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Executing written modifications to sale contracts

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As a rule, most commercial contracts - including those for the purchase and sale of real property - require that all contract modifications be made in writing in order to be deemed enforceable. However, time and time again, disputes arise as a result of the contracting parties' failure to draft and execute written modifications. This omission happens with great frequency, even when the stakes are rather high. In one case adjudicated by the First Department, Appellate Division just a few weeks ago, a prospective purchaser of an expensive piece of Manhattan real estate learned an important - and costly - lesson about the need to execute written modifications when required to do so by the contract.

In Nassau Beekman, LLC v. Ann/Nassau Realty, LLC, the Appellate Division, First Department, was called upon to ascertain whether an oral modification to a contract for the sale of real property, which purported to adjourn the closing date, could be deemed a sufficient modification. In this case, the plaintiff, a prospective purchaser, entered into a contract of sale with defendant, the seller, for the purchase of a parcel of property located at Ann St. and Nassau St. in N.Y.C. The purchase price of the property was $56.7 million, with an initial down payment of $5 million. The contract of sale contained a standard integration clause, as well as a provision prohibiting any modifications and amendments to the contract, unless signed by the party against whom enforcement would be sought. In the contract of sale, the closing was scheduled for August 30, 2007, with time of the essence as to this date. Notwithstanding the time of the essence provision, the closing date was rescheduled multiple times, each time in writing, through Sept. 25, 2008. During the course of these extensions, the down payment was increased to $9 million. On the scheduled closing date, the prospective buyer failed to appear, although the parties did meet that afternoon in an unsuccessful effort to negotiate another written amendment to the contract. On Nov. 6, 2008, the seller sent the buyer a written notice of termination, pursuant to which the seller advised that it would retain the down payment as liquidated damages. This lawsuit followed, in which the buyer sought, among others, the return of its down payment and additional damages for the alleged wrongful termination of the contract of sale. The seller counterclaimed to retain the down payment as liquidated damages pursuant to the contract.

The lower court ultimately dismissed the complaint, finding that the alleged oral adjournment of the closing date was ineffective in light of the writing requirement contained within the contract, and the fact that all extensions prior to Sept. 25, 2008 had been set forth in writing. As a result, the seller was entitled to retain the entire down payment as liquidated damages. On appeal, the appellate court affirmed the lower court's decision, holding that the buyer was unable to establish that the parties had orally modified the contract of sale to extend the closing date beyond Sept. 25, 2008. The court noted that the contact of sale required that all amendments and modifications be memorialized in writing, which writing was glaringly absent in this case. Although the court

acknowledged that partial performance of an alleged oral modification could, under certain limited circumstances, obviate the requirement of a written modification, this was not the situation herein. Although the parties met on the afternoon of Sept. 25, 2008, this meeting was not solely attributable to the alleged oral extension of the closing date. To the contrary, the meeting could be characterized as an attempt by the parties to salvage the deal (rather than to adjourn the scheduled closing), and therefore could not substantiate that the buyer's contention that the extension had been mutually and orally agreed to by both parties.

While this case does not present any novel issues or groundbreaking new law, it is important to the extent that it reemphasizes that parties to an agreement, which requires all amendments and modifications to be in writing, actually execute such written amendments and modifications. Contracting parties should not rely upon oral communications as constituting contract amendments, even if such oral communications may have sufficed in the past. Although the drafting of a simple modification agreement or amendment may mandate some additional work, as Nassau Beekman, LLC v. Ann/Nassau Realty, LLC demonstrates, it could prove well worth the extra effort at the end of the day.

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