

**Aldrich v LNG Enters., Inc.**

2022 NY Slip Op 34658(U)

September 2, 2022

Supreme Court, Chautauqua County

Docket Number: Ind. No. EK1-2019-000116

Judge: Grace M. Hanlon

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK

SUPREME COURT COUNTY OF CHAUTAUQUA

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BRIAN F. ALDRICH

Plaintiff

-vs-

IND. # EK1-2019-000116

LNG ENTERPRISES, INC.

Defendants.

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HANLON, J.

**MEMORANDUM DECISION AND ORDER**

This constitutes the Court's decision regarding a motion by the Defendant for an Order dismissing the Plaintiff's Complaint pursuant to CPLR §3211 (a)(7), or in the alternative pursuant to CPLR §3212. The Plaintiff filed a Notice of Cross Motion for Summary Judgment against the Defendant pursuant to CPLR §3211.

The Defendant filed a Notice of Motion dated May 5, 2022, for an Order dismissing the Plaintiff's Summons and Complaint pursuant to CPLR §3211 (a)(7), or in the alternative pursuant to CPLR §3212. The Defendant in support of their motion submitted the Affirmation of David M. Civilette, Esq., dated May 5, 2022, along with exhibits. The Defendant also submitted in opposition to the Plaintiff's Cross-Motion the Attorney Affirmation of David M. Civilette, Esq., dated June 28, 2022. The Plaintiff in opposition of the Defendant's motion filed the Affidavit of Matthew B. Schutte, Esq. sworn to on June 6, 2022, and exhibits.

The Plaintiff filed a Cross-Motion for Summary Judgment against the Defendant pursuant to CPLR §3211, dated June 6, 2022. The Plaintiff in support of his motion filed the Affidavit of Matthew B. Schutte, Esq. sworn to on June 6, 2022, and exhibits.

The Defendant previously filed and argued the same motion before the Honorable James H. Dillon on January 27, 2020, subsequently Judge Dillon dismissed the Defendant's motion without prejudice. At the time of the motion, the parties had yet to complete discovery. The Plaintiff contended in Court that complete discovery might provide admissible evidence to defeat the Statute of Limitations defense. The parties have since completed depositions and discovery.

This case is for the collection on a Note for monies lent by the Plaintiff to the Defendant. The action was commenced by Summons and Complaint being filed on or about May 17, 2019, the original Summons and Complaint was filed by another firm for the Plaintiff, and the current Law Firm was substituted as attorney on or about October 25, 2019.

An open-ended promissory note was entered into between the parties with a note dated May 6, 2003, in the amount of \$50,000.00. The terms of the note called for the Defendant to pay interest annually with the balance being payable upon demand of the holder (Plaintiff). The

parties agree that payments were made between May 6, 2004, and September 10, 2009, with no other payments being made since that 2009 payment, and no extension of credit.

New York UCC §3-122(1)(b) states that “a cause of action against a maker or acceptor accrues in the case of a demand instrument upon its date or, if no date is stated, on the date of issue.” New York CPLR §213(3) requires that an action to collect on a defaulted note must be commenced within Six (6) years. New York GOL §17-103(1) requires that any “promise to waive, to extend, or not plead the Statute of Limitations...” be “...in a writing signed by the promisor...” Similar language is found in the Note in question, namely “No modification ... shall be binding unless in writing.” (EBT pp 34-35 annexed at Exhibit E of the Defendant’s moving papers).

During the depositions, that were attached to the moving papers of the Defendant, the Plaintiff (who is also a shareholder) and the remaining Four (4) shareholders of the Corporation testified. The transcript is devoid of any testimony that acknowledges a modification being entered into in writing, nor were there any conferences or agreements among the empowered parties to toll the Statute of Limitations.

“The law is abundantly clear in New York that, even where a contract specifically contains ... a provision stating that it cannot be modified except by a writing, it can, nevertheless, be effectively modified by actual performance and the parties’ course of conduct.” *Kingston v. Kingston* 130 A.D.3d 1464 (2015). Even if the Court were to take into consideration actions of the parties to modify the Note in question, the actions alleged appeared Three (3) months after the expiration of the Statute of Limitations.

The Plaintiff contends that there was an oral modification of the contract, however there is no place in the record where the Defendant’s admitted to orally modifying the contract. This

appears to be a unilateral modification by the Plaintiff, rather than a bi-lateral modification between the parties.

The Plaintiff's attorney set forth in Oral arguments and in his moving papers, his interpretation of the Contract. This interpretation is different than the Plain language in the Contract that calls for no oral modifications of the contract.

It is therefore,

ORDERED that Defendant's Motion to Dismiss the Plaintiff's Complaint pursuant to CPLR §3211 (a)(7), is Denied, and it is further

ORDERED that the Plaintiff's Motion to for Summary Judgment against the Defendant pursuant to CPLR §3211, is Denied, and it is further.

ORDERED, that the Defendant's Motion to Dismiss pursuant to CPLR §3212 is granted.

**Dated:** Mayville, New York

September 2, 2022

  
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GRACE M. HANLON, J.S.C.