

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

RECEIVED

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

APR 27 2017

Hon. Perry H. Gravely, Circuit Court Judge

SC Court of Appeals

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 APPELLANT

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## **STATEMENT OF ISSUES ON APPEAL**

1. Did the Circuit Court err in dismissing Appellant's counterclaims for failure to state a claim on which relief can be granted?

## STATEMENT OF THE CASE

Appellant Stevens Aviation, Inc. (“Stevens”) appeals the circuit court’s dismissal of its counterclaims in a lawsuit filed by Respondent iStar Tara, LLC (“iStar”).

During the period of time relevant to this litigation, Stevens provided aircraft maintenance and repair services, operating out of leased space at the Donaldson Center Air Industrial Park (“Donaldson Location”) and the Greenville-Spartanburg International Airport (“GSP Location”). (R. pp. 10-14 (Compl. ¶¶ 3-9).)

In December 2006, Stevens obtained a loan in the aggregate principal amount of \$25 million, as evidenced by two promissory notes. (R. p. 15 (Compl. ¶¶ 15-16); R. pp. 161-173 (Compl. Ex. 2).) The “Loan Agreement” executed by Stevens (R. p. 15 (Compl. ¶ 15) provides, in relevant part, that it is governed by New York law and that its terms may not be modified except in writing. (R. pp. 109, 112 (Compl. Ex. 1, at 11.8, 11.16).) The loan was secured in part, by leasehold mortgages on the Donaldson and GSP Locations. (R. pp. 15-17 (Compl. ¶¶ 17-19); R. pp. 175-249 (Compl. Exs. 3-9).) iStar is the successor-in-interest to the original lender, the assignee of the mortgages, and the current holder of the promissory notes. (R. p. 17 (Compl. ¶ 21); R. pp. 251-271 (Compl. Exs. 10-11).)

In March 2011, Stevens executed amended promissory notes reflecting a total principal indebtedness of \$24,925,000. (R. pp. 17-19 (Compl. ¶¶ 22-30); R. pp. 273-

369 (Compl. Exs. 12-14).<sup>1</sup> The debt under one of the two notes was scheduled to mature on March 1, 2015. Prior to that time, however, Stevens and iStar entered into an oral agreement that replaced the then-existing loan.

Negotiations for the new agreement began in January 2015. (R. pp. 393-394 (Answer & Countercls. ¶ 82).) The result of the negotiations was an oral contract between Stevens and iStar (the “Discounted Payment Contract”). Under the Discounted Payment Contract, Stevens agreed that by the end of August 2015, it would (1) pay iStar \$8 million and (2) grant iStar the right to receive 50 percent of the proceeds of any sale of Stevens’s equity occurring within four years of the \$8 million payment (the “Contingent Equity Right”). iStar, for its part, agreed to accept \$8 million and the Contingent Equity Right as full and complete satisfaction of Stevens’s indebtedness. (R. pp. 393-394 (Answer & Countercls. ¶ 82).)

Stevens performed its obligations under the Discounted Payment Contract. Between March and July 2015, Stevens expended substantial time and resources arranging financing that would enable it to make the \$8 million payment to iStar. As a result of these efforts, by mid-July 2015 Stevens had obtained commitments for financing sufficient to make the agreed-upon payment to iStar. (R. p. 394 (Answer & Countercls. ¶ 85).) iStar knew or should have known that Stevens would engage in such efforts to fulfill its end of the parties’ bargain. (R. p. 394 (Answer & Countercls. ¶ 84).)

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<sup>1</sup> Throughout this brief, the term “loan documents” will refer collectively to Exhibits 1-14 of iStar’s complaint.

When Stevens informed iStar that it had arranged financing and was ready and able to complete its performance under the Discounted Payment Contract, however, iStar attempted to change the agreement by adding terms the parties had not previously discussed. (R. pp. 394-395 (Answer & Countercls. ¶ 86.) In addition to being a surprise to Stevens, the new terms were unreasonable. For example, iStar demanded the rights to monitor Stevens's internal cash flow and to impose restrictions on Stevens's ability to pay certain of its creditors—terms that effectively scuttled the financing Stevens had worked so hard to arrange. (R. pp. 394-395 (Answer & Countercls. ¶ 86).)

Stevens rejected iStar's attempt to introduce new terms into an agreement that had been reached months before, and under which Stevens was ready and able to perform. (R. p. 395 (Answer & Countercls. ¶ 87).) In response, iStar rejected Stevens's tender of performance under the Discounted Payment Contract, *i.e.*, payment of \$8 million and grant of the Contingent Equity Right, and refused to engage in any further discussion of the matter. (R. p. 395 (Answer & Countercls. ¶ 87).)

In October 2015, iStar filed an action in the Greenville County Court of Common Pleas to foreclose on the leasehold mortgage for the Donaldson Location. (R. pp. 375-380 (Lis Pendens); R. pp. 10-34 (Compl.).)<sup>2</sup> Stevens answered the complaint and asserted three counterclaims arising from iStar's breach of the Discounted

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<sup>2</sup> iStar filed a virtually identical action in the Spartanburg County Court of Common Pleas to foreclose on the leasehold mortgage for the GSP Location. Pursuant to a consent order, that action has been stayed pending resolution of the Greenville action. (R. pp. 1-3 (Consent Order).)

Payment Contract: breach of contract, negligent misrepresentation, and promissory estoppel. (R. pp. 393-398 (Answer & Countercls. ¶¶ 81-105).)

iStar moved to dismiss Stevens's counterclaims pursuant to Rule 12(b)(6), SCRPC, arguing that the Discounted Payment Contract was unenforceable because the loan documents require any modification of the loan to be made in writing. (R. pp. 401-402 (Pl.'s Mot. to Dismiss & Reply to Countercls. at 1-2).)

The parties submitted briefs and the circuit court heard oral argument on iStar's motion. Thereafter, the circuit court entered an order dismissing Stevens's counterclaims on the basis that "[t]he Discounted Payment Contract is an unauthorized oral modification to the Loan Agreement in direct contravention of its explicit terms prohibiting oral modifications." (R. p. 4 (Order, Apr. 26, 2016, at 1).) The circuit court further ruled that although New York law recognizes certain exceptions to no-oral-modification clauses, those exceptions did not apply. (R. pp. 4-5 (Order, Apr. 26, 2016, at 1-2).)

Stevens timely moved for reconsideration. (R. pp. 416-419 (Stevens Aviation, Inc.'s Mot. to Recons., Alter or Amend).) The circuit court denied this motion on July 27, 2016. (R. pp. 7-8 (Order, July 27, 2016).) Thereafter, Stevens timely filed its notice of appeal.

## ARGUMENT

On appeal from a dismissal under Rule 12(b)(6), SCRCF, the appellate court applies the same standard as the circuit court. *See Patterson v. Winter*, 791 S.E.2d 294, 300 (Ct. App. 2016). This means that the Court must base its ruling solely on, and assume the truth of, the allegations set forth in Stevens's counterclaims. *See Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015); *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 148, 714 S.E.2d 537, 539 (2011). Dismissal is improper "if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Cole Vision*, 394 S.C. at 148-49, 714 S.E.2d at 539. "The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id.* at 149, 714 S.E.2d at 539. "Further, novel questions of law should not ordinarily be resolved on a Rule 12(b)(6) motion." *Chestnut*, 413 S.C. at 227, 776 S.E.2d at 84.

### **I. THE FACTS ALLEGED BY STEVENS ESTABLISH AN ENFORCEABLE ORAL CONTRACT.**

In ruling on iStar's motion to dismiss, the circuit court was required to accept as true Stevens's allegation that the parties entered into an oral contract, pursuant to which iStar agreed to accept \$8 million and the Contingent Equity Right in full satisfaction of Stevens's indebtedness. The circuit court was further required to accept as true Stevens's allegations that it expended substantial time and resources to fulfill its end of the bargain by obtaining financing for the \$8 million payment and that, when Stevens tendered performance to iStar, iStar attempted to add new,

unreasonable terms to the contract. And, the circuit court was required to accept as true Stevens's allegation that iStar rejected Stevens's tender of performance under the oral contract. In reviewing the circuit court's dismissal of Stevens's counterclaims, this Court likewise must accept the truth of the foregoing allegations.

Stevens admits that it executed the Loan Agreement, that the Loan Agreement is controlled by New York law, and that the Loan Agreement contains a no-oral-modifications clause. However, it is critical to note that Stevens' counterclaims are not based upon a modification to the Loan Agreement, but on the separate Discounted Payment Contract entered into by the parties over eight years later, in 2015. Because the Discounted Payment Contract is a separate contract, it is not governed by New York law and must be governed by common law choice-of-law principles. "[A] contract is controlled by the laws of the State in which it is made and is to be performed." *Doctors Hosp. of Augusta, LLC v. CompTrust AGC Workers' Comp. Trust Fund*, 371 S.C. 5, 9, 636 S.E.2d 862, 864 (2006) (quoting *Murphy v. Equitable Life Assurance Soc'y of the United States*, 197 S.C. 393, 407, 15 S.E.2d 646, 651 (1941)). Because Stevens is a corporation with its principal place of business in South Carolina, the leased real and personal property at issue in this case is situated in South Carolina, and all of Stevens's operations necessary for performance under the Discounted Payment Contract took place in South Carolina, the Discounted Payment Contract is governed by South Carolina law. See *Witt v. Am. Trucking Assocs., Inc.*, 860 F. Supp. 295, 300-01 (D.S.C. 1994).

Oral contracts are expressly allowed under South Carolina law. "A contract is

an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct.” *Armstrong v. Collins*, 366 S.C. 204, 222-23, 621 S.E.2d 368, 377 (Ct. App. 2005) (quoting *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997)). “With certain exceptions, a contract need not be in writing to be enforceable.” *Id.*

Moreover, the Discounted Payment Contract is not prohibited by South Carolina’s statute of frauds, which codifies the common law rule requiring a writing for a contract that cannot be performed within one year. *See* S.C. Code Ann. § 32-3-10(5) (2007); *Roberts v. Gaskins*, 327 S.C. 478, 484, 486 S.E.2d 771, 774 (Ct. App. 1997) (“It is ... well established that the Statute of Frauds applies only to contracts which are *impossible* of performance within one year.” (emphasis added)). According to its terms, the Discounted Payment Contract was capable of being performed within one year, because Stevens would perform its part of the agreement by paying the \$8 million and granting the Contingent Equity Right to iStar, at which point Stevens’s indebtedness would be satisfied and both sides’ contractual duties would be fulfilled. *See Roberts*, 327 S.C. at 484, 486 S.E.2d at 774 (“A contract having a contingency which may occur within the year need not be supported by a written document. If there is a possibility of performance within a year, the contract is not barred by the Statute of Frauds. The fact that performance within a year is highly improbable or not expected by the parties does not bring a contract within the scope of this clause.” (citations omitted)).

The Discounted Payment Contract is equally valid under New York law, which

is clear that oral contracts are enforceable. See *Cron v. Hargo Fabrics, Inc.*, 694 N.E.2d 56 (N.Y. 1998); N.Y. Gen. Oblig. Law § 5-701 (McKinney 1963) (statute of frauds).

## **II. THE LOAN AGREEMENT'S NO-ORAL-MODIFICATIONS CLAUSE DOES NOT PRECLUDE ENFORCEMENT OF THE DISCOUNTED PAYMENT CONTRACT.**

iStar's argument for dismissal of Stevens's counterclaims rests on its contention that the Discounted Payment Contract is unenforceable because the Loan Agreement prohibits oral modifications of its terms. The circuit court erred in accepting iStar's argument, for either of two reasons.

First, the Discounted Payment Contract is not a *modification* of the Loan Agreement, but rather is a new and distinct contract, independent of the Loan Agreement. See *Rose Inn of Ithaca, Inc. v. Great Am. Ins. Co.*, 905 N.Y.S.2d 318, 320 (N.Y. App. Div. 2010) (“[A]n accord and satisfaction is effected when the parties ... enter into a new contract wherein they agree that a stipulated performance will be accepted in the future, in lieu of an existing claim.” (internal quotation marks omitted; alteration in original)); *Moore v. Weinberg*, 373 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007) (holding that “[n]ovation is a defense to contract claims” because “[a] novation is an agreement between all parties concerned for the substitution of a new obligation between the parties with the intent to extinguish the old obligation”).<sup>3</sup> Consequently, any strictures imposed by the Loan Agreement,

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<sup>3</sup> A novation is a form of accord and satisfaction. See 1 C.J.S. *Accord and Satisfaction* § 4.

including the no-oral-modifications clause, are inapplicable and the Discounted Payment Contract is enforceable in the same manner as any other oral contract.

Second, and in the alternative, the Discounted Payment Contract is enforceable even if it is an oral modification of the Loan Agreement. In arguing otherwise, iStar relies on New York statutory law providing that a contract containing a no-oral-modifications clause “cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought.” N.Y. Gen. Oblig. Law § 15-301(1); see *Maynard Ct. Owners Corp. v. Rentoulis*, 652 N.Y.S.2d 664, 665 (N.Y. App. Div. 1997) (“Where, as here, the parties to a written agreement include a proscription against oral modification, the effectiveness of any purported modification is governed by General Obligation Law § 15-301(1).”).

Even if the Discounted Payment Contract were a modification of the Loan Agreement (as noted above, it is not), § 15-301(1) would not bar its enforcement. New York courts have long recognized “[t]hat a written contract may ... be effectively modified, even when it contains a stipulation against oral modification.” *Alcon v. Kinton Realty, Inc.*, 156 N.Y.S.2d 439, 440 (N.Y. App. Div. 1956). In the seminal case of *Rose v. Spa Realty Associates*, 366 N.E.2d 1279 (N.Y. 1977), New York’s highest court held that an oral modification is effective, § 15-301(1) notwithstanding, when (1) there has been partial performance of the oral agreement, if such partial performance is “unequivocally referable to the modification”; or (2) “a party’s conduct induces another’s significant and substantial reliance on the agreement to modify.”

*Id.* at 1281. In the first case, performance takes the modification out of the scope of § 15-301(1), which applies only to executory modifications. *See id.* at 1283; *see also Maynard Ct. Owners*, 652 N.Y.S.2d at 665 (“By its terms, the statute bars only ‘executory’ modifications and, therefore, once a modification is executed, it may be proved despite the absence of the signed writing required by the statute.”). In the second case, a party that induces reliance on an oral modification will be equitably estopped from denying that the modification was made. *See Rose*, 366 N.E.2d at 1283; *see id.* (describing equitable estoppel as “analytically distinct from the doctrine of partial performance”).

1. *Section 15-301(1) does not apply because Stevens performed its obligations under the Discounted Payment Contract.*

The purpose of § 15-301(1) is to ensure the authenticity of modifications to written contracts. *Rose*, 366 N.E.2d at 1282. “Put otherwise, if the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls.” *Id.* In contrast, “when the oral agreement to modify has been acted upon to completion, the same need to protect the integrity of the written agreement ... does not arise” because “the actions taken may demonstrate, objectively, the nature and extent of the modification.” *Id.* The same principle applies to partial performance of an alleged oral modification, with the caveat that partial performance overcomes § 15-301(1) only if it is “unequivocally referable to the oral modification.” *Id.*

In this case, the factual allegations of Stevens’s counterclaims (which must be accepted as true) establish that the Discounted Payment Contract is no longer

executory because there has been complete performance. Stevens alleged that after entering into the Discounted Payment Contract, it performed its part of the agreement by successfully arranging financing for the \$8 million payment and, by mid-July 2015, tendering performance to iStar. (R. pp. 394-395 (Answer & Countercls. ¶¶ 85-87).) It makes no difference that iStar refused to perform its part of the bargain. (R. p. 395 (Answer & Countercls. ¶ 87).) Under New York law, when the party relying on an oral modification performs its obligations in good faith, the other party cannot show that the modification remains executory by pointing to its own refusal to perform. *See Arndt v. Leff*, 179 N.Y.S.2d 356, 358 (N.Y. City Ct. 1958) (holding that when plaintiffs fully performed their obligations under an alleged oral modification of a written contract, “it is difficult to conceive that” the defendant’s failure to perform its obligations “should change the character of the agreement from ‘Executed’ to ‘Executory’”).

Even if the Court views Stevens’s actions as constituting only partial performance, the performance exception to 15-301(1) is satisfied because Stevens’s arrangement of financing is “unequivocally referable” to the Discounted Payment Contract. Nothing in the loan documents requires, or even contemplates, a lump-sum payment of \$8 million or the grant of the Contingent Equity Right. *See, e.g., Rose*, 366 N.E.2d at 1284. *Rose* involved a land-purchase agreement, under which the plaintiffs’ obligation to purchase one or more parcels was contingent upon the defendants’ success in obtaining approvals to build 150 dwelling units. Plaintiffs alleged that the agreement had been orally modified to reduce the number of required approvals to

96, and the defendants in fact applied for, and obtained, 96 approvals. *See id.* at 1281-82. The court held that this partial performance was unequivocally referable to the oral modification because “nothing [in the written agreement] pertained to closing title on 96” units. *Id.* at 1284. Because the defendants’ conduct “was not compatible with any option in the written agreement,” the exception to § 15-301(1) was satisfied.

*Rose* is fatal to iStar’s argument that Stevens’s arrangement of financing for the \$8 million lump-sum payment is not unequivocally referable to the Discounted Payment Contract because “the [L]oan [A]greement always required Stevens to pay iStar.” (R. p. 429, lines 2-4 (Tr. of Hr’g. (Mar. 14, 2016), at 10).) If this reasoning were correct, the outcome in *Rose* would have been different because the land purchase agreement at issue in that case always required the defendants to obtain approvals.<sup>4</sup> As *Rose* makes clear, partial performance is “unequivocally referable” to an oral modification when, as here, the performance is identifiably different from what is required in the written agreement. *Accord John Street Leasehold LLC v. FDIC*, 196 F.3d 379, 382 (2d Cir. 1999) (holding that partial performance was not unequivocally referable to an alleged oral modification of mortgage agreement when the “partial performance” consisted of continuing to make mortgage payments and maintain the

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<sup>4</sup> In the circuit court, iStar referred to the performance doctrine as the “*Towers Charter* exception,” referring to *Towers Charter & Marine Corp. v. Cadillac Insurance Co.*, 894 F.2d 516 (2d Cir. 1990). *Towers Charter*, however, relied exclusively on *Rose*. *See id.* at 522. As a federal court, the Second Circuit can only interpret or anticipate state law. Consequently, *Rose* is the controlling decision, not *Towers Charter*. *See In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 159 (2d Cir. 2015) (“[W]hen an issue is governed by state law, federal courts must look to the decisions of that state’s courts, not to federal court decisions purporting either to interpret the state law or provide better answers.”).

premises, just as had been done prior to the alleged modification).

2. *iStar is equitably estopped from denying the Discounted Payment Contract.*

In addition to the exception for complete or partial performance of an oral modification, *Rose* additionally held that a party may be equitably estopped from denying a modification. *Rose*, 366 N.E.2d at 1281. “Once a party to a written agreement has induced another’s significant and substantial reliance upon an oral modification, the first party may be estopped from invoking [§ 15-301(1)] to bar proof of that oral modification.” *Id.* at 1283. As in the case of the partial performance exception, estoppel is appropriate only when the alleged reliance is “not otherwise ... compatible” with the terms of the written agreement. *Id.*; see *Club Haven Inv. Co. v. Capital Co. of Am., LLC*, 160 F. Supp. 2d 590, 593 (S.D.N.Y. 2001) (holding that conduct is inconsistent with a written agreement when it “can be explained only by reference to the alleged oral” modification). In determining whether equitable estoppel should apply, “it is only the acts and reliance of” the party asserting estoppel that are determinative of what equity requires.” *Messner Vetere Berger McNamee Schmetterer Euro RSCG, Inc. v. Aegis Grp. PLC*, 711 N.E.2d 953, 958 (N.Y. 1999).

The factual allegations of Stevens’s counterclaims—which, as previously noted, must be accepted as true—provide ample basis for equitably estopping iStar from denying the Discounted Payment Contract. Specifically, Stevens alleged that “iStar knew or should have known that Stevens would [and in fact, did] expend substantial time and resources in arranging for the funding for the \$8,000,000.00 payment to be made to iStar in or before August 2015.” (R. p. 394 (Answer &

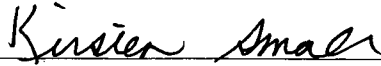
Countercls. ¶¶ 84-85).) Stevens further alleged that by mid-July 2015, it stood ready to make the \$8 million payment and to transfer the Contingent Equity Right to iStar. (R. pp. 394-395 (Answer & Countercls. ¶¶ 85-86).)

Thus, taking the facts and all reasonable inferences in the light most favorable to Stevens, Stevens's counterclaims allege that iStar lulled Stevens into relying on the Discounted Payment Contract and spending months arranging financing for the \$8 million payment. These circumstances are sufficient to establish that Stevens is entitled to equitable estoppel to prevent iStar from using § 15-301(1) to avoid the parties' oral agreement. *See Rose*, 366 N.E.2d at 1284.

### CONCLUSION

The circuit court dismissed Stevens's counterclaims on the basis that the Discounted Payment Contract was an attempted oral modification of the Loan Agreement, and as such was barred by N.Y. General Oblig. Law § 15-301(1). As Stevens has shown, however, the facts alleged in support of its counterclaims, taken as true and with all inferences in Stevens's favor, establish that the Discounted Payment Contract was not a modification of the Loan Agreement, but rather was a new contract, governed by and enforceable under South Carolina law. Alternatively, if the Discounted Payment Contract is an oral modification of the Loan Agreement, § 15-301(1) does not bar enforcement because the facts alleged by Stevens establish the applicability of the exceptions for performance and equitable estoppel.

Respectfully submitted,



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April 25, 2017  
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA  
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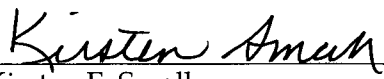
Of whom

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

**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that the foregoing Final Brief of Appellant complies  
with Rule 211(b).

April 25, 2017

  
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