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Importance of a Writing Under New York Law

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New York law requires the existence of a writing in many circumstances in order for legal rights or obligations to be conferred. There are statutes that require certain agreements to be in writing, for example, contracts for the conveyance of real property, N.Y. Gen. Oblig. Law §5-703(1); contracts for the payment of finder's fees, N.Y. Gen. Oblig. Law §5-701(10); and modifications to written agreements which state that they cannot be changed orally, N.Y. Gen. Oblig. Law §15-301. In addition, the parties themselves may require a written agreement, or an agreement between the parties may require that any amendments or modifications be in writing.

While the necessity of a writing in many cases should be quite evident, New York courts are continually faced with lawsuits brought by parties who have failed to abide by contractual writing requirements. A recent decision authored by Justice David Saxe of the Appellate Division, First Department, specifically addresses this issue and provides a clear example of how required writings cannot be avoided.

Oral Modifications

In *Nassau Beekman v. Ann/Nassau Realty*,[1] the plaintiff agreed to buy a piece of property in Manhattan for $56.7 million, although this amount was later reduced. The contract provided that it could not be amended, except by a signed agreement. The parties agreed to a closing date in 2007 but, through a series of written amendments, pushed this date back numerous times until Sept. 25, 2008, at noon. The plaintiff alleged that it was common practice for parties to orally agree to these amendments, which then later were finalized in writing.

On Sept. 25, 2008, the parties again attempted to negotiate another amendment to the contract through emails and a meeting at 3 p.m., but a written agreement was never finalized. Six weeks later, the defendant sent the plaintiff a notice of termination, informing the plaintiff that the defendant would be keeping the plaintiff's down payment on the property as liquidated damages. The plaintiff then sued, seeking the return of the down payment, as well as damages from the defendant's allegedly wrongful termination and anticipatory breach of the sales contract. The Supreme Court granted defendant summary judgment, dismissing the complaint, and the plaintiff appealed.

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The plaintiff argued on appeal that the parties had again agreed to postpone the closing date to a date later than Sept. 25, 2008, and cited the parties' history of orally modifying the closing date. In his opinion, however, Saxe cited to New York General Obligations Law §15-301, which states that, when a written agreement contains a provision that prohibits oral modifications, it cannot be modified by executory agreement, unless the executory agreement is in writing and signed by the party against whom enforcement is sought. The proposed amendment was unexecuted, and thus the email correspondence and 3 p.m. meeting on Sept. 25, 2008, were insufficient to indicate that the closing was postponed by agreement. Saxe characterized these actions as merely "preparatory steps" in the attempt to reach a new agreement.[2]

A party's mistaken reliance on oral modifications, even when a writing is required, is not uncommon. Saxe noted that "[a] standard provision included in many commercial contracts is one requiring any modification of the agreement to be in writing. Nevertheless, courts are presented over and over again with litigation arising out of circumstances where one party to a contract wrongly presumes, based on past practice, that an oral modification will be sufficient."[3]

No Binding Contract

Another recent case demonstrating the need for a writing in order for contractual obligations to exist is *Moulton Paving v. Town of Poughkeepsie*.[4] In *Moulton Paving*, paving contractors sued the town and other entities for breach of contract (as well as other causes of action). The Supreme Court found that there was no binding contract in existence at the time of the alleged breach, and dismissed the complaint.

The Second Department affirmed. The court held that, "if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed."[5] The agreement at issue contained a clause expressly stating that the agreement would not become binding until it was signed by the parties, which it was not. The absence of a signed writing meant that plaintiffs' claim for breach of contract failed.

Conclusion

These cases illustrate the importance of adhering to writing requirements. Parties of course must comply with statutory requirements. In addition, parties must be careful to not only scrutinize contractual language to determine when and if a writing is required, but also to avoid falling into the trap of relying on oral agreements, even if oral agreements have been honored in the past.

1. 2013 WL 362816, N.Y. Slip. Op. 00566 (1st Dept. Jan. 31, 2013).
2. N.Y. Slip Op. 00566 at *4.
3. Id. at *1.
4. 98 A.D.3d 1009, 1011, 950 N.Y.S.2d 762, 765 (2d Dept. 2012).
5. Id. at 1011, 950 N.Y.S.2d at 765 (internal quotations & citations omitted).

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