Actions Speak Louder Than Words: Potential Waiver of Written Contractual Provisions

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Often you will hear people, including attorneys, say that for something to be enforceable it must be in writing. You almost always hear that concerning the enforceability of contractual provisions. However, things are not always as they seem—or quite that simple. In fact, there is a vast body of law across many different states and industries where courts have found that written contractual provisions were (or have potentially been) waived by the conduct of the parties, essentially resulting in a new or at the very least modified agreement. At common law, an oral agreement is sufficient to modify a written contract notwithstanding the existence of a "no oral modification" provision; yet, several statutes including the Uniform Commercial Code have considerably curtailed this rule and permitted contracting parties to make binding agreements to the effect that they can be modified only by a writing. The result has been a state-by-state patchwork of jurisprudence, often turning on the nature of the contract at issue.

For example, New York law provides that all agreements with a "no oral modification" clause may only be modified by a writing. Other states limit this principle only to specific circumstances such as statutes that require that loan or credit agreements and any modifications be in writing. On the other hand, there is significant jurisprudence suggesting that written contract provisions may be waived by the conduct of the parties despite the existence of a "no oral modification" provision in the contract. Two recent decisions (below)—from a Georgia state court and a Pennsylvania federal court—demonstrate the judicial analysis undertaken by courts when evaluating whether written contract provisions have been waived by conduct of the parties.

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Reynolds v. CB&T

In *Reynolds v. CB&T,* 805 S.E.2d 472 (Ga. Ct. App. 9/22/17), a borrower filed suit against his lender for wrongful foreclosure and breach of contract. The plaintiff borrowed approximately $250,000 to construct his family's home and executed a promissory note stating the purpose was for "construction." After a non-judicial foreclosure, the plaintiff sued CB&T alleging that the bank expressly agreed orally to extend or modify the note's maturity date until the plaintiff could complete construction, at which point the plaintiff intended to obtain a permanent mortgage or convert the note into a mortgage loan. In discovery, the plaintiff asserted that the lender orally advised him to keep building and led him to believe that the completion of the house and the procurement of a permanent mortgage was in the best interest of both parties. The plaintiff further alleged CB&T even sent inspectors to the plaintiff's property who confirmed that construction was proceeding as planned. However, when the plaintiff applied for a permanent mortgage, he was denied owing to the CB&T default on his credit report. The trial court ultimately granted summary judgment for defendant and refused to admit parol evidence to alter the terms of the note. The plaintiff appealed, arguing that CB&T's oral agreement to modify the due date of the loan raised a general issue of fact regarding whether there was a mutual departure from the terms of the promissory note as to constitute a quasi-new agreement.

Though conceding that any modification of a promissory note must be in writing pursuant to the statute of frauds, the Georgia Appellate Court found that oral modification of a written contract may be effective where such modification is agreed to by all parties, performed by one party, and accepted by the other. The court explained that such result is consistent with the general rule that a mutual departure from the terms of an agreement results in a quasi-new agreement, suspending the original terms until one party has given the other reasonable notice of its intent to rely on the original terms. Moreover, the court emphasized that any question of waiver is one for the fact finder. Thus, the court found that a genuine issue of fact existed as to whether the plaintiff was given reasonable notice of CB&T's intent to rely on the original terms of the note before it commenced foreclosure proceedings.

STI Oilfield Services, Inc. v. Access MidStream Partners, L.P. et al.

Similarly, in *STI Oilfield Services, Inc. v. Access MidStream Partners, L.P. et al.,* 2014 WL 4716618 (M.D. Pa. 9/22/14), the plaintiff and defendant entered into a series of contracts for the construction of natural gas pipelines. Each contract was a compilation of several documents that became effective once the defendants accepted the plaintiff's bid. After the work was complete, STI filed suit alleging numerous causes of action, including breach of contract for failure to pay for work performed, and the defendants countered with motions for summary judgment. STI asserted that it should be compensated for weather delays based on an oral agreement with the defendants that if such contingencies were removed from its bid, the defendants would assume any extra costs incurred by STI despite the contract language to the contrary. Relying on the Pennsylvania Supreme Court's view that writings can generally be modified by oral agreement or conduct except when the statute of frauds is involved, the U.S. District Court for the Middle District of Pennsylvania emphasized that the testimony of representatives from both parties at the very least implied such an oral agreement. Consequently, the court found sufficient evidence to suggest that a reasonable juror could conclude that the contract was in fact modified by an oral agreement between the parties.

Conclusion

These decisions are neither novel nor unique. Attorneys who regularly represent clients in the preparation of contracts and who provide strategic advice when potential issues arise thereafter should focus on both the written provisions as well as the actions of their client to fully evaluate whether a written contractual provision has been waived or modified. Better yet, conversations about what conduct could potentially waive certain provisions should be had with the client at the outset of the contractual relationship so that the client is fully aware of the risks by conduct even when there is an inconsistent contractual provision.

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