

COMMERCIAL DIVISION UPDATE

Expert Analysis

Critical Distinctions Between Waiver and Estoppel

A recent decision by the Kings County Commercial Division reinforces the venerable New York principle that waiver is a creature of intent, and will not be imposed without a strong showing that the waiving party so intended.¹ In *Brooklyn Fed. Saving Bank v. 9096 Meserole St. Realty LLC*, Justice Robert J. Miller rejected an argument that a lender had waived its right to declare a default based upon its alleged oral representations. Because waivers require an unequivocal showing of intent to waive, the borrower's allegations that the lender's representative had "temporarily waived" the right to default failed in the face of a clear "no-oral-modification" clause in the mortgage.

In contrast, the distinct doctrine of estoppel turns upon the detriment suffered by one party stemming from the conduct of another. Waiver and estoppel are often applied by courts in the same breath.² Both doctrines, after all, serve to foreclose the exercise of a party's right based upon the party's words or conduct. Nevertheless, a number of Commercial Division decisions within the last year provide helpful illustrations of the important differences between these two doctrines.

Waiver

"The essence of a waiver is an 'intentional relinquishment of a known right.'"³ Waiver thus requires a strong and clear showing of intent to waive.⁴ In *Brooklyn Fed. Saving Bank*, a lender brought an action to foreclose on a mortgage. The parties had agreed in the loan agreement that no waiver of the loan's terms could be made orally. Further, the loan provided that no representative of the lender had the authority to modify orally the terms of the loan.⁵ The borrower, however, alleged that the lender's chief lending officer had orally represented that the lender would delay in declaring a default to allow the borrower to refinance, and that the lender therefore had "temporarily waived" its right to declare a default.⁶ In the face of the clear no-oral-modification provisions, Justice Miller reasoned that the lender could not have intended to waive its rights under the loan through



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the alleged oral statements of its representative, and thus found that no waiver had occurred.⁷

Just as waiver may not be created by ambiguous statements, it has been held that waiver may not be created by negligence or silence. For example, in *Lafarge Bldg. Materials Inc. v. Pozament Corp.*, a fly ash supplier failed to remit a tipping fee to a cement manufacturer for several months.⁸ Writing for the Albany County Commercial Division, Justice Richard M. Platkin rejected the argument that the cement manufacturer's silence regarding the ash supplier's breach constituted a waiver, because silence is insufficient to establish an intent to waive.⁹

Practitioners should remain wary of the ways in which estoppel may have implications beyond the express intent of contracting parties.

Estoppel

Estoppel, on the other hand, usually does not require examination of a party's intent. Instead, the equitable doctrine of estoppel looks to whether the party asserting estoppel would otherwise suffer an inequitable detriment based upon the conduct of the other party.¹⁰ In *Current Med. Directions, LLC v. Salomone*, a former executive claimed that a company had breached its agreement by failing to provide him with audited financial reports.¹¹ The executive himself, however, had allegedly prevented the company from performing those obligations by refusing to sign off on statements necessary to the audits. The company thus argued that the executive had waived his right to insist on the audited reports.¹²

Justice Bernard J. Fried of the New York County Commercial Division rejected the company's

waiver argument, holding that "[w]aiver is an 'intentional abandonment or relinquishment of a known right' and...[t]he record in this case does not reflect that [the executive] intentionally relinquished or abandoned his rights" to the reports.¹³ Justice Fried continued, however, that "in light of his subsequent conduct...[the executive] should be equitably estopped" from arguing that the company had breached its agreement by failing to provide the required reports—to allow such an argument would inequitably penalize the company for the former executive's own misdeeds.¹⁴

Estoppel may also be premised upon a detrimental change in position in reliance upon the conduct of the party to be estopped.¹⁵ That reliance, however, must be justified. In *Najung Seung v. Fortune Cookie Projects*, an art buyer allegedly relied upon the representations of an art dealer that a painting was worth as much as \$500,000, and purchased the painting without independently verifying its value.

The buyer later discovered, however, that the painting was worth barely a fifth of what the dealer had suggested.¹⁶ Because the art buyer purchased the painting from the dealer in an arm's-length transaction, in the absence of any special relationship of trust, Justice Eileen Bransten of the New York County Commercial Division found that the buyer's reliance on the dealer's representations was not justified, and rejected his claim of estoppel.¹⁷

Clauses

One context in which the difference between the doctrines of estoppel and waiver can be outcome-determinative relates to contracts containing no-oral-modification clauses. In a no-oral-modification clause, the contracting parties agree in writing that any rights under their contract may be altered only by signed writings.

No-oral-modification clauses are a clear, considered expression of intent to restrict the means of amending an agreement, and as demonstrated in *Brooklyn Fed. Saving Bank v. 9096 Meserole St. Realty LLC*, a subsequent oral statement generally will be insufficient to create a waiver.¹⁸ Estoppel, however, may provide a means for one party to enforce a subsequent oral promise against another, despite the presence of a no-oral-modification provision.

A contract may be orally modified despite a no-oral-modification clause if one party to a contract has partially performed and can demonstrate

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equitable estoppel. The case of *Ramlall v. Choice Money Transfer Inc.*, before Justice Timothy S. Driscoll of the Nassau County Commercial Division, involved an alleged breach of an employment contract.¹⁹ A former employee alleged that an executive of his former employer company orally promised him a new position in India, but that he was fired upon moving to India. The employee claimed that the company had breached its contract, based upon the alleged oral promises. The company responded that the employment contract at issue contained a no-oral-modification provision, and thus alleged oral promises should have no effect.²⁰

Justice Driscoll relied upon *B. Reitman Blacktop Inc. v. Missirlian* for the principle that an oral modification may be enforceable, despite the presence of a no-oral-modification clause, if there is "part performance that is 'unequivocally referable to the oral modification,'" and the party seeking enforcement makes a showing of equitable estoppel.²¹ Justice Driscoll held that, if the facts were true as alleged by the former employee and he had indeed moved to India in reliance upon the executive's promises, the employee could succeed in showing an enforceable oral modification and a resulting breach of contract.²² Justice Driscoll therefore rejected the company's motion to dismiss.²³

The doctrine of estoppel usually does not require the court to ignore all prior indications of the parties' intent, however. A party claiming estoppel based on detrimental reliance upon the conduct of another must show that its reliance was justified.²⁴ Therefore, if a contractual provision renders reliance upon subsequent oral representations unreasonable, it can still provide a defense against their enforcement. For example, a contractual merger clause may preclude justifiable reliance on representations extrinsic to the contract.

In *Telcar Group, Ltd. v. Telcar Certified Ltd.*, the former owners of various assets sued the acquirers, claiming that the acquirers had converted receivables, in addition to the assets rightfully acquired.²⁵ The acquirers responded that the former owners had represented that the disputed receivables would be included among the assets transferred according to an asset purchase agreement. The asset purchase agreement, however, contained a merger clause in which the parties stipulated that they did not rely upon any extrinsic representations in reaching the agreement.²⁶

Writing for the Commercial Division of Suffolk County, Justice Emily Pines found that in the face of the merger clause, any reliance by the acquirers on extrinsic representations would thus be unreasonable, and could not support a finding of estoppel.²⁷

Similarly, an unconditional guaranty may preclude a guarantor from arguing estoppel based on reliance upon oral modifications to the loan agreement. In *Anglo Irish Bank Corp. v. Ashkenazy*, guarantors contesting the enforcement of a loan agreement asserted the defense of estoppel, arguing that the lender should be bound by its alleged oral promises to extend loan structuring options in addition to the commitments in their written contract.²⁸ The guaranty, however, was "absolute and unconditional," and the guarantors explicitly waived any defenses to the enforceability of the loan terms.²⁹

Because the guarantors themselves had disclaimed any intent to contest the enforceability of the loan documents, Justice Fried of the New York County Commercial Division rejected the argument that the guarantors were entitled to rely upon the lender's alleged oral promises to restructure the loan.³⁰ In the absence of justifiable reliance, the guarantors' claims of estoppel were doomed to failure.³¹

Extending Obligations

Whereas waivers are usually narrowly construed according to the clear expressions of intent that support them, the doctrine of estoppel has been used to create obligations as justice requires, even going so far as to extend contractual obligations beyond the parties to a contract. In *Merrill Lynch Int'l Fin. Inc. v. Donaldson*, a company's affiliate gave loans on advantageous terms to the company's employees.³² The company's standard employment agreement contained an arbitration clause. The affiliate lender brought a lawsuit seeking repayment of a loan to an employee of the company. The employee, however, moved to compel arbitration with the lender, despite the absence of an arbitration clause between the two parties.³³

No-oral-modification clauses are a clear, considered expression of intent to restrict the means of amending an agreement. A contract, however, may be orally modified despite a no-oral-modification clause if one party to a contract has partially performed and can demonstrate equitable estoppel.

Justice James A. Yates of the Commercial Division of New York County relied upon the principle that estoppel can require the enforcement of an arbitration clause as to a third party when the third party acts in concert with a party to the contract with an arbitration clause, and held that arbitration should be compelled.³⁴ Though the company had not intended to subject its affiliate to the arbitration clause of its employment contracts, equity would not permit the company to escape the arbitration clause merely by using its affiliate as a financing arm; the affiliate was thus estopped from avoiding arbitration.³⁵

Conclusion

Although waiver and estoppel are often applied in tandem, this group of recent Commercial Division cases highlights the key distinctions between the two doctrines. Waiver and estoppel will in many cases lead to the same outcome, but practitioners should remain wary of the ways in which estoppel may have implications beyond the express intent of contracting parties. Moreover, while oral waivers frequently will not survive the existence of a no-oral-modification clause, claims of estoppel have been found to circumvent such clauses.

1. *Brooklyn Fed. Saving Bank v. 9096 Meserole St. Realty LLC*, NYLJ, Nov. 22, 2010, No. 3012/10, 2010 N.Y. Misc. LEXIS 5450 (Kings Co. Nov. 5, 2010) (Miller, J.).

2. See, e.g., *Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 N.Y.2d 966, 968 (1988) ("Waiver is an intentional relinquishment of a known right and should not be lightly presumed... Nor do the facts show that defendant, by its conduct, otherwise lulled plaintiff into sleeping on its rights... [in support of a claim of estoppel].") (citations omitted).

3. *Orange Steel Erectors Inc. v. Newburgh Steel Prods. Inc.*, 225 A.D.2d 1010, 1012 (3d Dept. 1996).

4. *Gilbert Frank Corp.*, 70 N.Y.2d at 968.

5. *Brooklyn Fed. Saving Bank*, 2010 N.Y. Misc. LEXIS 5450, at *8-10.

6. *Id.* at *6-7.

7. *Id.* at *10.

8. *Lafarge Bldg. Materials Inc. v. Pozament Corp.*, No. 3333-04, 2010 N.Y. Misc. LEXIS 4138, at *2-3 (Albany Co. Aug. 24, 2010) (Platkin, J.).

9. *Id.* at *42-43.

10. *First Am. Title Ins. Co. of N.Y. v. Rubal*, No. 018349-06, 2010 N.Y. Misc. LEXIS 1196, at *15 (Nassau Co. Jan. 22, 2010) (Driscoll, J.).

11. *Current Med. Directions, LLC v. Salomone*, No. 600941/06, 2010 N.Y. Misc. LEXIS 388, at *2 (N.Y. Co. Feb. 2, 2010) (Fried, J.).

12. *Id.* at *7-10.

13. *Id.* at *8.

14. *Id.* at *8-9.

15. *Najung Seung v. Fortune Cookie Projects*, No. 600537/09, 2010 N.Y. Misc. LEXIS 3991, at *5 (N.Y. Co. Aug. 9, 2010) (Branstetter, J.).

16. *Id.* at *3.

17. *Id.* at *5.

18. *Brooklyn Fed. Saving Bank*, 2010 N.Y. Misc. LEXIS 5450, at *9-10.

19. *Ramlall v. Choice Money Transfer Inc.*, No. 021683-07, 2010 N.Y. Misc. LEXIS 2280 (Nassau Co. June 11, 2010) (Driscoll, J.).

20. *Id.* at *22, 29.

21. *Id.* at *27 (quoting *B. Reitman Blacktop Inc. v. Missirlian*, 52 A.D.3d 752, 753 (2d Dept. 2008)).

22. *Ramlall*, 2010 N.Y. Misc. LEXIS 2280, at *29.

23. *Id.*

24. See *Rubal*, 2010 N.Y. Misc. LEXIS 1196, at *15.

25. *Telcar Group, Ltd. v. Telcar Certified Ltd.*, No. 27352-2004, 2009 N.Y. Misc. LEXIS 2870, at *2 (Suffolk Co. Sept. 14, 2009) (Pines, J.).

26. *Id.*

27. *Id.* at *6.

28. *Anglo Irish Bank Corp. v. Ashkenazy*, No. 103006/10, 2010 N.Y. Misc. LEXIS 3784, at *6 (N.Y. Co. Aug. 4, 2010) (Fried, J.).

29. *Id.* at *10-11.

30. *Id.*

31. *Id.*

32. *Merrill Lynch Int'l Fin. Inc. v. Donaldson*, 895 N.Y.S.2d 698, 701, 27 Misc.3d 391, 393-94 (N.Y. Co. 2010) (Yates, J.).

33. *Id.*

34. *Id.* at 703, 27 Misc.3d at 396-97.

35. *Id.*