THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Hon. Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-001691
Case No. 2015-CP-23-06023

---

iStar Tara LLC, ... Respondent,

v.

Stevens Aviation, Inc., Greenville County, South Carolina, and City of Greenville, South Carolina, ... Defendants,

Of whom

Stevens Aviation, Inc., is the ..... Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent iStar Tara LLC ("iStar") responds to Appellant Stevens Aviation, Inc.'s ("Stevens") appeal of the circuit court's dismissal of its counterclaims.

iStar and Stevens are parties to a December 12, 2006 Loan Agreement that is secured by, among other things, leasehold mortgages on commercial airports located in Greenville and Spartanburg Counties. (R. pp. 10-14). The Loan was initially evidenced by two promissory notes payable by Stevens in the original aggregate principal amount of $25,000,000. On March 31, 2011, Stevens and iStar agreed to amend the terms of the Loan Agreement to, among other things, reduce the aggregate principal balance of the loan to $24,925,000 and waive certain of Stevens' then-existing defaults on March 31, 2011 (the "2011 Amendment"). (R. pp. 17-18).

The Loan Agreement and its 2011 Amendment contain a choice-of-law provision stating that the Loan Agreement "shall be governed by, and shall be construed and enforced in accordance with, the internal laws of the state of New York, without regard to conflicts of law principles." (R. p. 109). The Loan Agreement expressly prohibits oral modifications, providing that no amendment or modification "shall in any event be effective unless the same shall be in writing and signed by the Lender (and, . . . [the] Borrower). (R. p. 106). The Loan Agreement also contains a merger clause, which further prohibits oral modification, providing in pertinent part that the Loan Agreement "MAY NOT BE VARIED BY ANY ORAL AGREEMENTS OR DISCUSSIONS THAT OCCUR BEFORE, CONTEMPORANEOUSLY WITH, OR SUBSEQUENT TO THE EXECUTION OF THIS LOAN AGREEMENT OR THE LOAN DOCUMENTS." (R. p. 112).

The promissory notes evidencing the Loan matured by their terms on March 1, 2015. Stevens failed to pay the Loan at maturity, and thus, was in default under the Loan Agreement.

(R. p. 24). On March 6, 2015, iStar sent Stevens a Notice of Maturity, Event of Default, Acceleration, and Reservation of Rights (the "Default Notice"), which reminded Stevens that "[t]he Loan Documents may only be modified in writing as provided in the Loan Agreement." (R. pp. 24, 373, 387-88).

iStar initiated lawsuits against Stevens in Greenville and Spartanburg Counties seeking to foreclose the leasehold mortgages securing the Loan and collect other damages and remedies. (R. p. 14). In response, Stevens asserted counterclaims for breach of contract, negligent misrepresentation, and promissory estoppel, alleging that Stevens and iStar began negotiating a new oral contract in January 2015 that replaced the Loan Agreement. (R. pp. 393-98). Specifically, Stevens alleges that the January 2015 negotiations resulted in an oral contract, which it refers to as the "Discounted Payment Contract." (App. Br., p. 3). Under the "Discounted Payment Contract," Stevens claims that it agreed to "(1) pay iStar $8 million and (2) grant iStar the right to receive 50 percent of the proceeds of any sale of Stevens'[] equity occurring within four years of the $8 million payment (the "Contingent Equity Right")." (App. Br., p. 3). Stevens asserts that in exchange, iStar agreed to accept the $8,000,000 and "Contingent Equity Right" in full and complete satisfaction of Stevens' debt. (App. Br., p. 3).

Stevens further claims that it secured financing in the amount of $8,000,000 as a result of iStar's inducement and that iStar subsequently failed to perform, damaging Stevens. (R. pp. 393-98). Stevens also alleges that it expended "substantial time and resources" to obtain the necessary financing and that iStar rejected Stevens' full payment of $8,000,000. (App. Br., pp. 6-7).

iStar moved to dismiss all three of Stevens' counterclaims. (R. pp. 401-02). By Order entered April 26, 2016, the Honorable Perry H. Gravely dismissed Stevens' counterclaims on the

basis that any oral modification to the Loan Agreement directly contravened its explicit terms prohibiting oral modification. (R. p. 4). Judge Graves further found that the limited exceptions to prohibitions regarding oral modifications were inapplicable because Stevens: (i) only took actions that were consistent with the terms of the Loan Agreement, and (ii) could not have reasonably relied on any purported oral modification of the Loan Agreement. (R. pp. 4-5).

On May 10, 2016, Stevens filed a Motion to Reconsider, Alter, or Amend Order Granting Plaintiff's Motion to Dismiss pursuant to Rule 59(g) of the South Carolina Rules of Civil Procedure. (R. p. 416). By Order entered July 27, 2016, the Court denied Stevens' Motion. (R. p. 7). Stevens appeals the Court's Order dismissing Stevens' Counterclaims.

STANDARD OF REVIEW

On appeal from an order dismissing claims pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, the appellate court applies the same standard of review as the trial court. *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). A trial judge may dismiss a claim that—viewed in the list most favorable to the non-moving party—fails "to state facts sufficient to constitute a cause of action." Rule 12(b)(6), S.C. R. Civ. P.; *see also Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct.App. 1999); *Jensen v. S.C. Dep't of Soc. Servs.*, 297 S.C. 323, 326, 377 S.E.2d 102, 104 (Ct.App. 1988), *aff'd sub nom. Jensen v. Anderson Cty. Dep't of Soc. Servs.*, 304 S.C. 195, 403 S.E.2d 615 (1991).

ARGUMENT

Each of Stevens' counterclaims hinges on the existence of the "Discounted Payment Contract." The only question before the trial court on iStar's Motion to Dismiss Stevens' Counterclaims was thus whether the "Discounted Payment Contract" amends the Loan Agreement or is a new contract between Stevens and iStar. Because the terms of the purported

"Discounted Payment Contract" amend the Loan Agreement, the trial court held that it was not a standalone contract, but rather an attempt to orally modify the Loan Agreement in direct contravention of its explicit terms requiring written modifications. The trial court thus correctly held that Stevens' counterclaims fail as a matter of law.

I. THE "DISCOUNTED PAYMENT CONTRACT" IS A MODIFICATION OF THE LOAN AGREEMENT.

As an initial matter, to the extent that Stevens argues that the trial court erred by not accepting as true Stevens' factual allegations that it entered into a standalone contract with iStar, that argument fails. Although the trial court and this Court are required to accept factual allegations as true, the existence of a contract is a question of law rather than fact when the undisputed facts do not establish a contract. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014). Here, the terms of the Loan Agreement are undisputed, and it is thus appropriate for this Court to determine that the "Discounted Payment Contract" does not exist as a separate contract as a matter of law based upon those undisputed terms. *Stevens*, 409 S.C. at 578, 762 at 701.

1. The "Discounted Payment Contract" is not a new contract; it is a purported modification of the Loan Agreement.

In an attempt to circumvent the express language of the Loan Agreement, Stevens takes great pains to paint the "Discounted Payment Contract" as a new agreement that is wholly separate from the Loan Agreement. But by its own purported terms, the "Discounted Payment Contract" modifies Stevens' repayment obligation under the Loan Agreement, and is thus, not a standalone contract. Specifically, Stevens claims that under the "Discounted Payment Contract," Stevens' debt to iStar under the Loan Agreement would be satisfied in full if Stevens (i) paid iStar $8,000,000 by the end of August 2015; and (ii) gave iStar the right to 50% of the proceeds from a sale of Stevens' equity if such sale were to occur within four years of Stevens' payment to

iStar. In other words, before the purported "Discounted Payment Contract," Stevens could satisfy its debt to iStar by paying iStar the balance of the promissory notes evidencing the Loan Agreement, but after the purported "Discounted Payment Contract" was entered, Stevens could satisfy its debt to iStar by paying iStar $8,000,000 and giving iStar a participation right in a sale of Stevens. Or stated yet another way, the "Discounted Payment Contract" amends the payment terms of the Loan Agreement.

As a matter of both common sense and New York law (which indisputably applies to the Loan Agreement), the "Discounted Payment Contract" amends the Loan Agreement. Under New York law, a subsequent agreement between the parties to a contract is an amendment rather than a separate agreement if it alters, changes, deletes, or cancels the original terms in the first agreement. *In re S.E. Nichols, Inc.*, 120 B.R. 745, 749 (Bankr. S.D.N.Y. 1990); *see also FDIC v. Herald Square Fabrics Corp.*, 81 A.D.2d 168, 182, 439 N.Y.S.2d 944, 953 (2d Dep't 1981) (finding that a dealer agreement was not amended by a subsequent agreement when none of the terms in the dealer agreement were altered). To determine whether a subsequent agreement is a modification rather than a new agreement, "substance, rather than form, controls." *In re S.E. Nichols, Inc.*, 120 B.R. at 748 (citing *Winter v. Ajax Auto Serv. Co.*, 81 N.Y.S.2d 17, 18 (Sup. Ct. N.Y. Co. 1948)).

The substance of the "Discounted Payment Contract" changes the repayment terms and purports to amend the Loan Agreement. Specifically, the "Discounted Payment Contract" purports to further reduce the aggregate principal balance of the Loan for which Stevens would make payment of $8,000,000 to iStar, and iStar would receive the right to 50% of the proceeds from a sale of Stevens' equity under certain terms and conditions. (R. p. 394). This change in payment terms is a modification rather than a new agreement.

Notably, Stevens does not dispute that the 2011 Amendment, which also modified the payment terms of the Loan Agreement, was a modification and not a new standalone agreement. Under the Loan Agreement, iStar loaned to Stevens the principal amount of $25,000,000. (R. pp. 10-14). Like the "Discounted Payment Contract," the 2011 Amendment modified the terms of the Loan Agreement by, among other things, reducing the aggregate principal balance of the Loan to $24,925,000. (R. pp. 17-18). In other words, the 2011 Amendment modified the payment terms of the Loan Agreement. Stevens does not dispute that the 2011 Amendment—which is indistinguishable in its effect from the "Discounted Payment Contract"—was a modification of the Loan Agreement. This Court should therefore affirm the trial court's ruling that the "Discounted Payment Contract" is an oral modification of the Loan Agreement.

2. The "Discounted Payment Contract" is not a novation.

Stevens argues for the first time on appeal that the "Discounted Payment Contract" is a novation. (App. Br., pp. 9-10). Stevens did not, however, raise this argument before the trial court or in its Motion for Reconsideration, so it is not properly before this appellate Court. (R. pp. 416-18); *Brouwer v. Sisters of Charity Providence Hospitals*, 409 S.C. 514, 520 n.4, 763 S.E.2d 200, 203 n.4 (2014) (holding argument not preserved for appeal after 12(b)(6) dismissal where issue was not raised before trial court or in plaintiff's motion to reconsider); *Hotel & Motel Holdings, LLC, v. BJC Enterprises, LLC*, 414 S.C. 635, 655, 780 S.E.2d 263, 274 (Ct.App. 2015).

Even if Stevens' novation argument were preserved for appeal, however, it fails. Under South Carolina law, a novation is an agreement between the parties for the substitution of a new obligation to extinguish the old obligation. *Wayne Dalton Corp. v. Acme Doors, Inc.*, 302 S.C. 93, 394 S.E.2d 5, 7 (Ct.App. 1990). The party asserting a novation has the burden of proving that both parties intended for a new agreement to extinguish a pre-existing agreement. *Adams v.*

B&D Inc., 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989); *Moore v. Weinberg*, 373 S.C. 209, 218, 644 S.E.2d 740, 744 (Ct.App. 2007). Stevens did not allege the required element that iStar intended for the "Discounted Payment Contract" to extinguish Stevens' executory obligations under the Loan Agreement, but even if it had, that allegation would be belied by the undisputed language of the Loan Agreement in which iStar manifested its intention that any amendments or modifications to the Loan Agreement be written. *See, e.g., Gonzalez v. Hurley Intern., LLC*, 920 F. Supp. 2d 243, 254 (D. P.R. 2013) (finding that an oral novation is impossible when an agreement requires amendments to be in writing).

Rather than a novation, the "Discounted Payment Contract" is an addendum that modifies, but does not eliminate, Stevens' pre-existing obligation to repay iStar under the Loan Agreement. As a matter of law, such an agreement is not a novation. *Parker v. Shecut*, 340 S.C. 460, 481, 531 S.E.2d 546, 557-58 (Ct.App. 2000), *rev'd on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002).

II. THE "DISCOUNTED PAYMENT CONTRACT" IS AN UNENFORCEABLE ORAL MODIFICATION TO THE LOAN AGREEMENT.

The oral "Discounted Payment Contract" is ineffective under both the terms of the Loan Agreement and New York law, which provides that a written agreement with a provision that it cannot be modified orally can only be modified by signed writing. N.Y. Gen. Oblig. Law § 15-301 (McKinney); *Towers Charter & Marine Corp. v. Cadillac Ins. Co.*, 894 F.2d 516, 522 (2d Cir. 1990) ("In general, therefore, a written agreement that expressly states it can be modified only in writing cannot be modified orally.")

1. The Loan Agreement expressly prohibits oral modifications.

The express language of the Loan Agreement, which Stevens admits that it executed, prohibits oral modifications. (App. Br., pp. 6-7). Thus, for the oral "Discounted Payment

Contract" to be effective, Stevens must show that the oral-modification provision of the Loan Agreement was ineffective or inapplicable, which it cannot do.

The Loan Agreement provides as follows:

> [N]o amendment, modification, termination or waiver of any provision of this Agreement, the Note, or any other Loan Document, or consent to any departure therefrom, shall in any event be effective **unless the same shall be in writing** and signed by the Lender (and, with respect to any amendment or modification, unless also signed by Borrower).

(R. p. 106) (emphasis added).

The Loan Agreement also contains a merger clause, which provides in pertinent part:

> THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS MAY NOT BE VARIED BY ANY ORAL AGREEMENTS OR DISCUSSIONS THAT OCCUR BEFORE, CONTEMPORANEOUSLY WITH, OR SUBSEQUENT TO THE EXECUTION OF THIS LOAN AGREEMENT OR THE LOAN DOCUMENTS. THIS WRITTEN AGREEMENT AND THE OTHER LOAN DOCUMENTS REPRESENT THE FINAL AGREEMENTS BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES.

(R. p. 112).

These provisions were reaffirmed and ratified by the 2011 Amendment. (R. pp. 17, 298). Upon Stevens' default, on March 6, 2015, iStar sent a Default Notice wherein it again expressed that "[t]he Loan Documents may only be modified in writing as provided in the Loan Agreement." (R. pp. 24, 373). The clear and express terms of the Loan Agreement prohibit oral modifications. Under New York law, therefore, the Loan Agreement could only be modified by signed writing. N.Y. Gen. Oblig. Law § 15-301. The trial court thus properly dismissed Stevens' counterclaims, which hinge entirely on an oral amendment to the Loan Agreement, as a matter of law.

2. The "Discounted Payment Contract" is prohibited by New York law.

Stevens attempts to avoid the application of § 15-301 by applying a limited exception to § 15-301 that oral modifications to contracts that require written modifications can be enforced when one party has partially performed or relied upon the oral modification and such performance or reliance is unequivocally caused by the modification. *Towers Charter*, 894 F. 2d at 522. To invoke this exception, the reliance or performance must be conduct that is utterly inconsistent with the original contract. *Id.*

a. Stevens' partial performance was entirely consistent with the Loan Agreement.

Stevens claims that the "Discounted Payment Agreement" caused it to attempt to obtain financing to pay iStar $8,000,000. This conduct—payment to iStar—is entirely consistent with the Loan Agreement, under which Stevens owed iStar nearly $31 million. Stevens cannot therefore invoke the *Towers Charter* exception. *Id.*

In *Towers Charter*, the plaintiff Towers obtained a loan from defendant Cadillac for purchase of a yacht. *Id.* at 518. Under the loan agreements, which forbade oral modifications, Towers was required to furnish certain documents to Cadillac before closing, including an appraisal, survey, and financial statements. *Id.* at 519. Towers did not submit the required documents to Cadillac by the deadline, so the loan did not close. Id. Towers then sued Cadillac for anticipatory breach, claiming that Cadillac had orally agreed to waive the requirement that Towers submit the required documentation. *Id.* at 521.

Towers attempted to invoke the "partial performance or reliance" exception to § 15-301 by arguing that Towers spent more than $1 million refurbishing the yacht after relying on Cadillac's purported promises to waive certain closing requirements. *Id.* at 522. The Court of Appeals affirmed summary judgment for Cadillac, noting that the loan agreements expressly

precluded oral modification, and nothing in the loan agreement prevented Towers from spending funds to refurbish the yacht pre-closing. *Id.* at 522. In other words, because Towers' actions were consistent with its rights under the loan agreements, the "partial performance" doctrine did not apply to allow an otherwise forbidden oral modification. *Id.*

Like in *Towers Charter*. Stevens' purported efforts to secure financing for $8,000,000 are not precluded by the Loan Agreement. In fact, Stevens' efforts to obtain funds to repay iStar are entirely consistent with the Loan Agreement, which always required Stevens to pay iStar. Accordingly, like in *Towers Charter*, the "partial performance" exception to § 15-301 does not apply.

Stevens cites *Rose v. Spa Realty Assocs.*, 42 N.Y.2d 338, 366 N.E.2d 1279 (1977) in support of its argument, but *Rose* is distinguishable. In *Rose*, the plaintiff Develco entered into an agreement with defendant Spa Realty to purchase a maximum of 760 acres on which Develco intended to build a large housing development. *Id.* The parties intended to close in stages as Spa Realty obtained necessary government approvals to develop the land, with Develco having a number of options as to how many units it could purchase at once. The price and payment terms varied with the amount of land Develco purchased, ranging from all-cash to all-credit, and neither party was obligated to perform the agreement unless Spa Realty was able to obtain approvals for and Develco was able to close on 150 units.

Because of an unforeseen sewer issue on the property, Spa Realty was only able to obtain approvals for 96 units. Even though the parties' agreement did not allow Develco to purchase the specific quantity of 96 units, the parties nonetheless took all necessary steps to obtain approvals for those units. After Develco expended significant sums preparing to develop 96

units, the parties disagreed as to payment terms and Spa Realty refused to close on the grounds that Develco had not purchased 150 units. *Id.* at 342.

Develco filed a claim for specific performance, and argued that the original written agreement, which could be modified only in writing, had nonetheless been orally modified so that Develco could purchase 96 units even though the agreement did not allow Develco to purchase that specific quantity of units and did not require Spa Realty to close if Develco purchased fewer than 150 units. *Id.* at 345. The court agreed with Develco, finding that Spa Realty's application for approvals for 96 units—rather than the required 150—was utterly inconsistent with the parties' written agreement, which did not contain pricing or payment terms for that specific quantity of units. The court therefore affirmed an order allowing Develco to close on the 96 units, albeit not on the credit terms Develco desired.

Critical to the court's decision was that Spa Realty—the party against whom the purported oral modification was sought to be enforced—acted in a manner entirely inconsistent with the parties' written contract by obtaining approvals for a quantity of units not included in the contract, and Develco relied upon these inconsistent actions. In other words, Develco was not permitted to purchase 96 units under the parties' contract, but Spa Realty acted as if it were and then refused to close. *Rose* is thus utterly distinguishable; here, there is no allegation that the "Discounted Payment Contract" allows Stevens to take any actions that are not permitted under the Loan Agreement. Rather, the "Discounted Payment Contract" merely amended Stevens' payment obligations under the Loan Agreement, and Stevens was always permitted—and indeed obligated—to pay iStar.

The instant facts are more analogous to those in *Village on Canon v. Bankers Trust Co.*, 920 F. Supp. 520 (S.D.N.Y. 1996) and *Gun Hill Road Service Station, Inc. v. ExxonMobil Oil*

Corp., 2013 WL 395096 (S.D.N.Y. Feb. 1, 2013), in which federal courts applying New York law have confirmed that obligors who temporarily waive strict compliance with contractual terms during periods of hardship are not subject to the "partial performance" exception to § 15-301. In *Village on Canon*, the plaintiff borrower claimed that the defendant lender orally agreed to extend a bridge loan. *Id.* at 525. The agreements documenting the bridge loan contained "customary provisions," including a merger and integration clause, prohibition against oral modifications, and denial of waiver by course of conduct or forbearance. *Id.* The lender orally assured the borrower that the bridge loan would be extended if the borrower did not have permanent financing in place by the time the bridge loan matured. Although the parties exchanged written drafts of an extension, they did not reach an agreement. The borrower then sued the lender for breach of the alleged oral extension. *Id.*

The borrower claimed that the oral modification fit within the "partial performance" exception and the lender acted inconsistently with the loan agreement by accepting payments after maturity and failing to initiate foreclosure proceedings. The Southern District of New York found, however, that the lender's actions were consistent with the loan agreement, which allowed the lender to accept payments and temporarily waive the borrower's strict compliance with the loan agreement. The borrower also claimed that the borrower's guarantors acted inconsistently with the loan agreement by liquidating assets to pay related debts in order to facilitate the extension. *Id.* Again, the court disagreed, noting that liquidating assets to pay a related debt is perfectly consistent with continuing to negotiate over loan terms.

Similarly, in *Gun Hill*, Exxon temporarily did not charge rent to its franchisee during a period of hardship, which its franchisee contended was a partial performance of an oral modification under which Exxon agreed not to charge rent. *Id.* at *5. The Southern District of

New York found that Exxon's actions were consistent with a franchise agreement that required the franchisee to pay rent, forbade oral modifications, and allowed Exxon to waive the franchisee's strict compliance with the agreement's terms without waiving all remedies. The court concluded, therefore, that Exxon's temporary waiver of rent payments did not constitute an oral modification under the "partial performance" exception to § 15-301.

Here, like in *Village on Canon* and *Gun Hill*, iStar offered an accommodation to Stevens in the form of a reduced and modified payment schedule, which is entirely consistent with the Loan Agreement that required Stevens to repay iStar, forbade oral modifications, and allowed iStar to waive strict compliance with some terms without waiving all remedies. Accordingly, like in *Village on Canon* and *Gun Hill*, Stevens is not entitled to invoke the partial performance exception to § 15-301.

3. Stevens' could not have reasonably relied on the purported conduct of iStar.

Both *Rose* and *Towers Charter* provide that a party can be equitably estopped from denying the enforceability of a prohibited oral modification if it induces the other to reasonably rely on an oral modification. *Towers Charter*, 894 F.2d at 522; *Rose*, 42 N.Y.2d at 344. As with the partial performance exception, this estoppel exception only applies where the "conduct [that is] claimed to have resulted from the oral modification [is] conduct that is inconsistent with the agreement as written." *Towers Charter*, 894 F.2d at 522. As discussed above, Stevens' conduct is entirely consistent with the Loan Agreement. Even if it were not, however, iStar is not equitably estopped from enforcing the prohibition on oral modifications because Stevens could not have reasonably relied on an oral modification of the Loan Agreement. *John Street Leasehold LLC v. FDIC*, 196 F.3d 379 (2d Cir. 1999).

In *John Street*, the litigants were parties to a mortgage that required written modifications signed by both parties. *Id.* at 380. The borrower claimed that the lender granted him an oral modification of the mortgage, and sought to invoke the estoppel exception by claiming that he made improvements to the mortgaged property in reliance upon the purported oral modification. *Id.* The United States Court of Appeals for the Second Circuit confirmed that the borrower could not have relied upon a purported oral modification because the lender reminded the borrower at the outset that the mortgage required all modifications to be in writing. *Id.*

Here, like in *John Street*, the Loan Agreement explicitly requires all modifications to be in writing. Like the borrower in *John Street*, iStar reminded Stevens that all modifications must be in writing when it sent its March 6, 2015 Default Notice iStar, which clearly stated that "The Loan Documents may only be modified in writing as provided in the Loan Agreement." (R. pp. 24, 373). In fact, unlike in *John Street*, Stevens and iStar previously modified the Loan Agreement to reduce Stevens' payment obligation to iStar. Stevens thus should have been aware, by reason of its prior participation in a loan modification with iStar, that all modifications must be in writing. Accordingly, like in *John Street*, Stevens' purported reliance on any oral modification of the Loan Agreement is unreasonable. Stevens may not, therefore, invoke the estoppel exception based upon reliance on any purported oral modification of the Loan Agreement.

III. STEVENS' COUNTERCLAIMS WERE PROPERLY DISMISSED PURSUANT TO RULE 12(B)(6).

Because each of Stevens' counterclaims hinges upon a finding that the parties orally modified the Loan Agreement, and the Loan Agreement—which defines the relationship between Stevens and iStar and is attached to and incorporated into the Complaint by reference—cannot be orally modified, it was procedurally appropriate to dismiss Stevens' counterclaims.

See, e.g., Charleston County School Distr. v. Laidlaw Transit, Inc., 348 S.C. 420, 424-25, 559 S.E.2d 362, 364-65 (Ct.App. 2001).

In *Laidlaw*, the Charleston County school district entered into a written contract with a transit company for school bus transportation services. *Id.* at 422. The contract, which was attached to the complaint and the existence of which both parties admitted, provided the specific services to be performed and compensation to be paid. *Id.* at 423. The transit company claimed, however, that it had performed additional services for which it was not paid, and asserted equitable claims against the school district. The school district moved to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, citing to the contractual language that limited payment for enumerated services.

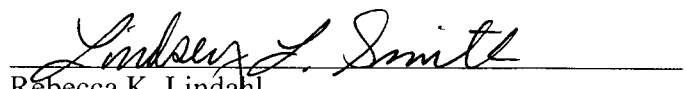
The Court of Appeals affirmed dismissal of the transit company's complaint pursuant to Rule 12(b)(6), rejecting the transit company's argument that it performed additional services "outside the contract" for which it should receive equitable relief. *Id.* The Court of Appeals noted that the transit company's characterization of the additional services as "outside the contract" was not an allegation of fact, but rather "an unsupported conclusion which is contrary to the admitted facts": the contract terms. *Id.* at 425.

Here, like in *Laidlaw*, iStar attached its Loan Agreement with Stevens to the Complaint (R. p. 15), and Stevens admitted that the Loan Agreement is a document that "speaks for itself." (R. p. 383). The existence of the Loan Agreement is, like in *Laidlaw*, admitted. Accordingly, like in *Laidlaw*, Stevens' counterclaims contain factual allegations that are inconsistent with the terms of the Loan Agreement and were properly disregarded by the trial court.

CONCLUSION

Based on the foregoing, Plaintiff iStar Tara LLC respectfully asks that this Court affirm the trial court's Order Granting Plaintiff's Motion to Dismiss Counterclaims.

Respectfully submitted,



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April 24, 2017
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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent iStar Tara LLC, hereby certifies that with the consent of counsel for Appellant Stevens Aviation, Inc., a footnote was removed from Respondent's Initial Brief.

Subject to the above-referenced removal, counsel certifies that the foregoing Final Brief of Respondent complies with Rule 211(b) of the South Carolina Rules of Appellate Procedure.

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