Coady Diemar Partners, LLC v ARC Group Worldwide, Inc.
2019 NY Slip Op 30054(U)
January 4, 2019
Supreme Court, New York County
Docket Number: 655402/2016
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 41EFM

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COADY DIEMAR PARTNERS, LLC

Plaintiff,

- v -

ARC GROUP WORLDWIDE, INC.,

Defendant.

INDEX NO. 655402/2016

MOTION DATE 10/03/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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HON. ANTHONY CANNATARO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37
were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff Coady Diemar Partners moves for summary judgment on its breach of contract claim and seeks a money judgment representing a commission allegedly owed by defendant ARC Group Worldwide following the sale of defendant's business to non-party Winchester Electronics Co. ("Winchester").

Prior to entering into an agreement with plaintiff, defendant attempted to sell its subsidiary, Tekna Seal to Winchester. The sale was never consummated and, on May 11, 2016, defendant entered into a written agreement with plaintiff, an investment bank, whereby plaintiff would advise and assist defendant in offering Tekna Seal to a wider range of potential buyers. Plaintiff was aware of the attempted sale to Winchester and of defendant's theory that marketing the business more widely might reignite Winchester's interest in the deal.

The agreement provided that defendant would pay a retainer fee of $22,5000 (with $7,500 paid per month for three months); plaintiff's expenses including those

incurred in an effort to enforce its rights under the agreement; and an additional fee based on a percentage of the value of the sale (3% of a sale up to $17.5 million or 5% of any amount above $17.5 million). In total, defendant would pay no less than $275,000 in the event of a sale. The agreement also included a no-oral modification clause stating that the terms could not be amended and no portion of the agreement could be waived except by a writing duly executed by the parties. The agreement did not provide for any exceptions or discounts in the event that the original potential buyer, Winchester, ultimately purchased Tekna Seal.

Talks with Winchester about purchasing Tekna Seal recommenced in June 2016. On September 30, 2016 defendant sold Tekna Seal to Winchester for $10.5 million. On October 3, 2016 plaintiff sent defendant an invoice for $295,378.43. This invoice represented 3% of the value for which Tekna Seal was sold ($315,000) less the $22,500 retainer fee that had been paid, plus expenses of $2,878.43. Defendant has yet to pay any amount other than the retainer fee.

Plaintiff argues that it is entitled to its contracted-for fee because no oral modification of the written agreement was created or is permitted here. Plaintiff argues that any alleged oral modification could not have altered the parties' agreement because the contract contains a "no oral modification" clause.

Plaintiff further argues that none of the narrow exceptions which would allow an oral modification, including partial performance of and detrimental reliance on the modification, are present here. Rather, plaintiff maintains it continued to perform work for defendant, including conducting due diligence and financial projections, producing marketing and sales materials, creating a potential buyers list, and communicating with plaintiff. Plaintiff also asserts that defendant has not made any payments in accordance with the alleged oral modification but rather continued to make payments towards the retainer, performing as required under the original agreement. Finally, plaintiff argues

that no oral modification could be enforceable under the circumstances here because there was no consideration for the purported change.

Defendant argues that the parties orally modified their agreement in July 2016 to the extent of significantly altering the compensation provisions of the contract so that plaintiff would receive a fee of $50,000 if no new buyers were found; second league table credit in the event a sale was made; and a right of first refusal on future business. Defendant further contends that there was an understanding that plaintiff would continue working with defendant but solely on revising a draft confidential information memorandum. On the issue of an exception to the no-oral-modification requirement, defendant asserts that plaintiff's actions in reducing its efforts to sell the business and not protesting when it was cut off from defendant's data constitutes proof of partial performance referable exclusively to the oral modification. Defendant also asserts that because plaintiff induced defendant to rely on the terms of the claimed modification, plaintiff should now be equitably estopped from refusing to honor the oral modification.

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has met this showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Id.*).

Section 15-301(1) of the General Obligations Law protects parties to a written agreement who include a no oral modification clause. "If the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between parties, the writing controls" (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1977]).

An exception allowing an oral modification to control exists where the parties have performed in a manner that is exclusively referable to the oral modification. Thus, it has been stated, "some performance confirming the modification must be present, and it must be unequivocally referable to the oral modification" (*Paramount Leasehold, L.P. v 43rd St. Deli, Inc.*, 136 AD3d 563, 568 [1st Dept 2016], *lv to appeal dismissed in part, denied in part*, 28 NY3d 1024 [2016], [internal citations omitted]). The parties actions must be "unintelligible or at least extraordinary" as to the written agreement and "explainable only with reference to the oral agreement" (*Anostario v Vicinanzo*, 59 NY2d 662, 664 [1983]). It has been held that partial performance is not unequivocally referable to an oral modification if it is "as reasonably explained by the possibility of other expectations" or "explainable as preparatory steps taken with a view toward consummation of an agreement in the future" (*Id.*).

On the record presented here, this Court finds that plaintiff's continued work for defendant was not unequivocally referable to an alleged oral modification of the parties' written agreement. Even if plaintiff's performance was somewhat limited compared to a full-scale effort to market Tekna Seal, such actions were compatible with performance under the original contract or in compliance with defendant's direction that plaintiff limit its efforts, and thereby expenses, when Winchester showed renewed interest in purchasing the business. It also appears that defendant did not make any payments in accordance with the alleged oral modification but only continued to make retainer payments required under the original agreement, evincing defendant's continued performance under the original agreement rather than a modification. The actions of both parties are therefore not unequivocally referable to the alleged oral modification.

Another exception to no-oral-modification rule exists under the doctrine of equitable estoppel. "Once a party to a written agreement has induced another's

significant and substantial reliance upon an oral modification, the first party may be estopped from invoking the statute to bar proof of that oral modification" (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 344 [1977]). Here too, the "conduct relied upon to establish estoppel must not otherwise be compatible with the agreement as written" (*Id.*).

Once again, there is no indication of detrimental reliance that would make the claimed oral modification enforceable. Defendant's decision to limit plaintiff's broader duties is plausibly explained by a business decision to have plaintiff temporarily focus on and dedicate resources to securing one likely potential buyer and scaling back efforts at marketing to a broader range of potential buyers. As such, defendant's actions are not unequivocally explained by a fundamental change to the parties agreement, either in terms of the scope of defendant's work or plaintiff's responsibility to pay. Thus, the conduct relied upon is entirely compatible with the agreement as written and is not explainable only with reference to the oral modification.

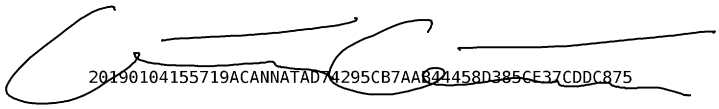
Finally, the oral modification cannot replace the written agreement as it lacks consideration. "Neither a promise to do that which the promisor is already bound to do, nor the performance of an existing legal obligation constitutes valid consideration" (*Tierney v Capricorn Inc'rs, L.P.*, 189 AD2d 629, 631 [1st Dept 1993]). Here, plaintiff was already contractually obligated to advise defendant in the sale of its subsidiary, and its actions were consistent with this duty rather than a reduction in obligations. Defendant was already contractually obligated to pay in accordance with the written agreement, which would be a minimum of $275,000. Thus, any agreement to simply lower the amount defendant would pay for the same services represents an individual reduction in obligation and lacks consideration. Accordingly it is,

ORDERED that plaintiff's motion for summary judgment and a declaratory judgment is granted; and it is further

ADJUDGED and DECLARED that plaintiff is entitled to $295,378.43 with prejudgment interest from October 3, 2016;

ORDERED that the matter shall be referred to a Special Referee to hear and report on costs, expenses, and attorneys' fees; and it is further

ORDERED that, within 15 days of the date of this order, counsel for plaintiffs shall serve upon the Special Referee Clerk (60 Centre Street, Room 119) a copy of this order with notice of entry and a completed Information Sheet and such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].



1/4/2019
DATE

ANTHONY CANNATARO, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE