SCANNED ON 8/30/2006

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ROSALYN RICHTER Justice

PART 24

CN Venture

- v -

Kleven Konrads

INDEX NO. 601047-05

MOTION DATE

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED
AUG 30 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/25/06

HON. ROSALYN RICHTER J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

CN VENTURE, L.L.C.,

Plaintiff,

-against-

KLEVER KONCEPTS USA, INC. and
RALPH LaMACCHIA,

Defendants.

DECISION AND ORDER
Index No. 601047-05
Motion Sequence No. 1

Richter, J.:

Plaintiff CN Venture, L.L.C. ("CNV") is in the business of selling hair care products under the trademark name "Peter Coppola". Pursuant to a sales agreement dated January 10, 2001, CNV retained the services of defendant Klever Koncepts USA, Inc. ("Klever") to act as its sales representative in the promotion and sale of Peter Coppola hair care products to QVC, a television network that sells merchandise. The agreement provides that Klever would receive a 15% commission on the products sold, which would be deducted from the funds Klever receives from QVC. Klever would then be responsible for remitting the 85% balance to CNV within five days of its receipt of payment from CNV.

In this action, CNV alleges that the sales agreement was amended to reduce Klever's commission from 15% to 10% on all Peter Coppola products sold on QVC that are designated as a Today's Special Value ("TSV") or Try Me item. Each TSV or Try Me item is associated with a unique identifying number. CNV maintains that although Klever properly reduced its commission on one TSV (number A55171 in June 2003) and one Try Me item (number A51086 in August 2003), it has failed to fully honor its obligations under the purported amendment and has wrongfully retained a 15% commission a second TSV (number A09348 in December 2004).

The complaint asserts causes of action against Klever for breach of contract and conversion

and also seeks a declaration that Klever is entitled to receive only a 10% commission on all past, current and future TSVs and Try Me items related to the Peter Coppola hair care product line. The complaint also contains claims against Klever for breach of fiduciary duty and specific performance relating to Klever's alleged failure to provide full accountings to CSV, and a conversion claim against defendant Ralph LaMacchia, one of Klever's principals, in his individual capacity.

In this motion, CNV seeks partial summary judgment against Klever on the breach of contract, conversion and declaratory judgment claims. There is no dispute that the terms of the sales agreement provide that Klever's commission is 15% of all products sold. CNV, however, maintains that Klever is bound by the purported amendment to the sales agreement setting a reduced 10% commission for TSVs and Try Me items. Klever and LaMacchia cross-move to dismiss the complaint in its entirety arguing that the sales agreement was never properly amended and that any purported amendment is foreclosed by the language of the sales agreement, General Obligations Law § 15-301[1] and the parol evidence rule.[1]

Paragraph 12 of the sales agreement provides:

> "This agreement constitutes the entire understanding between the parties with respect to the subject matter hereof. No representations, inducements, promises or agreements, oral or otherwise, not included herewith shall be of any force and effect. This Agreement may not be amended or modified except in writing signed by all parties."

Despite this clear language, CNV maintains that the sales agreement was modified as evidenced by a November 14, 2002 e-mail from LaMacchia to Richard Nicolo of CNV. In that e-mail, Lamacchia states: "As discussed and agreed, we will lower our 15% for items that QVC takes a 'TSV' margin

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[1] Klever has withdrawn that portion of its cross-motion seeking dismissal of the complaint on the basis that CNV failed to comply with LLC Law § 808[a].

on, which is either a 'TSV' or "Try Me' item." CNV argues that this e-mail communication satisfies the sales agreement's requirement that a modification to the agreement be in writing and signed by all parties.

The Court concludes that the November 14 e-mail does not suffice to modify the parties' original sales agreement. To begin, by its very words, the e-mail is not in itself an agreement but rather references an earlier oral agreement between the parties. Furthermore, the e-mail does not state that it constitutes an amendment to the sales agreement and in fact, never makes any mention of the sales agreement. Nor does the e-mail contain the signature of the parties as required by both the express terms of the sales agreement and General Obligations Law § 15-301[1].[2] *See Richardson & Lucas, Inc. v. New York Athletic Club of the City of New York*, 304 A.D.2d 462 (1st Dept. 2003)(where a contract requires modification to be in writing, oral modifications are barred). Moreover, CNV has not submitted an affidavit from Nicolo, the recipient of the e-mail. Thus, it is not even clear who Nicolo is, or whether he has any authority to modify the sales agreement, which was signed on CNV's behalf by its president, Peter Coppola. Nor does the affidavit of Coppola, who is listed as a "cc . . . by fax" on the e-mail, explain the circumstances of the alleged prior oral modification.

CNV's claim that the e-mail communication constitutes a signed writing is without merit. *See A & S Reps, LLC v. North American Enclosures, Inc.*, 10 Misc.3d 1062(A) (Sup. Ct. Suffolk Cty. 2005)(e-mail insufficient to satisfy requirements of General Obligations Law § 15-301[1] because it is not signed by either party and contains no clear indication that the plaintiff agreed to the defendant's

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[2] General Obligations Law § 15-301[1] provides that "[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."

proposed reduction of its commission). CNV erroneously relies upon General Obligations Law § 5-701[b][4] which provides that, for certain types of contracts, "tangible written text produced by . . . computer retrieval . . . shall constitute a writing" and that "any symbol executed or adopted by a party with the present intention to authenticate a writing shall constitute a signature". The language of this provision, however, states that it only applies "[f]or purposes of this subdivision", and thus is only applicable to subdivision [b] of General Obligations Law § 5-701. Subdivision [b] does not apply to all contracts, but rather, is limited to "qualified financial contracts", which are specifically defined in the statute. Since the contract at issue does not fall within the definition of a "qualified financial contract", General Obligations Law § 5-701[b][4] has no applicability here. *See Parma Tile Mosaic & Marble Co. v. Estate of Short*, 87 N.Y.2d 524, 528 n.1 (1996)(authentication requirements of General Obligations Law § 5-701[b][4] apply only to "qualified financial contracts"); *see also AIG Trading Corp. v. Valero Gas Mktg., L.P.*, 254 A.D.2d 117 (1st Dept. 1998).[3]

Finally, even if the e-mail could be considered a modification of the agreement, it fails for lacking definition of a material term – the amount of the lowered commission. The e-mail does not support CNV's present claim that Klever agreed to reduce its commission to 10% for certain items. Instead, the e-mail merely states that Klever agreed to an unspecified lowering of its 15% commission. Thus, the e-mail provides no support for CNV's present claim that the sales agreement was modified to reduce Klever's commission to 10%. *See Henri Associates v. Saxony Carpet Co.*, 249 A.D.2d 63 (1st Dept. 1998)("[a] contract must be definite in its material terms in order to be enforceable").

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[3] The Court cannot consider the allegations contained in the letter from Klever's co-owner, Barbara Bush, to LaMacchia because such parol evidence is immaterial to the threshold issue of whether the e-mail constitutes a signed writing necessary to modify the sales agreement. *See DeRosis v. Kaufman*, 219 A.D.2d 376 (1st Dept. 1996).

Although not specifically argued by CNV, there is no merit to any claim that Klever's partial performance removes the alleged oral agreement from the requirement of General Obligations Law § 15-301[1]. In order for this exception to apply, the partial performance must be "unequivocally referable" to the oral agreement. *O'Reilly v. NYNEX Corporation*, 262 A.D2d 207 (1st Dept. 1999). This is intended to be a "stringent standard", *L & B 57th Street, Inc. v. E.M. Blanchard, Inc.*, 143 F.3d 88, 92 (2d Cir. 1998), and "in order to be unequivocally referable, conduct must be inconsistent with any other explanation". *Richardson & Lucas, Inc. v. New York Athletic Club of the City of New York*, 304 A.D.2d at 463. Indeed, where the performance is "reasonably explained" by the possibility of other reasons for the conduct, the performance is equivocal. *Anostario v. Vicinanzo*, 59 N.Y.2d 662, 664 (1983).

Applying these principles, the Court concludes that Klever's acceptance of a reduced 10% commission on two products -- the first TSV and the first Try Me item -- is not "unequivocally referable" to an alleged oral promise to take a reduced commission on *all* TSVs and Try Me items. Indeed, Klever has consistently applied the contractually agreed-upon 15% commission to the second TSV and has explicitly told CNV that it would not reduce its commission on any other such promotion without fully receiving "costing information" from CNV. Since Klever's partial performance of accepting the 10% commission for the first two products is "reasonably explained" and is not "unequivocally referable" to the alleged oral promise, the exception to General Obligations Law § 15-301[1] is not applicable.

The Court concludes that Klever is entitled to summary judgment dismissing the first, third, fifth and sixth causes of action, all of which relate to the enforceability of the alleged modification of the sales agreement. The second and fourth causes of action, however, relate in part to Klever's

alleged failure to properly account and remit copies of checks. Since Klever has not met its burden of establishing its entitlement to summary judgment dismissing these claims, they will be severed and will continue.[4] Accordingly, it is

ORDERED that CNV's motion for partial summary judgment is denied; and it is further

ORDERED that Klever's cross-motion for summary judgment is granted as to the first, third, fifth and sixth causes of action; and it is further

ORDERED that Klever is directed to settle the judgment on notice.

This constitutes the decision and order of the Court.

August 25, 2006

Justice Rosalyn Richter

[4] In the event that CNV remains interested in pursuing the second and fourth causes of action, it shall contact the Court by conference call, prior to the settlement of the judgment, so that a trial date can be set for these claims.