SHORT FORM ORDER

INDEX
NO.: 15081-04

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 8-24-07
SUBMITTED: 10-3-07
MOTION NO.: 002-MG; CASE DISP

AIRWAY MAINTENANCE, LLC and AIRWAY CLEANERS, LLC,

Plaintiff,

-against-

NORTH FORK BANK,

Defendant.

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-12 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 13-19 ; Replying Affidavits and supporting papers 20-24 ; it is,

ORDERED that this motion by the defendant for summary judgment in its favor is granted; and it is further

ORDERED that the complaint is dismissed.

In 1998, the predecessor-in-interest of the plaintiff Airway Maintenance, LLC (hereinafter "Airway Maintenance") entered into a cash management connection service agreement with the defendant bank. In 2003, the plaintiff Airway Cleaners, LLC (hereinafter "Airway Cleaners") entered into a zero balance account service agreement with the defendant bank. Both agreements are fully integrated agreements and contain provisions prohibiting their oral modification. The cash management connection service agreement provides, in pertinent part, as follows:

> This Agreement constitutes the entire Agreement between the parties, with respect to the subject matter hereof, supersedes all prior agreements, oral or written, and may be modified, terminated or

> amended only by instrument in writing signed by both parties....No failure of the bank to enforce any right or remedy, shall act as a waiver thereof. No waiver shall be valid unless in writing.

The zero balance account service agreement contains similar language. Moreover, in 2002, Airway Cleaners executed a limited liability company authorization containing the following language:

> The bank shall not, by any act, delay, omission or otherwise, be deemed to have waived any of its rights or remedies hereunder unless such waiver be in writing, signed by the bank, and then only to the extent therein set forth; failure of the bank to insist on compliance with, or to exercise any right or remedy granted to it by, the resolutions and agreements set forth herein or any of its rules, regulations, conditions, limitations, and agreements contained in any signature card, deposit ticket, checkbook, statement of account, receipt, notice, instrument, or other agreement shall not be deemed a waiver thereof or a bar thereto on any other occasions nor shall same establish a course of conduct.

The plaintiffs commenced this action to recover $214,365.57 in bank fees and service charges that were debited by the defendant bank against their accounts in 2003 pursuant to the cash management connection service agreement and the zero balance account service agreement. The plaintiffs allege that, in 1998, in order to induce Airway Maintenance to become a customer of the defendant bank, a bank officer represented to Airway Maintenance's principal that Airway Maintenance's accounts would not be charged any fees. The plaintiffs further allege that, from 1999 until 2003, the defendant bank routinely reversed all service charges and bank fees debited against their accounts. The plaintiff contends that this prior course of dealing constitutes a waiver of the prohibitions against oral modification contained in the parties' agreements.

Parties to a written agreement who include a proscription against oral modification are protected by the statute of frauds (General Obligations Law § 15-301). Any contract containing such a clause cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement is sought (General Obligations Law § 15-301[1]). Put otherwise, if the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls. Thus the authenticity of any amendment is ensured (*see*, **Rose v Spa Realty Assoc.**, 42 NY2d 338, 343). There are two exceptions to the statute of frauds: partial performance and promissory estoppel. Neither exception is applicable to the facts of this case.

The part performance exception to the statute of fraud is closely related in origin and nature to equitable estoppel. The exception generally provides equitable relief for the party that performed the oral agreement, not the party that merely benefitted from the other party's performance (*see*, **Messner Vetere McNamee Scmetterer Euro RSCG, Inc. v Aegis Group**, 974 F Supp 270, *affd* 186 F3d 135 [SDNY]). Thus, to benefit from the part performance exception to General Obligations Law § 15-301, the plaintiff must prove (i) conduct that is unequivocally

referable to the alleged oral modification and (ii) that the conduct conferred some benefit on the party against whom enforcement is sought (*see*, **Club Haven Investment Co. v Capital Co. of America**, 160 F Supp 2d 590, 592 [SDNY]).

Here, there are no allegations that the plaintiffs performed, or had any obligations under, the alleged oral agreement to reverse all bank fees and service charges. Rather, it was the plaintiffs who benefitted from the bank's forebearance. Moreover, although the plaintiff's allege that they relied on the agreement to their detriment, their allegations are conclusory and without any factual detail. Imposing the alleged oral agreement on the bank under these circumstances, in the absence of any performance by the plaintiffs, who are the ones that benefitted therefrom, is not consistent with the purpose of the part performance exception to the statute of frauds (*see*, **Messner Vetere McNamee Scmetterer Euro RSCG, Inc. v Aegis Group**, *supra* at 275).

Comparable to the requirement that partial performance be unequivocally referable to the oral modification, the conduct relied upon to establish estoppel must not otherwise be compatible with the agreement as written (*see*, **Towers Charter & Marine Corp. v Cadillac Ins. Co.**, 708 F Supp 612, 614 [SDNY], *affd* 894 F2d 516; *see also*, **Club Haven Investment Co. v Capital Co. of America**, *supra* at 592). The plaintiffs have not pointed to any conduct by them that is unequivocally referable to the alleged oral agreement. They merely argue that, because the bank reversed all bank fees and service charges prior to 2003, it should have continued to do so. However, the fact that the parties acted in a manner inconsistent with the terms of their written contracts is not sufficient to alter those terms in the face of a contract provision that all alterations must be in writing (*see*, **Southern Federal Savings & Loan Assn. of Georgia v 21-26 East 105th Street Assocs.**, 145 BR 375, 381 [SDNY], *affd* 978 F2d 706). The plaintiffs' assertion that the bank's conduct modified its agreements with the plaintiffs must fail because the conduct itself cannot produce a modification of the agreement. Conduct can, at best, be evidence of an agreement based upon consideration between both parties to modify the existing contract (**Id.** at 381, *citing* **Nassau Trust Co. v Montrose Concrete Products Corp.**, 56 NY2d 175). The plaintiffs' have produced no evidence of an agreement to modify either the cash management connection service agreement or the zero balance account service agreement. They merely allege that the bank's custom and practice of reversing charges somehow constituted an agreement or became one. The plaintiffs' inferences taken from the bank's forebearance cannot be construed as an agreement with the bank (**Id.** at 381). Moreover, the evidence establishes that most, if not all, of the reversed charges were due to earnings credits that the bank used to offset the plaintiff's monthly service charges and fees. Such credits were disclosed to the plaintiffs in a separate document. The plaintiffs acknowledged in writing that they had received a copy of all rules, regulations, and disclosure statements pertaining to their accounts and that same would govern their business with the bank. Accordingly, the court finds that such credits were entirely consistent with the parties' agreements as written.

Finally, waiver is the voluntary and intentional abandonment of a contract right. It should not be lightly presumed and must be based on a clear manifestation of intent to relinquish a contractual protection (*see*, **Team Marketing USA Corp. v Power Pact, LLC**, 41 AD3d 939, 941, *citing* **Fundamental Portfolio Advisors, Inc. v Tecqueville Asset Mgt. L.P.**, 7 NY3d 96, 104). Nothing in the bank's conduct warrants the conclusion that the bank intentionally abandoned any of

its contractual rights. Moreover, the language of the parties' agreements is clear, "No failure of the bank to enforce any right or remedy, shall act as a waiver thereof."

In view of the foregoing, the court finds that the defendant has established, prima facie, its entitlement to judgment as a matter of law. The plaintiffs' conclusory assertions are insufficient to defeat the motion (*see*, **Zuckerman v City of New York**, 49 NY2d 557, 572). Accordingly, the motion is granted.

HON. ELIZABETH HAZLITT EMERSON

DATED: November 21, 2007

J. S.C.