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SHORT FORM ORDER **MOD**

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

GREAT GREENS, INC. and JAKLIN MECANIK,

Plaintiff(s),

- against -

COUNTRY BANK,

Defendant(s).

TRIAL/IAS PART 11

INDEX NO. 10840/07

MOTION SEQUENCE NO. 1

MOTION SUBMISSION DATE: September 21, 2007

The following papers read on this motion:

Notice of Motion	**X**
Notice of Cross Motion	**X**
Affirmation in Opposition	**X**
Memorandum of Law	**XXX**

Upon the foregoing papers, the motion by the defendant for an Order (a) pursuant to CPLR 3211(a)(1) and GOL § 5-1103, dismissing plaintiff's complaint because the alleged contract modification agreements are not supported by consideration and are unenforceable; (b) pursuant to CPLR 3211(a)(1) and GOL § 15-301 dismissing plaintiff's complaint on the basis of documentary evidence and the statute of frauds; (c) pursuant to CPLR § 3211(a)(7) dismissing plaintiff's complaint because none of its causes of action state a claim upon which relief may be granted; (d) pursuant to 22 NYCRR § 130.1.1 imposing sanctions on plaintiffs and their counsel for frivolously demanding return of $126,347.76 it previously paid to defendant, with pre-judgment interest, and treble damages against defendant and the cross motion by the plaintiffs for an order (a) pursuant to CPLR § 602 consolidating the above action with another action for a joint trial; (b) pursuant to CPLR § § 3124 and 3125 compelling defendant Country Wide to comply with a request of an examination before trial of Curt Farrell; and (c) pursuant to 22 NYCRR § 130-1.1 for sanctions on defendants and their counsel for frivolously asserting the request for sanctions are both determined as hereinafter provided.

The instant action sounding in breach of contract, specific performance, incidental and consequential damages and fraud arises out of an alleged "Settlement and Extension Agreement" by the plaintiffs and Sharok Jacobi in relation to three mortgage loans made to the plaintiffs by the defendant which were in default. Said Agreement which the plaintiffs contend was orally negotiated with the defendant was thereafter reduced to a writing but never signed by the defendant. The alleged Agreement provides:

Country Bank, with an office at 200 East 42nd Street, New York, New York

10017 (the "Bank"); Jaklin Mecanik, residing at 15 Carriage Road, Great Neck, NY ("Mecanik"); Sharok Jacobi, residing at 15 Carriage Road, Great Neck, NY ("Jacobi"); and Great Greens, Inc., a New York corporation with an office at 401 Great Neck Road, Great Neck, NY ("Great Greens").

In consideration of the mutual promises and covenants set forth below, the parties hereto agree as follows:

1. Great Greens has an outstanding loan from the Bank and Mecanik has two outstanding loans from the Bank. The loans are in default. If Great Greens and Mecanik pay the Bank $130,347.76 no later than 3:00 pm on April 30, 2007, time being of the essence, to cure defaults on the loans, then the Bank agrees that the loans shall be extended and mature on April 30, 2008 and the next month payment shall be due on June 1, 2007 to be billed by the Bank.

2. Great Greens and Mecanik must continue to make monthly interest and tax escrow payments on the first of each month, with a 15 day grace period. The payments will be based upon a 7% interest rate, without regard to the accrual rate that the borrowers continue to owe under the notes.

3. If the payments described in Paragraphs 1 or 2 are not made when due, it shall be a default without any notice.

4. If the $475,000 and the $575,000 loans are repaid in full by April 30, 2008 and the principal balance of the $1,300,000 loan is reduced to not more than $1,000,000, then the maturity of the $1,300,000 loan shall be further extended so that it shall be due and payable in full on April 30, 2009, with interest payments and accrual to continue as set forth above and in the note for that loan.

5. This Agreement does not waive any of the Bank's rights to demand payment of all amounts owed pursuant to the terms of the original notes and mortgages if there is a default.

6. Great Greens, Mecanik and Jacobi, to the extent that they are guarantors of any of the loans, hereby consent to all the terms, covenants and conditions of this Agreement.

In support of the plaintiffs' cross motion, Sharok Jacobi submits an affidavit which amongst other things sets forth:

I am a defendant in the action commenced by Country Bank and the principal party and charged by my wife Jaklin Mecanik, one of the plaintiffs in the above entitled action, for purposes of overseeing the financing transactions with Country Bank, and as such I am fully familiar with the facts and circumstances regarding this matter.

The salient issues in our case against Country Bank revolve around the

> Settlement and Extension Agreement dated April 23, 2007 ("Settlement Agreement"--Exhibit "A"). However, in the early part of 2007, due to a turn down in the real estate market, some of our payments were admittedly paid late to Country Bank. Country Bank became quite aggressive in how they applied various charges to the account, resulting in disputes with the bank.
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> On April 16, 2007, I met with Curt Farrell at Country Bank's office at 200 East 42nd Street, New York, NY. Attending this meeting was John Murphy (Senior Vice President), Curt Farrell (Vice-President), Anthony Calabrese (CFO) as well as several other individuals who I do not recall. At this meeting, I attempted in good faith to resolve any outstanding issues I had with Country Bank, which included a 1 year extension of the mortgage loans. It was this meeting that resulted in the Settlement Agreement (Exhibit "A").

A review of the respective mortgages in issue establish that the respective mortgages contain the same Article 8 which sets forth:

> ARTICLE 8: NO ORAL CHANGE
>
> This Note may not be modified, amended, waived, extended, changes, discharged or terminated orally or by any act or failure to act on the part of Maker or Payee, but only by an agreement in writing signed by the party against whom enforcement of any modification, amendment, waiver, extension, change, discharge or termination is sought.

Amongst other things, the defendant contends that the instant action is barred by the provisions of General Obligations Law § 5-1103. Said section provides:

> An agreement, promise or undertaking to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration, provided that the agreement, promise or undertaking changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest, shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge, or by his agent.

In support of said position the defendant cites to **Nassau Trust Company** v **Montrose Concrete Products Corp.**, 56 NY2d 175, 451 NYS2d 663, which in addressing the issue of the foregoing provision of the General Obligations Law stated:

> The Appellate Division erred in failing to distinguish between an oral agreement that purports to modify the terms of a prior written agreement and an oral waiver by one party to a written agreement of a right to require of the other party certain performance in compliance with that agreement (see **Imperator Realty Co.** v **Tull**, 228 NY 447; **Arnot** v **Union Salt Co.**, 186 NY 501; **Toplitz** v **Bauer**, 161 NY 325; **Thompson** v **Poor**, 147 NY 402), and in failing to consider whether the facts set forth in the **Imperato** affidavit were sufficient to sustain Montrose's claims of waiver, estoppel, bad faith or

unconscionability. Modification of the terms of a mortgage requires consideration except when a statute, such as section 5-1103 of the General Obligations Law dispenses with the need for consideration when a writing (such as the Feb., 1977 extension agreement) exists. Neither waiver (**Alsens Amer. Portland Cement Works** v **Degnon Contr. Co.**, 222 NY 34, 37; **Arnot** v **Union Salt Co.**, 186 NY 501, 511, *supra*; **Prentice** v **Knickerbocker Life Ins. Co.**, 77 NY 483) nor estoppel (**Rothschild** v **Title Guar. & Trust Co.**, 204 NY 458, 464; **Witherell** v **Kelly**, 195 App Div 227, 233) rests upon consideration or agreement. A modification, because it is an agreement based upon consideration, is binding according to its terms and may only be withdrawn by agreement. An estoppel " 'rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury' " (**Triple Cities Constr. Co. v Maryland Cas. Co.**, 4 NY2d 443, 448; **Lynn** v **Lynn,** 302 NY 193- 205; **Metropolitan Life Ins. Co.** v **Childs Co.**, 230 NY 285, 292). It is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought (**White** v **La Due & Fitch**, 303 NY 122, 128). While estoppel requires detriment to the party claiming to have been misled, waiver requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable (**City of New York** v **State of New York**, 40 NY2d 659; **Davison** v **Klaess**, 280 NY 252). A waiver, to the extent that it has been executed, cannot be expunged or recalled (see **Alsens Amer. Portland Cement Works** v **Degnon Contr. Co.**, 222 NY 34, *supra*), but, not being a binding agreement, can, to the extent that it is executory, be withdrawn, provided the party whose performance has been waived is given notice of withdrawal and a reasonable time after notice within which to perform (**Imperator Realty Co.** v **Tull**, 228 NY 447, 456, *supra*; **Arnot** v **Union Salt Co.**, 186 NY 501, **511,** *supra*; **Toplitz** v **Bauer**, 161 NY 325, 333, *supra*; **Thompson** v **Poor**, 147 NY 402, 409, *supra*). **Nassau Trust Company** v **Montrose Concrete Products Corp.,** *supra* at 183-184.

Based upon a review of the respective submissions, the plaintiffs in their Verified Complaint seek relief addressed to the alleged Settlement and Extension Agreement which may be sought pursuant to the provisions of General Obligations Law § 5-1103 if said Agreement were executed by the defendant. Based upon the fact that the defendant did not execute the Agreement, that portion of the defendant's application which seeks an Order pursuant to CPLR § 3211(a)(1) and GOL § 5-1103, dismissing plaintiffs' complaint because the alleged contract modification agreements are not supported by consideration and are unenforceable, is **granted**.

That branch of the defendant's motion which seeks an Order pursuant to 22 NYCRR 130-11 imposing sanctions on plaintiffs and their counsel for frivolously demanding return of $126,347.76 it previously paid to defendant, with pre-judgment interest and treble damages, is **denied**. The Court does not find that the plaintiffs' Verified Complaint rises to the level for the imposition of sanctions.

Based upon the foregoing, the plaintiffs' application for an Order (a) pursuant to CPLR § 602 consolidating the above action with another action for a joint trial; (b) pursuant to CPLR § § 3124 and 3125

compelling defendant Country Wide to comply with a request of an examination before trial of Curt Farrell; and (c) pursuant to 22 NYCRR § 130-1.1 for sanctions on defendants and their counsel for frivolously asserting the request for sanctions is **denied as moot.**

SO ORDERED.

DATED: 12/3/2007

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J.S.C.

ENTERED
DEC 06 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE