FILED
LORAIN COUNTY
2018 APR 19 AM 11:45
COURT OF COMMON PLEAS
TOM ORLANDO

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date April 19, 2018 Case No. 15CV188007

DESIGNERS CHOICE, INC.
Plaintiff

Mark Stephenson
Plaintiff's Attorney

VS

ATTRACTIVE FLOORINGS, LLC, *ET AL.*
Defendant

Geoffrey Smith
Defendant's Attorney

This matter is before the Court on Plaintiff, Designers Choice, Inc.'s, Motion For Summary Judgment, filed February 1, 2018; Defendants' Brief in Opposition, filed February 26, 2018; and Plaintiff's Reply Memorandum, filed March 5, 2018.

THE COURT RULES THAT: As there are genuine issues of material fact in dispute, Plaintiff's Motion For Summary Judgment is not well-taken and DENIED.

Case remains set for jury trial on May 14, 2018.

See Judgment Entry. No Record.

IT IS SO ORDERED.

JUDGE D. Chris Cook

cc: Stephenson, Esq.
Smith, Esq.

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Mark Stephenson — Plaintiff's Attorney

VS

ATTRACTIVE FLOORINGS, LLC, *ET AL.* — Defendant
Geoffrey Smith — Defendant's Attorney

INTRODUCTION

This matter is before the Court on Plaintiff, Designers Choice, Inc.'s, Motion For Summary Judgment, filed February 1, 2018; Defendants' Brief in Opposition, filed February 26, 2018; and Plaintiff's Reply Memorandum, filed March 5, 2018.

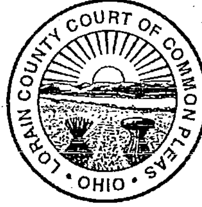
STATEMENT OF PERTINENT FACTS

This case involves the sale of business assets by way of an Asset Purchase Agreement ("The Agreement"). Plaintiff, Designers Choice, Inc. ("Designers Choice"), agreed to sell to separate Defendant, Attractive Floorings, LLC ("Attractive Floorings"), business assets and a lease for a total purchase price of $355,000.00. Separate Defendant, Eric Moen ("Moen"), guaranteed payment by Attractive Floorings.

The Agreement documents, including the Asset Purchase Agreement, the Lease, and a Promissory Note, were executed on December 30, 2011, with the first of 96 equal payments of $3,697.92 due on February 1, 2012.

Payments were timely made by Attractive Floorings until July, 2015, when it stopped making payments. On October 26, 2015, Designers Choice accelerated the balance due under the Promissory Note and demanded payment from Attractive Floorings and Moen in the amount of $200,885.28.

Around this time, Moen experienced serious health issues that prevented him from running Attractive Floorings and led to the default.



Ultimately, Attractive Floorings vacated the leased premises, brought the rent current, abandoned physical assets associated with the business and returned them to Designer's Choice, agreed to the substitution of a new tenant to take over the business, and, paid-off a $40,000.00 debt to "Mohawk Carpet" owed by Designers Choice (but incurred by Attractive Floorings).[1]

SUMMARY JUDGMENT STANDARD OF REVIEW

The standard of review for summary judgment in Ohio is well-settled. The Ninth District Court of Appeals has recently stated the standard of review for summary judgment.

> This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court uses the same standard that the trial court applies under Civ.R. 56(C), viewing the evidence in the light most favorable to the nonmoving party and resolving any doubt in favor of the non-moving party. See *Viock v. StoweWoodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).
>
> Pursuant to Civ.R. 56(C), summary judgment is proper if: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. Citing, *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977).
>
> *Petroskey v. Martin*, 9th Dist. Lorain No. 17CA011098, 2018-Ohio-445, at ¶ 15.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Specifically, the moving party must support the motion by pointing to some evidence of the type listed in Civ.R. 56(C). *Id.* at 292-293. If the moving party satisfies this burden, then the non-moving party has the reciprocal burden to demonstrate a genuine issue for trial remains. *Id.* at 293. The non-moving party may not rest upon the mere allegations or denials in their pleadings, but must point to or submit evidence of the type specified in Civ.R. 56(C). Id. at 293; Civ.R. 56(E). *Petroskey* at ¶ 16.

[1] It is unclear if the alleged amount due of $200,885.28 includes credit for any of these items.

Once the moving party satisfies this burden, the non-moving party has a reciprocal burden to "set forth specific facts showing that there is a genuine issue for trial. * * * The non-moving party may not rest upon the mere allegations or denials in his pleadings, but instead must submit evidence as outlined in Civ.R. 56(C)." *Id.* at 293; Civ.R. 56(E). Additionally, expressions of speculation or assumptions in deposition testimony and affidavits are insufficient to sustain the non-movant's burden. See *Dailey v. Mayo Family Ltd. Partnership*, 115 Ohio App.3d 112, 117 (7th Dist.1996), *Messer v. Summa Health System,* 9th Dist. Summit No. 28470, 2018-Ohio-372, at ¶ 31.

ANALYSIS

Defendants do not dispute that in June, 2015, Attractive Floorings ceased making payments to Designers Choice. The gravamen of their defense for the default is that due to health reasons, Moen was no longer able to run the business. As a result, Moen and Designer's Choice's principal, Jon Lilley ("Lilley"), allegedly met sometime in August, 2015, to discuss a resolution and modification of The Agreement ("The Meeting").

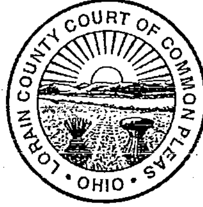
According to Defendants, the result of The Meeting was a modification or new deal whereby Defendants would ". . . return all the previously purchased assets, pay off the note to Mohawk Carpets and terminate the lease in exchange for [Designers Choice] releasing [Defendants] for any and all obligations under the Asset Purchase Agreement, Lease and Note . . ." (Defendants' Brief, pg.2)

Interestingly, Designers Choice does not deny that The Meeting occurred nor does it dispute that these "extra" payments were made. Instead, Designers Choice argues that 1) a modification of The Agreement is not enforceable unless it is in writing; 2) no valid consideration was exchanged to modify The Agreement; and, 3) the assets that were abandoned by Defendants did not benefit Designers Choice but instead, the new tenant.

MODIFICATION OF A WRITTEN AGREEMENT WITH A NO ORAL MODIFICATION PROVISION

Paragraph 27 of The Agreement contains a provision that reads, in pertinent part,

> No modification or termination of this Agreement, nor any waiver or any provision hereof shall be valid or effective unless in writing and signed by the party or parties sought to be charged therewith.



Clearly, the modification advanced by Defendants contemplates an oral modification as there is no evidence that the parties entered into a written agreement to modify The Agreement.

According to Designers Choice, since there was no written modification of The Agreement, Attractive Flooring is precluded from enforcing the oral modification.

As a matter of law, this legal maxim is not completely accurate.

There are many examples of written contracts being orally modified over no oral modification clauses where such oral modifications are deemed valid and enforceable. And, it is not lost on this Court that no oral modifications provisions in written contracts are disfavored at law as recently enunciated by the Ninth District Court of Appeals and many other reviewing courts.

In *Glenmoore Builders v. Smith Family Trust,* 9th Dist., Summit No. 24299, 2009-Ohio-3174, the court affirmed a jury verdict finding that the plaintiff, a developer, orally agreed to a modification of the parties written contract despite the presence of a no oral modification clause.

The Ninth District held, "Smith Developer also argues that the finding of an oral modification was contrary to law because the contract contained a provision barring oral modifications. However, we have stated that:

> [d]espite principles of freedom of contract and the potential benefit of avoiding false claims, the no-oral-modification clause has not garnered favor in the law. Indeed, this clause, which purports to erect a kind of 'private' statute of frauds for contracting parties, has generally not been given full effect by courts. * * * Accordingly, it has been held that the clause itself can be waived by oral agreement like any other term in a contract." *Fraher Transit, Inc.* at ¶ 13, quoting *Fahlgren & Swink, Inc. v. Impact Resources, Inc.* (Dec. 24, 1992), 10th Dist. No. 92AP–303, at *4.
>
> Thus, **the presence of a provision in the Agreement barring oral modifications does not, in and of itself, make the jury's finding of an oral modification to the Agreement contrary to law.**" *Id.* at ¶ 41, emphasis added.

Moreover, in a recent case, the Eighth District Court of Appeals in *3637 Green Road v. Specialized Component*, 8th Dist., No. 103599, 2016-Ohio-5324, reached a similar conclusion to the holding and analysis in *Glenmoore Builders.* The Eighth District in *3637 Green Road* went into great detail in discussing and construing no oral

modification clauses and upheld the trial court's finding that the parties written lease agreement was orally modified despite two separate no oral modification clauses.

The Eighth District posited the following:

"Where, as here, a party claims that a written contract was 'orally modified despite the presence of a 'no oral modification' clause,' that party 'is also implicitly asserting that the clause itself was orally waived.' * * * The purpose of a no-oral-modification provision is 'to protect a party against fraudulent or mistaken oral testimony regarding the alleged existence of an oral modification.' * * * However, no-oral-modification and written waiver provisions, like any other contractual provision, can be waived by the parties. * * * However, waiver of a contract term can occur when a party conducts itself in a manner inconsistent with an intention to insist on that term. * * * (Acknowledging 'the disfavor that courts have traditionally afforded no oral-modification clauses in written contracts and the resulting principle that a no-oral-modification clause can be waived by oral agreement like any other term in a contract.')" *Id.* at ¶ 22.

The court continued, "Despite principles of freedom of contract and the potential benefit of avoiding false claims, the no-oral-modification clause has not garnered favor in the law. * * * '[W]henever two men contract, no limitation self-imposed can destroy their power to contract again.' * * * Accordingly, it has been held that the clause itself can be waived by oral agreement like any other term in a contract." *Id.*

And, the Twelfth District Court of Appeals stated, ". . . [a party], through its actions, may waive a requirement under the agreement." Discussing no-oral modification clauses, the Twelfth District reasoned,

> if such clauses are rigidly enforced, then a party could simply insert the clause into an agreement and would be magically protected in the future no matter what that party said or did. More simply, by including a no-oral-modification clause in a contract, a party could orally induce the opposing party in any way and then hide behind the clause as a defense. * * *

Fields Excavating v. McWane, 12th Dist. No. CA2008-12-114, 2009-Ohio-5925, at ¶ 17.

Like the situations in *Glenmoore Builders, 3637 Green Road,* and *Fields Excavating,* in the case at bar there is substantial, competent, and credible evidence in the record to support the conclusion that Designers Choice waived The Agreement's no oral modification and written waiver provisions, particularly when viewing the evidence in a light most favorable to Attractive Floorings.

Accordingly, by its subsequent course of conduct in accepting Attractive Floorings offers to bring the rent current, pre-pay the Mohawk debt[2], and leave its inventory for the new tenant, reasonable minds could clearly conclude that a waiver occurred and a new deal was reached.

LACK OF CONSIDERATION

Plaintiff next argues that even if there was an oral modification, it is unenforceable for lack of consideration.

This Court disagrees.

In *3637 Green Road,* The Eighth District also addressed lack of consideration for an oral modification. That court opined,

> "As this court has stated, '[o]ral agreements to modify a prior written agreement are binding if based upon new and separate legal consideration or, even if gratuitous, are so acted upon by the parties that a refusal to enforce the oral modifications would result in fraud to the promisee.' *Corsaro v. ARC Westlake Village, Inc.*, 8th Dist. Cuyahoga No. 84858, 2005-Ohio-1982, 2005 WL 984502, ¶ 16; *see also Wilhelmy v. 15201 Detroit Corp.*, 8th Dist. Cuyahoga No. 71290, 1997 WL 298052, *4 (June 5, 1997); *Thurston v. Ludwig,* 6 Ohio St. 1 (1856), syllabus. The burden of proving consideration for an oral modification lies with the party seeking to establish the modification. *See, e.g., Apex Sales Agency, Inc. v. Mather Co.,* 8th Dist. Cuyahoga No. 60344, 1992 WL 354816, *4 (Nov. 19, 1992); *Hare v. Endersby,* 3d Dist. Allen Nos. 1–15–46, 1–15–47, 2015-Ohio-5442, 2015 WL 9461777, ¶ 45; *Baker & Hostetler, LLP v. Delay,* 10th Dist. Franklin No. 08AP–1007, 2009-Ohio-2507, 2009 WL 1486628, ¶ 19. Whether consideration exists for a modification is a question of fact. *Coldwell Banker Residential Real Estate Servs. v. Sophista Homes, Inc.,* 2d Dist. Montgomery No. CA–13191, 1992 WL 303073, *3 (Oct. 26, 1992)." *3637 Green Road, supra,* at ¶ 27.

In this case, there is no question that Attractive Floorings was contractually obligated to make monthly payments to Designers Choice in a specified amount. It was not, however, contractually obligated to give-up its lease, hand-over its inventory, or make full-payment on the Mohawk line of credit.

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[2] The Court is aware that the Mohawk debt was incurred by Attractive Floorings, but given that it was a line of credit, the Court infers that the entire balance was not due and owing when Attractive Floorings paid it off.

As noted *supra,* Moen testified that he became very ill and could not continue running the business (Attractive Floorings). Moen further testified that as a result of their discussions, Designers Choice agreed to accept the above-noted consideration in exchange for allowing Attractive Flooring off the hook. This position is bolstered, according to Attractive Floorings, because Designers Choice had a new tenant to take over the business and Attractive Floorings brought the rent current.

Under these facts and circumstances, a jury could certainly come to more than one conclusion that the offer and acceptance of these items constituted sufficient "new and separate consideration" for relieving Attractive Floorings from further obligation under The Agreement.

Moreover, even if Attractive Floorings delivery of its inventory, its lease, and its pre-payment of the Mohawk line of credit does not constitute adequate consideration for the release, there is sufficient competent, credible evidence, especially when viewed in a light most favorable to Attractive Flooring, that the oral agreement had been "so acted upon by the parties that a refusal to enforce the oral modifications would result in fraud to the promissee." *3637 Green Road, supra.* See also: *Corsaro v ARC Westlake,* 8th Dist. NO. 84858, 2005-Ohio-1982, at ¶ 16.

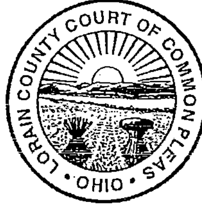
ATTRACTIVE FLOORINGS' ASSETS DID NOT BENEFIT DESIGNERS CHOICE BUT THE NEW TENANT

In this argument in support of summary judgment, Designers Choice argues that 1) Designers Choice did not use or receive this property and 2) that Attractive Floorings never asked for the abandoned, tangible personal property to be returned to them.

Both of these arguments fail.

First, there is conflicting evidence in the record about what really happened to this property such that summary judgment is inapposite. Moreover, when viewing the facts in a light most favorable to Attractive Floorings, reasonable minds could conclude that they would not have simply abandoned this property if there was no deal for its transfer. And, while Designers Choice may not have taken actual custody of the property, it can certainly be inferred that the property was used by or acquired for the new tenant which, at least arguably, benefited Designers Choice.

Finally, it makes sense that Attractive Floorings did not ask for the return of the property if it was in fact intended to be transferred to Designers Choice for either their use or by the new tenant. Put another way, the fact that Attractive Floorings did not ask for the property back bolsters their argument that it was delivered to Designers Choice as part of the orally modified agreement.



CONCLUSION

After review of the pleadings and extensive briefing, the Affidavits and other Civ. R. 56(E) materials, perusal of Civ. R 56(C) as well as the relevant case law supplied by the parties and Court, the Court finds the following:

There are genuine issues of material fact in dispute. As such, Plaintiff's Motion For Summary Judgment is not well-taken and hereby DENIED.

Case remains set for jury trial on May 14, 2018.

IT IS SO ORDERED. No Record.

JUDGE D. Chris Cook