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How NY Courts Balance Intent, Conduct and Statute of Limitations

By Lara Flath, Jacob Fargo and Gaby Colvin
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In this article, we explore so-called "scrivener's errors"—a mistake that occurs when parties have reached a mutual oral agreement but the signed writing does not express that agreement and one of the parties seeks to reform the contract. *VNB N.Y. v. Chatham Partners*, No. 114222/10, 2013 N.Y. Slip Op. 33535(U), at *5 (Sup. Ct. N.Y. Cnty. 2013). These errors have the capacity to affect the validity, interpretation and enforceability of contractual agreements and thus can profoundly impact transactions and business operations.

Although a court can use its inherent power to reform contracts and equitably align language with the parties' original intentions, New York courts have shown a judicial wariness against this practice. This article delves into how New York courts determine whether to resolve a scrivener's error, including a recent First Department decision, *NCCMI v. Bersin Properties*, Index No. 650276/15, 2024 N.Y. Slip Op. 01161 (1st Dep't 2024), that did so.

Courtesy photos

L-R: Gaby Colvin, Jacob Fargo, and Lara Flath of Skadden, Arps, Slate, Meagher & Flom.

In assessing whether to resolve a scrivener's error by effectively rewriting the contract to fix the "mistake," New York courts scrutinize the intent and the conduct of the parties. They do so against the backdrop of a six-year statute of limitations, which begins to run the moment the contract is fully executed. *See* CPLR §213(6); *see also Wallace v. 600 Partners*, 86 N.Y.2d 543, 547 (1995).

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New York courts set a rigorous standard for parties seeking contract reformation stemming from a scrivener's error. The standard requires clear and convincing evidence of the error's nature as well as a clear understanding of the agreement between the parties involved. *See Warberg Opportunistic Trading Fund v. GeoResources*, 112 A.D.3d 78, 85-86 (1st Dep't 2013) ("[T]he party demanding this equitable remedy [contract reformation] 'must establish his right to such relief by clear, positive and convincing evidence'…In order to 'overcome the heavy presumption' that the contract embodies the parties' true intent, the party seeking reformation must 'show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties[.]'") (citations omitted); *NCCMI*, 2024 N.Y. Slip Op. 01161, at *3.

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Thus, and likely unsurprisingly, intent usually plays the most important role in determining a court's involvement in resolving a scrivener's error. For example, the status and sophistication of the parties, the parties' actions before and after the execution of documents, including any attempts to rectify errors, or exploit them to their advantage, can provide valuable insights into a contract's true purpose. *See Ebasco Constructors v. Aetna Insurance*, 260 A.D.2d 287, 290-91 (1st Dep't 1999).

Tellingly, New York precedent indicates a willingness to correct *obvious* errors that are clear from the context and evidence presented, juxtaposed against an unwillingness to update language where such changes would alter the substance of the contract or when the agreements are negotiated by sophisticated parties. *Compare Wallace*, 86 N.Y.2d at 548 (six-year statute of limitation for scriveners' errors barred reformation even though it would require a lump sum payment 32 years from the lease renewal date because "the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length") *and Rely-On-Us v. Torres*, 165 A.D.3d 719, 721 (2d Dep't 2018) ("…[T]he cause of action seeking reformation is time-barred since the note, including the alleged scrivener's error regarding the lender's name, was made in 2006, yet the plaintiff commenced this action in 2015."), *with Slifka v. Slifka*, 177 A.D.3d 418, 419 (1st Dep't 2019) ("The court was not, as plaintiffs suggest, constrained to adopt an absurd phrasing in the contract merely because the statute of limitations for reformation had passed, when the error is obvious and the drafters' intention clear.") *and 1414 APF, LLC v. Deer Stags, Inc.*, 39 A.D.3d 329, 331 (1st Dep't 2007) (looking past the six-year statute of limitations for scrivener's errors where the lease agreement contained ambiguities that would have led to an absurd result, such that court intervention was required to determine the intent of the parties).

One of the limited instances where a court is willing to correct an error is when a court deems that enforcing a contract as written would lead to an absurd result. *See Episcopal Church Home & Affiliates Life Care Community v. Gates Circle Holding*s, 203 A.D.3d 1706, 1708-09 (4th Dep't 2022). The First Department focused on this narrow exception in *NCCMI v. Bersin Properties*, Index No. 650276/15, 2024 N.Y. Slip Op. 01161 (1st Dep't 2024), in which it revised a contract, despite the lapse of the six-year statute of limitations, because the contract absurdly designated the borrower and guarantor as the same party.

The defendants also invoked the six-year statute of limitations for contract reformation and asserted that any judicial modi?cations were time-barred.

In this case, defendant Bersin Properties LLC (Bersin Properties) entered into a multi-million dollar loan agreement with Nomura Credit Capital Inc., the predecessor of plaintiff, NCCMI Inc. (NCCMI), to renovate a shopping mall. The loan agreement designated co-defendant, Scott Congel, as the guarantor in the transaction, and Congel further assumed liability as "indemnitor" through an indemnity and guaranty agreement that was intended to impose joint and several liability in the event of a default.

Unbeknownst to the parties, however, the guaranty agreement bifurcated the loss recourse provisions by using the term "borrower" instead of "indemnitor" in the full recourse provision. *NCCMI v. Bersin Properties*, 74 Misc.3d 1221(A), 2022 N.Y. Slip Op. 50198(U), at *6 (Sup. Ct. N.Y. Cnty. 2022).

Following a default by Bersin Properties, NCCMI eventually initiated foreclosure proceedings against Bersin and sought to hold Congel personally liable under the guaranty. But defendants contended that the guaranty, as written, *only* applied to Bersin Properties, not Congel.

Specifically, defendants asserted that Congel's personal liability was not intended under the guaranty based on the guaranty's plain language as well as other factual evidence, including Congel's deposition, term sheet negotiations, Congel's limited communications, and an email from a NCCMI's executive stating "the payments are not guaranteed by anyone in this loan" and that "it is a sort of performance guaranty but not the guaranty for the payments of principal and interest," to support his lack of involvement in the transaction. *NCCMI, Inc.*, 2022 N.Y. Slip Op. 50198(U), at *7-8.

The defendants also invoked the six-year statute of limitations for contract reformation and asserted that any judicial modifications were time-barred. In response, NCCMI argued that the failure to replace "borrower" with "indemnitor" in the guaranty was a scrivener's error that would improperly relieve Congel's personal liability for Bersin Properties' debts. NCCMI further argued that this interpretation would lead to an absurd result—holding only Bersin Properties, a single-purpose entity with

no assets, liable for its own debt would render the guaranty illusory.

Justice Robert Reed of the New York County Commercial Division found the guaranty's language ambiguous but declined to amend the contract at summary judgment because he did not find that (1) the extrinsic evidence supplied a clear interpretation of the terms of the guaranty, (2) there was indisputable evidence of the parties' intent or (3) the plaintiffs had adequately demonstrated an absurd result. *NCCMI,* 2022 N.Y. Slip Op. 50198(U), at *8.

Upon appeal, however, the First Department reversed and recognized the error. *See PNC Capital Recovery v. Mechanical Parking Systems*, 283 A.D.2d 268 (1st Dep't 2001) (rejecting the written language in a guaranty because allowing a corporation to guarantee its own indebtedness would render the agreement meaningless).

In contrast to the trial court, the First Department found that factual evidence presented to the trial court, including the pre-contract term sheets executed by Congel, the initial drafts of the guaranty exchanged between the parties, and the preamble to the guaranty, supported Congel's personal liability. *NCCMI*, 2022 N.Y. Slip Op. 50198(U), at *4. Furthermore, the interpretation urged by defendants, which would have resulted in Bersin Properties guaranteeing its own debt, would create an illogical result. *NCCMI*, 2024 N.Y. Slip Op. 01161, at *4.

In sum, *NCCMI v. Bersin Properties* exemplifies the nuanced scrivener's error analysis that a court will conduct to assess the original intent of the parties and their subsequent conduct—*even if* the statute of limitations has lapsed. While the First Department's reasoning in *NCCMI* illustrates the interplay between several complex legal principles, the most profound and relatable theme is perhaps elucidated by Justice Jeffrey Oing in the first paragraph of the opinion: that the purported scrivener's error serves as "a reminder that proofreading is an essential, indispensable tool in the drafting of contracts." *NCCMI*, 2024 N.Y. Slip Op. 01161, at *1.