Litigation

February 14, 2013

New York Appellate Court Enforces 'No Oral Modification' Clause, Holds Parties to Their Written Agreement

By Edward Flanders and Teresa T. Lewi

In response to a deluge of cases involving parties' attempts to enforce oral modifications of contracts, the New York Appellate Division, First Department recently reiterated that contractual provisions requiring amendments to be in writing will trump any oral modifications or past practices by the parties. This ruling indicates the importance of finalizing in writing any changes—no matter how minor—to agreements between parties when those agreements contain "no oral modification" clauses.

First Department Enforces Clause Prohibiting Oral Modifications

Noting that "courts are presented over and over again with litigation arising out of circumstances where one party to a contract wrongly presumes, based on past practice, that an oral modification will be sufficient," the First Department unanimously held in *Nassau Beekman, LLC v. Ann/Nassau Realty, LLC*, that a buyer breached its contract when it did not appear at the closing time agreed upon in the $56.7 million real estate contract—regardless of the parties' history of orally adjourning the closing time.[1]

In August 2007, the plaintiff, Nassau Beekman, LLC ("Nassau Beekman"), contractually agreed to purchase real property in Manhattan from the defendant, Ann/Nassau Realty, LLC ("ANR"), with the closing to occur on August 30, 2007, though Nassau Beekman retained the right to extend the closing date to October 10, 2007. The contract contained a standard integration clause and a provision prohibiting modifications or amendments to the contract "except by an instrument signed by the party against whom the enforcement of such . . . modification . . . is sought, and then only to the extent set forth in such instrument."

Despite this language forbidding oral modifications, the plaintiff asserted that the parties adjourned the closing date multiple times through oral agreements that were subsequently finalized through written amendments to the contract. Eventually, the parties executed an amendment agreeing that the closing time would be at noon on September 25, 2008. On September 25, the defendant appeared shortly past noon for the closing, but the

[1] *Nassau Beekman, LLC v. Ann/Nassau Realty, LLC*, 2013 WL 362816, at *1 (N.Y. App. Div. Jan. 31, 2013).

plaintiff was not present. The parties convened that afternoon to negotiate a new amendment but did not execute another written modification, though emails from the plaintiff on that date reference an unexecuted proposed amendment to the contract.

With the sale still not closed, ANR informed Nassau Beekman in November 2008 that it was terminating the agreement and exercising its contractual remedy to retain the down payment as liquidated damages. Both parties alleged breach of contract.[2]

In affirming the grant of summary judgment dismissing the complaint, the First Department wrote that the plaintiff's claim failed because the "parties' past ability to arrive at a mutually acceptable written modification does not justify reliance on an assumption that they would be able to agree on the necessary written modification in the future." Citing General Obligations Law § 15-301,[3] the court stressed that any executory agreement not memorialized in a signed writing would be insufficient to modify a contract that explicitly required written amendments.

Furthermore, the First Department found that the parties did not fully perform by meeting after the deadline, but noted that the meeting could qualify as partial performance of the alleged modification. Partial performance may permit the plaintiff to avoid the writing requirement only if the performance is "unequivocally referable to the modification"; in other words, "[w]here the conduct is 'reasonably explained' by . . . possible reasons [other than the oral agreement], it does not satisfy this standard." Here, the emails and unexecuted proposed amendment were not explainable solely by reference to the oral modification, but "clearly explainable as preparatory steps" toward a future agreement.

Ultimately, the First Department stressed that parties ought to put contractual amendments or modifications in writing. In light of *Nassau Beekman*, parties may safely rely on the enforcement of clauses prohibiting oral modifications, so long as the parties have not clearly performed in reliance on any such modification.

Lessons for Contracting Parties

This decision drives home an important message for contracting commercial parties in New York: contracts should include a provision requiring any amendments or modifications to be in writing. Because reliance on past practices can be risky, parties should strictly abide by provisions requiring changes in writing, rather than relying on oral agreements first and later memorializing them in writing. Ultimately, parties must diligently protect their own interests and be aware of these contractual clauses before executing contracts containing them.

If you have questions, please contact the Pillsbury attorney with whom you regularly work, or the authors.

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[2] Nassau Beekman sued to recover its down payment and additional damages for ANR's alleged wrongful termination and anticipatory breach of the contract, while ANR counterclaimed for breach of contract. Both moved for summary judgment on their claims. *See Nassau Beekman*, 2013 WL 362816, at *2.

[3] N.Y. Gen. Oblig. Law § 15-301 ("A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent.").