

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

AMCO INVESTMENT CO.,

Plaintiff/Counter-Defendant,

v

File No. 98-18047-CK
HON. PHILIP E. RODGERS, JR.

TELLUREX CORPORATION, CHARLES J.
CAUCHY, and GREGORY SMITH,

Defendants/Counter-Plaintiffs.

Amco Investment Co.
c/o Mr. Alf H. Geffcken

Kent E. Gerberding (P42345)
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Attorneys for Defendants/Counter-Plaintiffs

DECISION AND ORDER
ON DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

On September 30, 1991, the Plaintiff Amco Investment Co. ("Amco") loaned the Defendant Tellurex Corporation \$20,000.00. Defendant Cauchy, as President of Tellurex, executed a promissory note pursuant to which the loan was payable with interest on or before January 7, 1992. Defendants Cauchy and Smith executed personal guarantees.

There is a dispute over whether Mr. Geffcken, on behalf of Amco, agreed to extend the due date to January 7, 1997. There is an Agreement to Extend Debt Payment which is dated January 6, 1992. It was signed by the Plaintiff Alf H. Geffcken for and on behalf of Amco. The Plaintiff contends that the due date of the note was extended at the request of the Defendants. However, the Agreement is not signed by the Defendants and the Defendants deny any knowledge of the extension prior to collection efforts commenced by Amco in 1998.

The Defendants filed a Motion for Summary Disposition which was set for hearing on Monday, January 25, 1999. Their position is that this action should be dismissed pursuant to MCR 2.116(C)(7) and (10) because it is time barred by the applicable statute of limitations and the "purported extension of the maturity date of the subject promissory note is not legally binding." Following oral arguments, the Court requested additional briefing on the issue of whether the promissory note is a negotiable instrument under the Uniform Commercial Code ("UCC") and whether the note could be extended "at the option of the holder" pursuant to Section 3.108 of the UCC.

The Defendants have filed a supplemental brief addressing these issues. They contend that this action on the promissory note is subject to a six-year statutory limitation period under MCLA 600.5807; MSA 27A.5807 governing breach of contract actions. See *Federal Deposit Ins Corp v Garbutt*, 142 Mich App 462, 468; 370 NW2d 387 (1985).

UCC Sec. 3104 provides in pertinent part:

(1) Except as provided in subsections (3) and (4), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if all of the following apply:

- (a) It is payable to bearer or to order at the time it is issued or first comes into possession of a holder.
- (b) It is payable on demand or at a definite time.
- (c) It does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain an undertaking or power to give, maintain, or protect collateral to secure payment, an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or a waiver of the benefit of any law intended for the advantage or protection of an obligor.

The Defendants first contend that the subject promissory note is not a negotiable instrument under this definition because it refers to an "accompanying letter" which describes the steps by which the Plaintiff will acquire an ownership interest in the Defendant corporation. The letter agreement obligated the Plaintiff to furnish additional funds to the Defendants. The reference to the "accompanying letter" is in the context of the note becoming immediately due and payable upon a breach of any condition of the note or "its accompanying letter." The promise to pay was not

conditional. The Defendants were obligated to pay the money regardless of anything contained in the "accompanying letter."

In *Thomas v State Mortgage Inc*, 176 Mich App 157, 162; 439 NW2d 299 (1989), the parties did not dispute that the promissory note was a negotiable instrument under the UCC and so the Court assumed without deciding that the promissory note was a negotiable instrument. In other cases, promissory notes have been found to be negotiable instruments under the UCC. *AAI Recoveries Inc v Pijuan*, 13 F Supp2d 448 (SD NY 1998) and *National Bank of Detroit v Alford*, 65 Mich App 634; 237 NW2d 592 (1976).

A promissory note being a negotiable instrument would be governed by Article 3 of the Uniform Commercial Code, being MCLA 440.3101 *et seq.* ("UCC") The UCC provides for a six-year statute of limitation. MCLA 440.3118. The action on the guarantees which are not negotiable instruments is subject to the six-year statute of limitations governing contract actions. See, *Aiton v Slater*, 298 Mich 469, 482; 299 NW 149 (1941).

Section 3108 of Article 3 of the UCC provides in pertinent part as follows:

440.3108. Payable on demand or at a definite time

* * * *

(2) A promise or order is "payable at a definite time" if it is payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued, subject to rights of:

- (a) Prepayment.
- (b) Acceleration.
- (c) **Extension at the option of the holder.** (Emphasis supplied.)

* * * *

440.3118. Statute of Limitations

Sec. 3118. (1) Except as provided in subsection (5), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within 6 years after the due date or dates stated in the note or, if a due date is accelerated, within 6 years after the accelerated due date.

The Defendants contend in their supplemental brief in support of their motion for summary disposition that Section 3.108 of the UCC merely reiterates the note holder's right to **consent** to an extension of a note without affecting the negotiability of the note. The Defendants quote a portion of the comment to that section. The entire comment reads as follows:

This section is a restatement of former Section 3-108 and Section 3-109. Subsection (b) broadens former Section 3-109 somewhat by providing that a definite time includes a time readily ascertainable at the time the promise or order is issued. Subsection (b)(iii) and (iv) restates former Section 3-109(1)(d). It adopts the generally accepted rule that a clause providing for extension at the option of the holder, even without a time limit, does not affect negotiability since the holder is given only a right which the holder would have without the clause. If the extension is to be at the option of the maker or acceptor or is to be automatic, a definite time limit must be stated or the time of payment remains uncertain and the order or promise is not a negotiable instrument. If a definite time limit is stated, the effect upon certainty of time of payment is the same as if the instrument were made payable at the ultimate date with a term providing for acceleration.

Contrary to the Defendants' reading of the limited portion of the comment they quoted, the comment actually indicates that the holder of a note has the right to extend the note at his option and doing so does not affect the negotiability of the note. Other requirements to maintain negotiability are imposed if the note is to be extended at the option of the maker.

The note in the instant case specifically provided for extension at the option of the Plaintiff. The Promissory Note in the instant case expressly states: "[s]aid sum shall be paid in full on or before January 7, 1992 **unless extended . . . at the option of Amco Investment Company.**" The Guaranty in the instant case expressly states: "[t]he undersigned agree to remain bound on this Guaranty notwithstanding any **extension**, forbearance or waiver, release, discharge or substitution of collateral or security for the debt. . ." The Agreement to Extend Debt Payment clearly appears to be an extension of the note by the Plaintiff.

In any event, the critically important question is whether the purported extension of the note is legally binding. There are material fact issues regarding whether the extension agreement was executed and delivered in 1992 as claimed by the Plaintiff. These things the Defendants deny. Assuming that the Plaintiff can prove that the extension was executed and delivered in a timely fashion, is it legally binding? The Defendants contend that the extension is not binding as a matter of law because it was not signed by them. They rely on hornbook principles of contract law to

support their position that one party to a contract cannot unilaterally modify the contract. They further contend that the extension is invalid because there was no consideration given for the extension. The Defendants rely upon MCLA 566.1 which provides:

An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration; Provided, That the agreement changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest, shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge.

This statute was not intended to make unenforceable all oral modification agreements but only those in which no valid consideration is alleged. *Minor-Dietiker v Mary Jane Stores of Mich Inc*, 141 NW2d 342; 2 Mich App 585 (1966). A written agreement may be orally modified if the modification is supported by adequate consideration. Whether the agreement has been modified is a question of fact. Forbearance may constitute adequate consideration. *Coffee v GMAC*, 5 F Supp 1365 (SD Ga 1998).

There are numerous material fact issues presented here which must be resolved by the trier of fact. Even if the Agreement to Extend Debt Payment is invalid for whatever reason, it may still be that the parties agreed to extend the due date of the note and that the consideration was the forbearance by the Plaintiff from seeking payment when the original due date expired. It would seem that the fact that the Plaintiff did not seek payment after the original due date of January 7, 1992 until after the extended due date of January 7, 1997, is some evidence that there was in fact a mutually agreed upon extension of the note as evidenced further by the Agreement to Extend Debt Payment.

For these reasons, the Defendants' motion for summary disposition should be and hereby is DENIED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

2/05/99