COURT OF CHANCERY
OF THE
STATE OF DELAWARE

WILLIAM B. CHANDLER III
CHANCELLOR

THE FAMILY COURT BUILDING
P.O. BOX 581
GEORGETOWN, DELAWARE 19947

Date Submitted: January 26, 2000
Decided: February 15, 2000

David C. McBride
Martin S. Lessner
Young Conaway Stargatt & Taylor, LLP
P.O. Box 391
Wilmington, DE 19899-0391

Stephen E. Herrmann
Richards, Layton & Finger
P.O. Box 551
Wilmington, DE 19899

Re: *The Continental Ins. Co., et al. v. Rutledge & Co., Inc., et al.*
Civil Action No. 15539

Dear Counsel:

Rutledge & Company, Inc. ("RCI") and John Rutledge ("Rutledge") have moved to reargue this Court's January 11, 2000 Opinion pursuant to Court of Chancery Rule 59(f). RCI and Rutledge (together the "defendants") submit that this Court inappropriately granted summary judgment to The Continental Insurance Company and The Fidelity and Casualty Company of New York (together "Continental") on the issue of whether Continental had the right to withdraw from John Rutledge Partners, L.P. ("JRP" or the "Partnership").

The Court of Chancery will not grant a motion for reargument "unless the Court has overlooked a decision or principle of law that would have controlling effect or the Court has misapprehended the law or the facts so that the outcome of the decision would be affected."[1] A successful motion for reargument must show that the Court misunderstood material facts or applied the wrong legal standard.[2] If a motion for reargument merely restates arguments a court has already rejected, the court should deny the motion. As defendants' motion does not meet this standard, I deny it.

The defendants initially claim that they had "no reason to believe" the Court would consider the plaintiffs' cross motion for summary judgment; therefore, the defendants argue, the Court denied the defendants' "due process right to adequate notice." This claim lacks merit. First, Delaware law clearly entitles this Court to grant summary judgment upon suggestion of the non-moving party or *sua sponte* against a party seeking summary judgment.[3] The defendants do not cite any Delaware law contesting this

---

[1] *Miles, Inc. v. Cookson America, Inc.*, Del. Ch., 677 A.2d 505, 506 (1995), *citing Stein v. Orloff*, Del. Ch., C.A. No. 7276-NC, Hartnett, V.C., slip op. at 5 (Sept. 25, 1985).
[2] *Bissell v. Marriott Family Restaurants*, Del. Ch., C.A. No. 13022, Chandler, V.C., mem. op. at 1, 3 (Dec. 6, 1994).
[3] *Stroud v. Grace*, Del. Supr., 606 A.2d 75, 81 (1992)("Chancery Court Rule 56 gives that court the inherent authority to grant summary judgment *sua sponte* against a party seeking summary judgment . . . when the 'state of the record is such that the non-moving party is clearly entitled to such relief.'"); *Sapala v. Forest Health Service Corp.*, Del. Ch., C.A. No. 14260, let. op. at 4-5, Jacobs, V.C. (May 3, 1996). *See also Wier v. Manerchia*, Del. Ch., C.A. No. 14836, mem. op., Allen, C. (Jan. 28, 1997); 10A Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 3d § 2720 at 347-51 (1998)("The weight of

well-recognized principal. Second, the plaintiffs' answering brief ("PAB") clearly placed defendants on full notice regarding plaintiffs' request for summary judgment on the issues the defendants raised. The defendants' aggressive assertion that an alleged lack of notice prejudiced defendants' case compels me to list all eleven separate references to plaintiffs' request for summary judgment in their favor:

- **I. Plaintiffs' Answering Brief in Opposition to Defendants' Motion for Partial Summary Judgment, and in Support of Summary Judgment in Favor of Plaintiffs on the Withdrawal and Fee Issues**

  PAB title page (bold original, underline added).

- As explained in this brief, summary judgment is not appropriate for the defendants on either issue tendered, but is appropriate in favor of plaintiffs on both issues tendered.

  PAB at 4 (underline original).

- **A. Plaintiffs are Entitled to Partial Summary Judgment Declaring that the Unambiguous Terms of the Partnership Agreement . . .**

  PAB at 24 (bold original, underline added).

- Where one party moves for summary judgment, the non-moving party may be granted summary judgment. See Stroud v. Grace, Del. Supr., 606 A.2d 75, 81 (1992)("Chancery Court Rule 56 gives that court the inherent authority to grant summary judgment *sua sponte* against a party seeking summary judgment . . . when the 'state of the record is such that the non-moving party is clearly

---

authority . . . is that summary judgment may be rendered in favor of the opposing party even though the opponent has made no formal cross-motion under Rule 56").

entitled to such relief.'"); Sapala v. Forest Health Service Corp., Del. Ch., C.A. No. 14260, let. op. at 4-5, Jacobs, V.C. (May 3, 1996). Thus, summary judgment may be granted to plaintiffs based upon the unambiguous terms of the Agreement.

PAB at 25.

- **B. Plaintiffs are Entitled to Partial Summary Judgment Declaring that they Withdrew from the Partnership Effective September 30, 1995**

  PAB at 25. (bold original, underline added).

- Unless the defendants have raised a triable issue with respect to oral modification, promissory estoppel or covenant of good faith, which they have not . . ., plaintiffs are entitled to partial summary judgment declaring that they properly withdrew from JRP effective September 30, 1995.

  PAB at 26-7. (underline added).

- **C. Plaintiffs Are Entitled to Partial Summary Judgment Declaring That Upon the September 30, 1995 Withdrawal of the Limited Partners, JRP Is Dissolved . . .**

  PAB at 27. (bold original, underline added).

- In sum, plaintiffs are entitled to partial summary judgment declaring that upon the September 30, 1995 withdrawal of the limited partners, JRP is dissolved . . .

  PAB at 29. (underline added).

- Once a party to a limited partnership agreement demonstrates that the language of the agreement at issue is clear and unambiguous, the burden shifts to the non-moving party to prove that there are still issues of fact remaining that would otherwise preclude entry of summary judgment on the unambiguous agreement. Cantera, mem. op. at 7 n.2. . . . As discussed below, because defendants

have failed to meet this burden either legally or factually, plaintiffs are entitled to partial summary judgment.

PAB 29-30. (underline added).

- Thus, to the extent that defendants now submit affidavits of Parker and Bollman which directly contradict this testimony, those affidavits cannot be relied upon by defendants to create a material issue of fact sufficient to defeat summary judgment in plaintiffs' favor on the withdrawal issue, much less support summary judgment in defendants' favor on the same issue.

PAB at 29-30. (underline original).

- For the reasons stated herein, defendants' motion for partial summary judgment should be denied, and partial summary judgment should be granted in plaintiffs' favor on the "Withdrawal" and "Fees" Issues.

PAB at 60. (underline added).

In addition to these eleven separate references, plaintiffs' counsel, at oral argument, began his argument in the following way:

> Let me turn to, then, what I think is the real issue on these motions or these *cross applications* at this stage, and, that is, whether there was any reason to have a trial in an effort by the defendants to avoid the written partnership agreement. (Emphasis added.)[4]

At oral argument, therefore, plaintiffs' counsel placed the defendants on further notice that the plaintiffs were asserting a cross-claim for summary judgment.

[4] Transcript at 31.

Despite eleven references in the plaintiffs' answering brief, and a further reference at oral argument, the defendants failed to raise a due process issue until after the Court entered summary judgment against them on the withdrawal issue. To put it mildly, I find this timing curious. The defendants had every opportunity to present their case. They filed a moving brief, a reply brief, and advocated their position at oral argument. They could have objected after receiving plaintiffs answering brief, or at oral argument. They did not. They could have moved to extend or to supplement the briefing and argument. They did not. Rutledge and RCI chose none of these available and customary options, yet they now approach the Court for relief due to lack of notice. I find that Rutledge and RCI had full notice that Continental asserted a cross-motion for summary judgment. Accordingly, neither Continental nor the Court has prejudiced Rutledge or RCI in this regard.

For their second contention, the defendants argue that the testimony of defendant Rutledge, and former Continental employees, Parker and Bollman, establishes a triable issue of fact, and that the Court did not properly consider this testimony. This argument simply restates the argument defendants made in their papers to the Court, an argument which this Court has already rejected. I have not overlooked or misunderstood any

material facts, and the defendants have not claimed as much. I carefully considered the testimony of Rutledge, Parker and Bollman, in addition to all the evidence the defendants presented regarding a modification of the Agreement's withdrawal provision. I also construed this testimony and the evidence in the light most favorable to the defendants and with all reasonable inferences drawn in their favor. After properly considering all of the evidence in this matter, the Court concluded that the defendants could not maintain an oral modification of the Agreement's withdrawal provision as a matter of law. In my opinion, the evidence, even when reviewed in the light most favorable to the defendants, could not support an oral modification to the Agreement's withdrawal provision with "specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by document."[5]

The defendants, however, claim as their third argument, that the Court has applied an incorrect legal standard regarding an oral modification of a written contract. This argument also lacks merit. This Court correctly held that Delaware law requires a party, asserting an oral modification to a written contract to prove the modification with "specificity and directness as

[5] *Reeder v. Sanford, Inc.*, Del. Supr., 397 A.2d 139, 141 (1979).

to leave no doubt of the intention of the parties to change what they previously solemnized by document."[6]

The defendants' argument that the holding of *Pepsi-Cola Bottling Co. v. Pepsico, Inc.*[7] establishes a conflicting evidentiary standard required to prove oral modifications is, in a word, wrong. The *Pepsi-Cola* decision merely holds that conduct as well as words can amend a written agreement. Such a holding is unremarkable, and reflects clearly established Delaware law. *Pepsi-Cola* and *Reeder* are not inconsistent. Although parties can orally amend a contract with their conduct, when a party attempts to demonstrate that *conduct* has amended a written contract, that party still must present sufficient evidence of the conduct to prove the asserted modification with "specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by formal document."[8]

---

[6] *Id.*; *Mastin v. Freedom Wings, Inc.*, Del. Super., No. 94C-09-020NMT, Terry, J., Order at 8 (Feb. 6, 1996); *Durig v. Woodbridge Bd. of Ed.*, Del. Super., C.A. No. 90C-NO-22, Ridgely, P.J., Order at 3 (Dec. 8, 1992). *See also* 17A C.J.S. *Contracts* § 377 at 434 (1963).

[7] Del. Supr., 297 A.2d 28 (1972).

[8] *See Durig* at 1 ("Plaintiff relies on *Pepsi-Cola Bottling Co. v. Pepsi Cola, Inc.* to contend that defendants' verbal assurances of continued employment and the Board's yearly issuance of 'Contract Renewal' forms modified his one-year administrative contract ... While the Court recognizes that oral modifications of a contract may occur by conduct of the parties as well as by express words, an oral modification altering the term of a written contract 'must be of such specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by formal document.'")

Even assuming arguendo that the defendants are correct that the Court has applied an erroneous standard or failed to properly consider material facts in this regard, the Court has articulated two other grounds for its holding that plaintiffs' had not relinquished their contractual right to withdraw from the Partnership. First, the Agreement did not permit oral modifications. Second, defendants did not prove, as a matter of law, the elements of contract modification. Accordingly, even if the defendants were correct, I would still deny this motion because granting it would not affect the outcome of the Court's Opinion.[9]

For the foregoing reasons, defendants' motion for reargument is denied.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:meg

oc: Register in Chancery
xc: Vice Chancellors
Law Libraries

---

[9] *McElroy v. Shell Petroleum, Inc.*, Del. Supr., No. 375, 1992, Moore, J. (Nov. 24, 1992); *Miles, Inc. v. Cookson America, Inc.*, Del. Ch., 677 A.2d 505, 506 (1995).