IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

ANTHONY SALVATORE and VIN SALVATORE, INDIVIDUALLY and t/d/b/a 33TWONONECO, LLC,	: No. 18-00182
Plaintiffs	: Civil Action – Law
vs.	:
DANKO HOLDINGS, LP; 3RD ST. PLCB VENTURES, LLC d/b/a FAT CAT GRILLE AND NIGHT VENUE,	:
Defendants	: Motion for Partial Summary Judgment

OPINION AND ORDER

AND NOW, following argument held on April 8, 2022 on Defendant Danko Holdings, LP; 3rd St. PLCB Ventures, LLC d.b.a. Fat Cat Grille and Night Venue's Motion for Partial Summary Judgment, the Court hereby issues the following OPINION and ORDER.

The Court has reviewed Defendants' Motion with support documents, along with Plaintiffs' response. Although this Court did not attend the oral argument held on April 8, 2022, the Court has read the transcript of that argument. For the reasons more fully set forth herein, the Motion will be denied.

The Management Agreement:

The Plaintiffs as captioned are Anthony and Vin Salvatore, both individually and trading as 33 Two Noneco LLC (hereinafter collectively "Restauranteurs"). While this issue is not central to the instant Motion, the Court has seen little evidence in the record to support the conclusion that the individuals have any cause of action distinct from the claims of Two Noneco LLC (hereinafter "Noneco"). In the absence of trial evidence to support the alleged individual causes of action, eventual dismissal of those claims is likely.

The pleadings allege that Noneco entered into a written management agreement (hereinafter the "Management Agreement"), dated July 1, 2016, with Defendant 3rd St. PLCB Ventures LLC (hereafter "Licensee", the same term used for that limited liability company in the Management Agreement). Under the terms of the Management Agreement, Restauranteurs were responsible for operating Licensee's restaurant, and were to pay Licensee monthly fees of $4,500 titled "Distribution" and $500 titled "Accounting Services". Licensee was the owner of the restaurant real estate, personal property, and liquor license. Under Section 8 of the Management Agreement, Licensee was responsible for maintenance of the real estate, including the building roof. Section 15 of the Management Agreement provided

that, in the event of default of the Restauranteur, the Licensee may opt to void the agreement and to seek other remedies. Section 16 of that Agreement provided in part that,

> in no event shall LICENSEE be charged with default in the performance of any of its obligations hereunder until LICENSEE shall have failed to perform such obligations for thirty (30) days or such additional time as is reasonably required to correct any such default) after notice given to LICENSEE by RESTAURANTEUR, specifying LICENSEE's failure to perform.

Section 27 of the Agreement contains a cooperation provision requiring the parties to "execute, deliver and file all such documents… as may be necessary… to effectuate the intent of this agreement." Section 30 of the Agreement requires notices to be in writing, and sent by registered or certified mail, or by express mail or messenger delivery requiring a delivery receipt. Section 33 of the Agreement titled "Complete Agreement" provides that no modification will be effective unless reduced to written and signed by all parties.

The Record Evidence:

Daniel Klingerman (principal for Licensee) testified that the Licensee was aware of a roof leak, and that the leak was repaired prior to the opening of the restaurant. Def's Br. at 35; Pl.'s Br. at 35. The Management Agreement ran for 18 months with the possibility of extension beginning on the opening day of the restaurant which was November 15, 2016. Def's Br. Supp. Mot. Summ. J., 3. (Def.'s Br.). Restauranteurs do not deny that repairs were made on the building, but contend that the roof repairs were never satisfactorily completed. Licensee contends that Restauranteurs began to pay the management fees and continued through July 2017, but made no further payments. Def.'s Br. at 27-28. Restauranteurs contend that Licensee agreed to waive the management fees for the first six months of the management agreement. Def's Br. at 49; Resp. to Def.'s Mot. for Partial Summ. J., 49 (Pl.'s Br.) at 27-8 (Citing Ex. D).[1]

Restauranteurs contend that Licensee never complied with § 8(A) of the management agreement by failing to repair the restaurant building roof prior to commencement of restaurant operations. Vin Salvatore texted "back-and-forth" with Michael Bolsar, a maintenance worker for the Licensee, between May 7, 2017 and January 9 2018 regarding the leaking roof. Def's Br. at 52. On January 10, 2017, Vin Salvatore emailed Daniel Klingman,

[1] Plaintiff's version of the facts could be interpreted to be inconsistent by the Court. First Plaintiff contends that the "parties agreed there would be no monthly management fee for a period of six (6) months… the rent payments did not commence until February 1,2017," implying that the first 6 moths of payment were waived. Pl.'s Br. 26. Immediately afterwards, Plaintiff asserts that "Plaintiffs were given a six (6) month *extension* to make payments," implying that the Plaintiffs' first six months of payment were deferred by six months rather than waived. Pl.'s Br. 27 (emphasis added).

a representative of Licensee, noting that "[T]he roof is leaking again. Caused minor damage in the stairway." Def's Br. at 49; Pl.'s Br. at 49 (Citing Ex. D).

Michael Bolsar, testified that he was aware that repairs were done on the roof in May and June of 2017, and that Nova Construction may have been involved in the repairs. Id. at 36-7. Licensee has produced invoices showing that Nova Construction performed roof work on the restaurant building in May and June of 2017. Id. at 37.

Vin Salvatore testified that Restauranteurs provided notice to Licensee about the roof "in email, text, phone call, in person." Def's Br. at 43; Pl's Br. at 43. The parties agree that all communication between the parties regarding continuing issues with the restaurant roof after June 2017 were either oral or in email. Def.'s Br. at 46 (citing Ex. I.); Pl. Br. at 46,48. On June 20, 2017, Vin Salvatore texted Bolsar indicating that the roof was still leaking. Def. Br. at 54. On June 23, 2017, Mr. Bolsar informed Vin Salvatore that the roof was being repaired and Vin Salvatore acknowledged that he spoke with the maintenance worker and showed the worker areas of damage to the roof. Id. at 56; Pl.'s Br. at 56.Klingerman contends that he was never notified that Restauranteurs were unable to use a portion of the building because of the leaky roof. Def's Br. at 58; Pl.'s Br. at 58.

Discussion:

In Pennsylvania, a party may move for summary judgement "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action…" Pa.R.C.P. No. 1035.2(1). In response, the adverse party may not rest on denials but must respond to the motion. Pa.R.C.P. No. 1035.3(a). The non-moving party can avoid an adverse ruling by identifying "one or more issues of fact arising from evidence in the record…" Pa.R.C.P. No. 1035.3(a)(1).

> Summary judgment is appropriate only when the record clearly shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Only when the facts are so clear that reasonable minds could not differ can a trial court properly enter summary judgment.
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> *Hovis v. Sunoco, Inc.,* 2013 Pa.Super. 54, 64 A.3d 1078, 1081, quoting *Cassel-Hess v. Hoffer*, 44 A.3d 84-85 (Pa.Super. 2012).

The presence of an explicit "no oral modification" clause in a written contract does not preclude the Court's consideration of a claim of oral modification. Rather, where a written contract contains such a provision, any claimed oral modification will be ineffective unless the evidence reveals a clear intent to waive the requirement that amendments must be in writing. *Accu-Weather, Inc. v. Prospect Commc'ns, Inc.*, 435 Pa. Super. 93, 644 A.2d 1251

(Pa. Super. Ct. 1994); *Universal Builders, Inc. v. Moon Motor Lodge*, Inc., 430 Pa. 550, 557-9 (Pa. 1968); *Wagner v. Graziano Const. Co.*, 390 Pa. 445, 448-9 (Pa. 1957). The effectiveness of oral modification in the face of a "no oral modification" clause "depends upon whether enforcement… is barred by equitable considerations, not… whether the condition was… expressly and separately waived before the non-written modification." *Universal* 430 Pa. at 560. Whether a contract with a "no oral modification" clause was subsequently modified is a question of fact to be decided by the jury. *Achenback v. Stoddard*, 253 Pa. 338, 343; *Accuweather* 430 Pa. at 103 n.5. An oral contract modifying a prior written contract must be proved by clear, precise, and convincing evidence. *Pellegrene v. Luther,* 403 Pa. 212, 215 (Pa. 1961). A modification of a written contract is still invalid if the modification conflicts with the law or public policy. *Pellegrine*, 403 Pa. at 217 n.2.

In sum, the determination of the validity of an oral modification to a written contract containing a "no oral modification" clause hinges on whether the finder of fact concludes by clear, precise, and convincing evidence that the parties agreed to modify the contract.

In *Wagner* a painter sued a construction company to recover compensation for work the painter was asked to do in addition to what was laid out in the party's original written contract. *Wagner* 339 Pa. at 446-7. There, an agent of the construction company explicitly requested the painter to do supplemental work which the painter performed. *Id.* at 447. The Pennsylvania Supreme Court ruled the agent's verbal request for supplemental work to be sufficient bases to allow evidence that the agent of the company had authority to modify the contract. *Id.* at 451. The implication of *Wagner* is that a verbal command to perform supplemental work may provide sufficient clear, precise, and convincing evidence to support modification of a written contract. *Achenbach* is similar to *Wagner* in that a landowner allegedly, verbally, negotiated with and requested an excavation company to do supplemental work after the formation of a written contract. *Achenbach* 253 Pa. at 340. The Pennsylvania Supreme Court affirmed the lower court ruling that the oral modification of the written contract was valid.

In *Accuweather* the Court reversed the lower court's grant of summary judgement in favor of a communications company against a weather service company. *Accuwather* 435 Pa.Super. at 96. There, a written contract was formed requiring either party to give the other party 120 days' notice to terminate the contract. *Id.* The communications company attempted to give 90 days' notice to terminate the contract in February of 1991 but the weather company rejected the notice because there was not adequate notice under the contract. *Id*. at 97. The telecommunications continued to perform the contract but gave another, oral, notice, in June,

1991, of its intention to terminate the contract on August 16, 1992. *Id.* at 97-8. The weather company once again rejected the notice because of there was not adequate notice under the written contract. *Id.* The Superior Court there found that, under the contract's provisions, the weather company did not have adequate notice—neither notices to terminate the contract gave the contractual requisite 120 days' notice, however, the written agreement may have been modified by the oral notice given by the communications company in June of 1991. *Id.* at 101-2. Because the existence of the oral modification is a question for the jury, the Superior Court reversed the summary judgement entered by the lower court in favor of the weather company. *Id. Accuweather* reinforces the common law rule that enforcement of a written contract is barred by equitable considerations, not whether the condition was expressly and separately waived.

In *Fenstermacher*, a seller contracted to sell their real property to a buyer. *Schwoyer v. Fenstermacher,* 251 Pa. Super. 243 (Pa. Super. Ct. 1997). There, the contract contained an express clause stating that time is of the essence. *Id.* at 245. The buyer was unable to timely obtain a title search, and the seller allowed the buyer extra time to perform title searches. *Id.* at 245-6. When the buyer was able to obtain a title search, the seller refused to close the sale and claimed that the contract was null and void because the time is of the essence clause was breached *Id.* The Superior court there held that the seller waived the "time is of the essence" provision by her conduct. *Id.* at 246-9.

Even where the terms of an alleged oral modification are clear, the Court may elect to reject the claimed modification, where the Court finds no evidence that the parties consciously intended to waive the "no oral modification" clause. *Douglas v.* Benson, 294 Pa.Super. 119 (Pa. Super. Ct. 1982). In *Douglas,* Lessees of land tracts with coal resources formed a contract with lessees that included a no oral modification clause. *Id.* at 121. Lessors sued the lessees alleging breach of contract and lessees counterclaimed in pursuit of coal mining expenditures which were allegedly agreed upon in settlement negotiations. *Id.* at 121. The trial court heard conflicting testimony as to the intent of the parties during settlement negotiations. *Id.* at 124. The Court held that, "even if the lower court had accepted the appellants' contention that the parties had reached a verbal agreement, there was no evidence by anyone that the parties had consciously intended to waive the requirement that amendments must be in writing." *Id*. at 128.

In the matter at bar, the Management Agreement unquestionably required Licensee to maintain the roof. The Agreement contained a "no oral modification" clause, which required that the Restauranteurs provided written notice of breach, and allow a period of thirty (30)

days to cure. The record establishes that Restauranteurs communicated with Licensee about the leak in the restaurant roof, both before and after the commencement of restaurant operations. There is conflicting testimony as to whether the Restauranteurs notified the Licensees about the most recent leak in the restaurant roof, and as to whether the Restauranteurs notified the Licensees about how the leak affected Restauranteur's ability to operate.

Conclusion:

In order to avoid summary judgment, the non-moving party must establish the existence of at least one genuine issue of material fact for trial. Here, Restauranteur asserts that a genuine issue of fact is presented for trial on the question of whether the Management Agreement requirement of written notice of a claimed breach, and a thirty (30) day opportunity to cure, were waived by Licensee. At trial, the evidence of those claimed oral modifications to the Management Agreement must be clear, precise, and convincing.

In this Court's view, the record evidence in support of Restauranteur's claim of oral modification of the terms of the Management Agreement is dubious. While Restauranteur clearly provided Licensee with notice of a leaking roof, there is little evidence in the record upon which to base the conclusion that Licensee expressly waived Sections 16 and 30 of the Management Agreement. Nevertheless, this Court cannot predict that the trial testimony of Restauranteurs will inevitably falls short of clear, precise, and convincing evidence. In considering a motion for summary judgment, it is not the function of this Court to decide issues of fact. Rather, is it our function to decide whether an issue of fact exists. *Fine v. Checcio,* 582 Pa. 253, 273, 870 A.2d 850, 862 (2005). Because such an issue now exists, summary judgment is inappropriate.

Nothing set forth herein is intended to preclude Licensee from making a motion pursuant to Rule 226(b), at the conclusion of Restauranteur's case a trial, if Restauranteur fails to produce evidence to support the claimed oral modification.

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ORDER

For the foregoing reasons the Court hereby ORDERS that the Defendants' Motion for Partial Summary Judgment is DENIED.

IT IS SO ORDERED this 4th day of October, 2022.

By the Court,

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William P. Carlucci, Judge

TSR/WPC
cc: Dean F. Piermattei, 2205 Forest Hills Drive, Suite 10, Harrisburg, PA 17112
Joseph Orso, 339 Market Street, Williamsport, PA 17701