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Commentary

Appellate Court: Contractual 'Anti-Waiver' Clauses Will Be Enforced (Usually)

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By **Alan Goodman and R. Gregory Hyden** | May 24, 2019 at 10:07 AM

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to be modified. However, trouble can arise when the parties attempt to orally change their contract even though it contains a provision requiring all modifications or waivers to be in writing signed by the parties—commonly known as an “anti-waiver” clause. In that scenario, the party seeking to enforce the oral modification will likely argue that the anti-waiver clause was waived by virtue of the parties’ subsequent course of conduct.

Except under very narrow circumstances, Florida’s courts will routinely reject oral modification arguments when a contract contains an anti-waiver provision. This principle was recently reaffirmed by Florida’s Fourth District Court of Appeal in Perera v. Diolife, 2019 WL 1781947 (Fla. 4th DCA 2019). There, the parties entered into a written contract in which Douglas Perera agreed to sell Diolife a 5% membership interest in a company for $200,000. The contract also gave Perera the option to sell Diolife an additional 5% interest for another $200,000, which Diolife was required to pay once the option was exercised. The sale of the additional interest had to occur on or before March 31, 2016, and Diolife was required to give written notice to Perera no later than March 21 when it was ready to close.

The agreement also contained an anti-waiver clause, which required all modifications to be in writing signed by the parties. On March 21, Diolife failed to give the required written notification. Instead, the parties began a series of communications about reducing the available membership interest from 5% to 2.5% (for the same purchase price of $200,000) and extending the closing date from March 31, 2016, to April 15, 2016. Those communications ended on April 11, 2016, when Diolife informed Perera the transaction would not move forward. Perera sued for breach of contract, claiming Diolife failed to purchase the original 5% interest by the March 31 closing date. Diolife argued it was not in breach because the parties orally modified the contract by extending the closing date through their subsequent communications. The trial court agreed and found in favor of Diolife. The Fourth District reversed and reaffirmed the general rule that “when a contract contains (an anti-waiver) provision, any alleged oral modification is generally disposed of as a matter of law, and the court should enforce the contract as written.”

Of course, like most other rules, the court recognized that this rule has an exception—albeit a very limited one. Citing the long-settled Florida Supreme Court decision in Professional Insurance v. Cahill, 90 So.2d 916 (Fla. 1956), it stated that contracts that preclude oral modifications can still be orally modified, but only if the party asserting it can prove the oral agreement was accepted and acted upon by the parties in such manner as would work a fraud on either party to refuse to enforce it. Because Diolife failed to meet that burden, the court upheld the anti-waiver provision and found that Diolife breached the agreement by failing to close by the original closing date of March 31.

The Perera case reminds us of some of the most fundamental legal principles in contract law. Contracts should generally be interpreted as written, and its terms cannot be easily ignored unless there is an extraordinarily compelling reason to do so. When parties elect to adopt a term or condition, including one addressing the question of modification, it is generally not within the province of the court to second-guess the wisdom of their bargain, or to relieve either party from any potential burden of that bargain by rewriting the

document. This is consistent with the general proposition, as stated in Perera, that “contracting parties are at liberty to address any issue they see fit, including the question of whether their agreement may be modified at all, and if so, how.”

The lesson learned here is that parties should be expected to adhere to the express language of their agreement and not be surprised by the legal consequences if they fail to do so.

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