SHORT FORM ORDER

Index Number: 13058-2010

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 05-03-2010
Motion Submit Date: 08-24-2010
Motion Sequence .: 001 WDN
002 MD
003 MD

[ ] FINAL DISP
[x] NON - FINAL DISP

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DEMATTEO SALVAGE CO., INC.,

Plaintiff,

-against-

ANTHONY FARINO,

Defendant.
_____X

Attorney for Plaintiff
Steven A. Costantino, Esq.
Costantino & Costantino, ESQS.
632 Merrick Road
Copiague, New York 11726

Attorney for Defendant
Siben & Ferber
Melissa B. Pittelli, Esq.
1455 Veterans Memorial Highway
Hauppauge, New York 11749

In this contract action, Plaintiff, DeMatteo Salvage (" DeMatteo"), a recycler, moves by Amended Notice of Motion (Motion Sequence # 002) for an Order, pursuant to CPLR § 3213, granting Judgment against the Defendant, Anthony Farino based on the Defendant's alleged default in payment under the terms of a Promissory Note ("Note") in the amount of $75,000 plus interest, penalties and attorney's fees, as provided for in the Note. Defendant opposes the motion and cross- moves, by Notice of Cross-Motion (motion sequence # 003) to disqualify Plaintiff's counsel pursuant to Rule 3.7 Part 1200 of the New York Rules of Professional Conduct, setting forth that Steven Constantino is a necessary witness in this action. Plaintiff opposes the cross-motion.

According to Plaintiff, as a result of a monetary loan, in the amount of $75,000

from Plaintiff to Defendant, dated December 27, 2007, the Defendant executed a written Note, agreeing, inter alia, to repay the entire loan by February 2, 2008; as well as to pay late fees equivalent to 10% of the principal balance due; and interest in the sum of 14% per annum following a default, defined as nonpayment within ten days of the due date in the Note. The Note also provided for reasonable attorney's fees and costs incurred in connection with enforcement of the Note. Plaintiff's Treasurer and Secretary submitted an affidavit stating that no part of the Note has been paid to date and that Plaintiff is, therefore, entitled to Judgment in Lieu of Complaint based the Defendant's obligations under an instrument for the payment of money only.

In response to the motion, Defendant asserts that the motion must be denied as the parties entered into and partially performed on an oral modification of the terms of the Note. Farino submitted an affidavit, in which he explained that he is the President of Long Island Rubbish Removal Eastern Corp., which had a history of dealing with the Plaintiff. In November, 2007, he claims to have executed a similar Note, based on a loan in the amount of $150,000. The same parties orally modified the terms of the $150,000 note by Farino's company delivering clean, corrugated recyclables to DeMatteo, which would sell the materials until the entire loan was paid off. According to Farino, not only was a similar oral modification entered into for the repayment of the $75,000 note that is the subject of this proceeding, but contemporaneous writings of the Plaintiff and Plaintiff's counsel support his contentions. These include a Security Agreement, which is referred to in the Note and was signed by both parties. The security agreement bears the handwritten notation, by Farino, stating "All pending meeting & intent letter". In fact, a Letter of Intent was sent by Carmine DeMatteo, to Defendant, dated January 10, 2008, which states, in pertinent part "(p)ending finalization and execution of those recycling agreements, we will continue to accept clean, corrugated recyclables from Long Island Rubbish Eastern Corp against the $150,000 Promissory Note dated November 8, 2007 and, if applicable, the Promissory Note dated January 4, 2008. According to Farino, the meeting referred to in the Security Agreement actually occurred on April 29, 2008, where Plaintiff, through Carmine DeMatteo, Defendant, Defendant's former attorneys, and Plaintiff's current counsel agreed that the $75,000

loan would be repaid from the delivery of cardboard from Defendant's newly acquired 8 BJ's accounts, which DeMatteo would then sell, until the entire Note was paid. Thereafter, according to Farino, the parties agreed to continue their relationship and deliver cardboard to Plaintiff, the profits from which would be split on an even basis. Farino avers that his view of the oral modification is supported by letters from Plaintiff's current attorney, such as one dated June 17, 2008 stating that although there is a shortfall in the amount of corrugated materials delivered to DeMatteo, "(y)our client has regularly been delivering large sums of corrugated recyclables to my client in partial discharge of his obligations". This same letter refers to a request for a meeting to resolve the party's differences to memorialize a repayment methodology "more consistent with the course of dealing which has emerged between our clients since the Promissory Notes were originally executed. . . . ."

In support of his claim that the modification was partially performed, Farino attaches the Affidavit of the bookkeeper for Long Island Rubbish Removal Eastern Corp, annexing a business ledger showing that DeMatteo received $45,301.71 in corrugated cardboard recyclables between September 1, 2009 and June 1, 2010. Attached to her ledger are statements from DeMatteo setting forth the amounts delivered and their equivalent in dollars. According to Farino, he intended to continue with the arrangement, which he states is clearly referable to the oral modification of the Note; however, he stopped upon the commencement of this lawsuit.

In support of the cross-motion to disqualify Plaintiff's counsel, Defendant submits the affirmation of Defendant's former counsel, who attested to the fact that he was present at the meeting on April 29, 2008, before which Plaintiff took no action on the Note, and that a deal was consummated verbally, to allow Long Island Rubbish to repay the Note by delivery of clean corrugated cardboard to Plaintiff, until the entire principal amount, without interest was repaid. In consideration therefore, Long Island Rubbish would continue thereafter to deliver Plaintiff the cardboard and split profits there from on a 50/50 basis. Since Mr. Constantino was present at the meeting, Defendant's former counsel insists he is a necessary witness in this case and should be disqualified from

representing the Plaintiff.

In Reply, Plaintiff's counsel avers that the meeting was a settlement conference between the parties and certainly not a basis for disqualifying the attorney of Plaintiff's choice. In addition, he annexes the Security Agreement, which is also annexed to Defendant's papers and points to its provision barring any oral modifications thereof. He argues that because the Note refers to the Security Agreement and the Security Agreement, signed by Farino, states that it cannot be orally modified, such applies equally to the Note. He and Carmine DeMatteo both deny that any oral modification was ever made to the terms of the $75,000 Note and they both state, supported by an affidavit from DeMatteo's bookkeeper and Comptroller that all the recyclables received by DeMatteo from November 8, 2007 on were credited as part payment of the $150,000 Note. That Note was paid in full following a request for and delivery of a check for the balance forwarded by Defendant's current attorney to Plaintiff. DeMatteo's Comptroller avers further that during that period not one ounce of delivered corrugated material was credited by DeMattteo to reduction of the $75,000 Note that is the subject of this action.

ANALYSIS

When a contract, which must be read in its entirety in order to glean its intent, clearly demonstrates the purpose of the parties, the court may grant relief via summary judgment. **WWW Assoc v Giancontiari**, 77 NY 2d 157, 566 NE 2d 639, 565 NYS 2d 440 (1990). However, where the contractual provisions relied upon are ambiguous, the resolution of such is tendered to the trier of fact. **State of New York v Home Indemnity Co**, 66 NY 2d 669, 486 NE 2d 827, 65 NYS 2d 440 (1985).

General Obligations Law 15-301 provides, in pertinent part:

"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."

Thus, while there is no prohibition against modifying a written agreement by a subsequent writing, enforcement of an alleged later oral modification is more complex. Although the prohibition set forth in the statute apples in those instances where the instrument itself bars all but written change, it has been held to apply even where a provision barring oral modifications is contained in a related instrument. **See, Josephthal Holdings, Inc v Weisman**, 5 AD 3d 221, 773 NYS 2d 398 (2d Dep't 2007); **4 M Development Company v China Trust Bank**, 240 Ad 2d 210, 658 NYS 2d31 (1st Dep't 1997).

Yet, despite the general prohibition against parole evidence of oral modification of a clear, integrated contract, the bar can be lowered where there is evidence of the terms of the oral modification, coupled with consideration therefore and partial performance of the modification unequivocally referable to the oral agreement. **Allen v Rose**, 42 NY 2d 338, 366 NE 2d 1279, 397 NYS 2d 922 (1977); **Sarcona v DiGiaimo**, 226 AD 2d 1143, 641 NYS 2d 479 (4th Dep't 1996); **Pau v Bellavia**, 145 AD 2d 609, 536 NYS 2d472 (2d Dep't 1988). Thus, the Court denied Summary Judgment to a mortgagee bank, and found that a genuine issue of fact existed as to whether an oral modification had occurred, in which the bank allegedly agreed not to declare the borrower in default and rather, apply rental income from the property toward reduction of the principal balance. **Fairchild Warehouse Associates, LLC v United Bank of Kuwait**, 285 AD 2d 444, 727 NYS 2d 153 (2d Dep't 2001).

In the case at bar, the Plaintiff met its initial burden of establishing entitlement to summary judgment by setting forth a clear promissory note and an allegation of Defendant's default in the payment thereof. **See, Niskayuna Square LLC v 81 and 3 of Watertown, Inc**, 12 AD 3d 1160, 784 NYS 2d 419 (4th Dep't 2004). However, in response to the motion, Defendant has raised several issues which must be addressed. First, the Note refers to another instrument, the Security Agreement, which was signed by the Defendant on the same date. The Security Agreement, while containing a clause prohibiting oral modification, has a handwritten notation that it is subject to a Letter of

Intent and meeting. The collateral to be secured is also crossed out and initialed by Plaintiff's Controller and Defendant. In addition to the above, the parties had a course of dealing with regard to an identical Note previously issued in the amount of $150,000 whereby the loan was being paid down by delivery of corrugated materials to Plaintiff for its resale. Third, Defendant has attached letters from the Defendant referencing a continuation of acceptance of corrugated recyclables against the $150,000 note and, if applicable, the $75,000 (subject) Note. This letter is accompanied by a letter from Plaintiff's attorney that, while complaining that deliveries are not up to date, states that there has been partial performance of the parties' agreement through the delivery of materials to Plaintiff.

While Plaintiff attacks the allegation of partial performance through the affidavit of its own Controller, it simultaneously raises issues concerning the partial performance by Defendant. The Court finds that the Defendant has raised issues sufficient to defeat Summary Judgment. Taken together, the Note and the so-called Security Agreement create several ambiguities. The Agreement both lacks collateral and contains Defendant's notation that it is subject to a meeting. While it is uncontroverted that the meeting occurred, whether it produced an oral modification of the Note is a question of fact . Also unclear is whether the deliveries of material from defendant's corporation to Plaintiff constituted a partial performance of Defendant's obligations to repay the loan specifically referrable to an orally modified agreement. These are questions of fact which require a trial.

The decision of whether or not to disqualify an attorney from representation of a client rests in the sound discretion of the court. However, the party seeking the disqualification must sustain its burden of demonstrating that such is warranted. **See, Jamaica Public Service Co v AIU Insurance Co**, 92 NY 2d 631, 707 NE 2d 414, 684 NYS 2d 459 (1998). This issue touches on both the ethics of the legal profession and the valued right of a client to be represented by an attorney of its own choosing. **S & S Hotel Ventures Ltd Partnership v S H Corp**, 69 NY 2d 437, 508 NE 2ed 647, 515 NYS 2d 735 (1987). With regard to the prohibition against an attorney acting as a witness in his/her client's trial, such rests, in part, on the necessity of such testimony.

Old Saratoga Square Partnership v Compton, 19 AD 3d 823, 798 NYS 2d 743 (3d Dep't 2003). Whether such necessity exists will turn, at least in some significant part, on the availability of other evidence. **See, Feinstein v Carl**, 4 Misc 3d 1008 (A), 791 NYS 2d 869, 2004 N Y Slip Op 50770 (U) (Sup Ct Nassau Cty 2004).

With regard to the cross-motion, the Court does not find it frivolous in light of Defendant's reliance on what occurred at a particular meeting where Plaintiff's counsel was present. However, Plaintiff's counsel was not the sole party present at the meting. According to Defendant's prior counsel, the meeting was attended by the President of Plaintiff, as well as the Defendant and Defendant's former counsel who have voluntarily chosen not to represent Defendant in this matter. In view of the opportunity to examine other witnesses and the value set by the Court on the right of a client to retain counsel of it's own choosing, the Court denies the cross-motion at this time, with right to renew before trial.

Counsel are directed to appear for a Preliminary Conference on Tuesday, January 11, 2011 at 11 a m. The Defendant shall serve and file an answer within thirty (30) days from the date of this Order.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: November 3, 2010
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.

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