ. App.—San Antonio 1979, no writ) (plaintiff must establish facts which take oral contract outside statute of frauds).

Arguments on Appeal

Dyneyg argues the judgment below should be reversed and rendered because the oral agreement between Yates and Dyneyg was to answer for the debt of a third person, *i.e.*, Jamie Olis's legal fees, and therefore is unenforceable under the statute of frauds. Dyneyg notes that Yates failed to plead an exception to the statute of frauds, and failed to secure jury findings establishing an applicable exception to the statute of frauds. Therefore, Dyneyg asserts that both Yates's fraud claim seeking benefit-of-the-bargain damages and his alternative breach of contract theory are barred.

□ As a preliminary matter, Yates contends that because Dyneyg did not challenge the alternative breach of contract findings in its opening brief on the merits, it has waived any error regarding those findings. See TEX. R. APP.P. 38.1; *JHC Ventures, L.P. v. Fast Trucking, Inc.*, 94 S.W.3d 762, 773 n.9 (Tex. App.—San Antonio 2002, no pet.), *overruled on other grounds by Medical City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55 (Tex. 2008) (appellant waived issue on appeal by failing to raise it in brief on the merits and urging it for first time in reply brief). We disagree. Dyneyg's opening brief on the merits does address the contract claim. Specifically, Dyneyg argues that Yates's fraud claim is barred because he sought only benefit-of-the-bargain damages and enforcement of the underlying oral contract is barred by the statute of frauds.

[Close](#) Yates responds that the statute of frauds does not preclude his claims because: (1) Dyneyg failed

to meet its burden to prove the statute of frauds applies when it did not seek summary judgment or a directed verdict, or submit a jury question, on that issue; (2) the contract was completely performed by Yates; (3) the oral contract was performed within one year; and (4) Dynegy's promise to pay Yates's legal fees as incurred was not a promise to answer for the debt of another. We begin our analysis by examining whether the statute of frauds bars enforcement of the oral contract.

Initial Burden of Proof

The first question we must address is whether Dynegy met its burden of proof on its affirmative defense of the statute of frauds. Yates argues that Dynegy failed to meet its burden when it did not move for summary judgment or a directed verdict on that ground, and did not submit a jury question on the statute of frauds. We agree that statute of frauds is an affirmative defense which is waived if not pleaded. *See* TEX. R. CIV. P. 94; *Phillips v. Phillips*, 820 S.W.2d 785, 791 (Tex. 1991). In addition, the party pleading the statute of frauds bears an initial burden to establish its applicability. *Brenner*, 590 S.W.2d at 152. We disagree, however, that a motion for summary judgment or directed verdict is required. Here, Dynegy pleaded the affirmative defense of the statute of frauds in its answer, and moved for judgment notwithstanding the verdict on the basis of the statute of frauds, thereby preserving it as a ground for judgment as a matter of law. TEX. R. CIV. P. 301; *T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 220 (Tex. 1992).

Further, based on the evidence at trial, Dynegy met its initial burden of establishing the applicability of the statute of frauds. It is undisputed that Dynegy did not sign any written fee agreement with Yates. The only written fee agreement was between Yates and Olis, which also evidenced the attorney-client relationship between Yates and Olis—not Yates and Dynegy. The testimony by both Cracraft and Clark was consistent as to the fact that Cracraft orally agreed that Dynegy would pay Olis's legal fees to Yates based on the Board of Director's resolution and Olis's signed undertaking. Based on

the trial evidence, Yates sought and secured an affirmative jury finding that Dynegy agreed to pay Yates "for legal fees and expenses for representing Jamie Olis."

□ Jury Question No. 1 read as follows: "In June, 2003, did Dynegy Inc. agree to pay Terry Yates for legal fees and expenses for representing Jamie Olis?" The jury answered "Yes."

[Close](#) Yates was entitled to charge "legal fees and expenses" solely by virtue of his contractual relationship with Olis, his client. Under the statute of frauds, a promise by one person to answer for the debt of another is "not enforceable unless the promise or agreement, or a memorandum of it, is (1) in writing; and (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him." TEX. BUS. & COM. CODE ANN. § 26.01(a), (b)(2). Based on this record, we conclude Dynegy conclusively established the applicability of the statute of frauds, *i.e.*, that Dynegy's oral promise to pay Olis's legal fees to Yates was a promise by one person to answer for the debt of another. *Id.* Thus, absent an exception to the statute, Dynegy's affirmative defense based on the statute of frauds was established as a matter of law.

Burden Shifts

Once the applicability of the statute of frauds is established, the burden of proof then shifts to the plaintiff to establish facts which would take the oral contract out of the statute, thus allowing the oral promise to be enforceable. *Brenner*, 590 S.W.2d at 152. "Whether the circumstances of a particular case fall within an exception to the statute of frauds is generally a question of fact." *Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 705 (Tex. App.—Houston [1st Dist.] 1988, writ denied). The party seeking to benefit from an exception to the statute of frauds bears the burden of pleading and proving an exception. *Mann v. NCNB Tex. Nat'l Bank*, 854 S.W.2d 664, 668 (Tex. App.—Dallas 1992, no writ) (party must plead and prove exception to the statute of frauds). In addition, unless the evidence conclusively establishes an exception, a party must secure a favorable jury finding on the exception. TEX. R. CIV. P. 279; *Barbouti v. Munden*, 866 S.W.2d 288, 295 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (party claiming an

exception to the statute of frauds must secure a finding to that effect), *overruled on other grounds by Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1998).

On appeal, Yates argues the following exceptions to the statute of frauds apply: (1) the oral contract was completely performed by Yates; (2) the oral contract was performed within one year; and (3) Dynegy's promise to pay Yates's legal bills was not a promise to answer for the debt of another. However, Yates did not plead any of these possible exceptions in the trial court. Generally, a party seeking to avail itself of an exception to the statute of frauds must plead the exception or the exception is deemed waived. TEX. R. CIV. P. 94; *Mann*, 854 S.W.2d at 668; *cf. Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex. 1988) ("A defendant who has established that the suit is barred [by the statute of limitations] cannot be expected to anticipate the plaintiff's defenses to that bar.").

Additionally, Yates did not request a jury issue or obtain a jury finding regarding an exception that would take the oral agreement outside the statute of frauds. Dynegy called this omission to the attention of Yates and the trial court in its written charge objections, stating that the oral contract was barred by the statute of frauds because it was "a promise to pay the debt of another and it is unenforceable as a matter of law, and no jury question is being submitted to establish any exception to the statute." The trial court denied Dynegy's objections; Yates secured no jury finding on an exception. Thus, Yates has waived any exception to the statute of frauds by failing to plead it and by failing to obtain a favorable jury finding. *See* TEX. R. CIV. P. 94, 279; *W.H. McCrory & Co., Inc. v. Contractors Equip. & Supply Co.*, 691 S.W.2d 717, 720-21 (Tex. App.—Austin 1985, writ ref'd n.r.e.) (plaintiff waived any exception by failing to request findings).

Exceptions Argued by Yates on Appeal

Although the record establishes that the oral contract between Dynegy and Yates is barred by the statute of frauds, and Yates failed to obtain a finding on any exception, we will nevertheless address Yates's argument that three exceptions—raised for the first time on appeal—take the oral agreement out of the statute of frauds. As previously discussed, a party claiming an exception to the statute of frauds must generally secure a fact finding to that effect. *See Barbouti*, 866 S.W.2d at 295. However, if the evidence conclusively establishes an exception to the statute of frauds, the issue is not waived for failure to obtain a finding. *See* TEX. R. CIV. P. 279; *Parks v. Landfill Marketing Consultants, Inc.*, No. 14-02-01243-CV, 2004 WL 1351545, at *3 (Tex. App.—Houston [14th Dist.] June 17, 2004, pet. denied) (mem. op.). Thus, we must determine whether any of these three exceptions were conclusively established by the evidence.

1. Performance of Contract

Yates first contends that the statute of frauds does not apply as a matter of law because the evidence shows he completely performed the contract, while Dynegy only partially performed by failing to pay Yates the balance of his fees and expenses. Under this exception to the statute of frauds, contracts that have been partially performed may be enforced in equity if applying the statute of frauds would amount to a virtual fraud on the party acting in reliance on the contract. *Carmack v. Beltway Dev. Co.*, 701 S.W.2d 37, 40 (Tex. App.—Dallas 1985, no writ); *Sheffield v. Gibson*, No. 14-06-00483-CV, 2008 WL 190049, at *2 (Tex. App.—Houston [14th Dist.] Jan. 22, 2008, no pet.) (mem. op.). The performance exception requires evidence establishing the existence of an agreement and its terms, and that the party acting in reliance on the contract would suffer a substantial detriment for which he has no adequate

remedy, and the other party, if permitted to plead the statute of frauds, would reap an unearned benefit. *Carmack*, 701 S.W.2d at 40; *Callahan v. Walsh*, 49 S.W.2d 945, 948 (Tex. Civ. App.—San Antonio 1932, writ ref'd). To allow the second party to repudiate the contract and then assert the statute of frauds as a bar to paying for the other party's complete performance "would amount to a fraud, which the courts will not sanction." *Sheffield*, 2008 WL 190049, at *2; *Callahan*, 49 S.W.2d at 948.

Without deciding whether a performance exception applies in the context of an oral promise to pay the debt of another,

□ Dynegy notes that all the cases decided to date which apply this exception are confined to oral promises for the sale of real estate or oral promises that cannot be performed in a year—not oral promises to pay the debt of another. *See, e.g., Sheffield*, 2008 WL 190049, at *2 (oral modification of contract for sale of real estate); *Callahan*, 49 S.W.2d at 948 (sale of real property); *Estate of Kaiser v. Gifford*, 692 S.W.2d 525, 526 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (oral installment loan agreement was not barred because lender had fully performed). Dynegy further directs us to several treatises in support of its argument that the full performance exception does not apply in the context of debt of another. *See, e.g., WILLISTON ON CONTRACTS* § 27:19 (4th ed. 2008) ("It seems clear, however, than in no event can this notion of full performance by one party removing the contract from the Statute be applied to a promise to answer for the debt of another, since the creditor will always have fully performed, and the promisor urging the Statute will often, if not usually, simply (allegedly) owe money."); *CORBIN ON CONTRACTS* § 14.13 (rev. ed. 1997) ("full performance does not always entitle a plaintiff to enforce a contract within the statute"); *see also Gifford*, 692 S.W.2d at 526-27 (quoting the *RESTATEMENT (SECOND) OF CONTRACTS* § 130 (1982) for the rule that the full performance exception applies to oral promises that cannot be performed within a year, "unlike other provisions of the Statute").

Close we hold the performance exception is not conclusively established by this record. The rationale underlying application of the exception turns on proof that the plaintiff's performance is "unequivocally referable to the agreement and corroborative of the fact that a contract actually was made;" that is, it must be conduct that "could have been done with no other design than to fulfill the particular agreement sought to be enforced." *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 439-40 (Tex. App.—Dallas 2002, pet. denied). When conducting a no-evidence review of whether the performance was "unequivocally referable," the relevant issue is "not whether there is evidence that the performance could be referable to the contract which the party is trying to enforce; rather, it is whether there is evidence that the performance is *solely* referable to the contract." *Id.* at 440. Yates cannot meet this test because his proof of performance—his completed representation of Olis—is not "unequivocally referable" to the promise by Dynegy, but is equally referable to his contractual obligation to represent Olis.

2. Performed within One Year

Second, Yates argues that the statute of frauds is inapplicable because the oral agreement was capable of being performed within one year, and was in fact performed within one year. *Miller v. Riata Cadillac Co.*, 517 S.W.2d 773, 775 (Tex. 1974). “A contract that could *possibly* be performed within a year, however improbable performance within one year may be, does not fall within the statute of frauds.” *Beverick*, 186 S.W.3d at 149. This argument fails because it is irrelevant to the type of statute of frauds defense asserted by Dynegy. The statute of frauds for a promise to guarantee a debt of another is distinct from the statute of frauds for promises that cannot be performed within a year. *See* TEX. BUS. & COM. CODE ANN. § 26.01(b) (listing eight distinct clauses of the statute of frauds).

3. Promise to Reimburse — Not Promise to Pay Debt of Another

Finally, Yates argues that “[a]t the time Dynegy entered into the promise to pay Yates’s legal bills for defending Olis, there was no debt. Rather, Dynegy’s promise was a promise to reimburse Yates for his bills as they were incurred.” As such, Yates contends the statute of frauds does not apply. Yates relies on two cases, both of which are distinguishable because they did not involve a debt owed to a third party. In *Domingo v. Mitchell*, the plaintiff Domingo sued a co-worker Mitchell, alleging she promised to pay for Domingo’s portion of the winning lottery ticket pool. *Domingo v. Mitchell*, 257 SW.3d 34, 41-42 (Tex. App.—Amarillo 2008, pet. denied). Mitchell obtained summary judgment based in part on the statute of frauds. *Id.* at 37. The court of appeals held the oral agreement between Domingo and Mitchell did not violate the statute of frauds because “Domingo’s financial obligation was her [own] contractual obligation to reimburse Mitchell and not a promise to answer for the debt of another” *Id.* at 42.

In the second case relied on by Yates, *Walker v. Lorehn*, the plaintiff Lorehn claimed the defendant Walker promised to reimburse Lorehn for half of \$15,000 that Lorehn advanced to a corporation in which they were both stockholders. *Walker v. Lorehn*, 355 S.W.2d 71, 72-73 (Tex. Civ. App.—Houston 1962, writ ref'd n.r.e.). Lorehn subsequently sued Walker based on his failure to reimburse Lorehn for \$7,500. *Id.* at 72. The jury found in Lorehn's favor, and Walker appealed, contending the oral agreement between them was barred by the statute of frauds because it was a promise to answer for the debt of another. *Id.* at 72-73. The court of appeals held the agreement between Lorehn and Walker was "an original undertaking and in no way a collateral agreement to stand surety for the corporation or to answer for any debt of the company." *Id.* at 73.

The facts presented in *Domingo* and *Walker* do not fall within the statute of frauds "because the Statute is designed to require written evidence only in the case where the promise is made to the creditor." RESTATEMENT (SECOND) OF CONTRACTS § 123 cmt. a (1981). Neither *Domingo* nor *Walker* dealt with a debt owed to a third party creditor; rather, both involved a breach of contract claim for failure to perform their own contractual obligation. Here, by contrast, Yates (the creditor) has sued Dynegy based on Dynegy's promise to pay the debt of another—Olis's legal fees. The debt owed to Yates is not Dynegy's debt, but Olis's debt. The statute of frauds is designed to apply to just such a situation. *See* TEX. BUS. & COM. CODE ANN. § 26.01(a), (b)(2); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 112 cmt. c (1981) ("The suretyship provision applies only if there is a principal obligation 'of another' than the promisor.").

Conclusion as to Oral Contract

In summary, Dynegy met its initial burden of establishing that the oral agreement at issue was a promise to pay the debt of another, and therefore was unenforceable under the statute of frauds. The burden then shifted to Yates to plead, prove, and secure a favorable jury finding establishing an exception—which he failed to do. Moreover, the evidence does not conclusively establish an exception to the statute of frauds. Accordingly, we conclude the statute of frauds applies to this oral contract to pay the debt of another, and bars enforcement of the contract as a matter of law.

Fraud ClaimNext, we turn to Yates’s fraud action under which he elected to recover. Dynegy argues that Yates cannot recover benefit-of-the-bargain damages under his fraud claim because the contract out of which the damages arise is barred by the statute of frauds. We agree. The only damages asserted and proved at trial for Yates’s fraud claim were benefit-of-the-bargain damages, *i.e.*, the amount of fees and expenses Yates incurred in representing Olis. The Texas Supreme Court has held that the statute of frauds bars a fraud claim when the only damages sought are benefit-of-the-bargain damages arising out of a contract that is unenforceable under the statute of frauds. *See Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007); *Haase v. Glazner*, 62 S.W.3d 795, 798-99 (Tex. 2001); *see also Villanueva v. Gonzalez*, 123 S.W.3d 461, 468 (Tex. App.—San Antonio 2003, no pet.). The court reasoned in *Haase* that it would be circumventing the statute of frauds if it determined that a contract was unenforceable because of the statute, yet allowed a party to assert a fraud claim so as to recover the benefit of the unenforceable bargain. *Haase*, 62 S.W.3d at 799; *see McMillan v. Hillman Int’l Brands, Ltd.*, No. 14-03-01392-CV, 2004 WL 1660760, at *3 n.2 (Tex. App.—Houston [14th Dist.] July 27, 2004, pet. denied) (mem. op.). As noted, *supra*, Yates’s oral agreement with Dynegy is unenforceable because of the statute of frauds. Therefore, Yates’s fraud claim seeking benefit-of-the-bargain damages is also

barred. *Haase*, 62 S.W.3d at 799 (stating the purpose of statute of frauds is frustrated and the statute easily circumvented if a party can use a fraud claim to enforce a contract the statute makes unenforceable).

CONCLUSION

Based on the foregoing analysis, we hold that the record conclusively establishes that the statute of frauds applies to the oral agreement between Yates and Dynegy. No exception to the statute of frauds was submitted to the jury or conclusively established by the evidence. Therefore, the oral contract between Dynegy and Yates is barred as a matter of law. Because the contract is barred, Yates's fraud claim seeking benefit-of-the-bargain damages is also barred. *Haase*, 62 S.W.3d at 799. Accordingly, the judgment of the trial court must be reversed, and judgment must be rendered that Yates take nothing. Given our disposition of the statute of frauds issue, we need not address the other issues raised by Dynegy.

Phylis J. Speedlin, Justice