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Settlement and Compromise

Considering Parties' Conduct in Enforcing Settlement Agreements

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Practitioners often strive for parties to litigation to execute clear, unambiguous written settlement agreements to resolve disputes. Nonetheless, there are circumstances where a writing that falls short of that standard is still an enforceable settlement agreement. The Appellate Division, Second Department, recently issued an interesting decision holding that a writing from a party's former attorney that is followed by performance of the settlement agreement satisfies CPLR §2104's standard for enforceability of a settlement agreement.

Action for Trespass

In *Martin v. Harrington*,[1] plaintiff brought an action for trespass against her neighbors. Specifically, plaintiff claimed that her neighbors installed and built an asphalt driveway that had encroached on her land. Plaintiff brought her action in 2009 and sought both injunctive relief and damages. Six months after filing the action, plaintiff's then-attorney wrote to defendants' counsel proposing to discontinue the action if defendants satisfied certain conditions; those conditions included retaining the previous surveyor of the property to mark the area of encroachment, acknowledging the accuracy of the survey and removing the encroaching portion of the driveway.[2]

Defendants' counsel accepted these terms by letter a week later, and defendants satisfied the conditions outlined in the settlement proposal, including removing the alleged encroachment at a cost of more than $5,500.[3] However, plaintiff never discontinued the action, and approximately three years later, plaintiff complained to defendants again that they had encroached on her property. Defendants moved to dismiss the action and to enforce the settlement agreement.

The lower court largely analyzed the settlement agreement under the issue of apparent authority and held that plaintiff's prior counsel had the apparent authority to settle the case.[4] The court noted that plaintiff's counsel was then counsel of record and plaintiff had been copied on her counsel's settlement proposal letter. The settlement proposal itself stated plaintiff's counsel had forwarded defendants' letters to his client and he had been authorized by plaintiff to make the enclosed settlement proposal. The lower court also cited plaintiff's failure to object to the work done to remove the encroachment despite her physical presence before, during and after the work.

The court concluded that after defendants fulfilled the conditions set forth in plaintiff's settlement proposal, plaintiff's inaction over the next three years demonstrated that plaintiff was both aware of the settlement proposal and ratified it by failing to prosecute her action. Interestingly, the lower court

specifically cited the passage of time, not the defendants' actual conduct, as the determining factor, as it went so far as to say that it would not have enforced the same settlement agreement had plaintiff voiced an objection as long as a month after defendants repaved their driveway.

On appeal, the Second Department's focus was whether the correspondence between the parties and their subsequent conduct constituted an enforceable settlement agreement under the CPLR. The court cited hornbook law that a settlement agreement is enforceable under CPLR §2104 if it is a writing subscribed to by either the party or her attorney, sets forth all material terms, and there is clear mutual accord between the parties.[5] The court found that the material terms were set forth in plaintiff's counsel's letter and plaintiff's counsel had apparent authority to settle the case on her behalf based on the plaintiff's actions. The court then concluded that the letters exchanged between the parties' counsel in conjunction with defendants' compliance with the terms of settlement demanded by plaintiff constituted an enforceable settlement agreement. The court also cited plaintiff's failure to object to defendants' efforts to remove the encroachment and repave their driveway.

Precedent

The Second Department's decision is consistent with precedent in the Third Department. In *Palmo v. Straub*, the court considered whether the parties' agreement coupled with plaintiff's subsequent conduct constituted an enforceable settlement agreement. Plaintiff was involved in a car accident and subsequently collected Workers' Compensation and no-fault benefits for lost wages from his car insurance, State Farm Insurance Company.[6] Later, State Farm's then-attorney wrote to plaintiff stating that it had overpaid him $10,857 and demanded reimbursement. State Farm threatened to file an action to recover the overpayment if it was not repaid in a certain amount of time, but also stated that it was willing to contract a lien on plaintiff's personal injury suit so that it would receive its overpayment when the personal injury suit settled.

Several weeks later, State Farm wrote to plaintiff again, reaffirming the amount of overpayment and requested that plaintiff sign a written agreement that plaintiff would reimburse State Farm for the specified overpayment out of any settlement funds from the personal injury action. Plaintiff complied with the request and signed a writing accepting a lien on his personal injury action for approximately $10,857. On the same day, plaintiff's counsel wrote to State Farm "[a]s per our agreement, you [i.e., State Farm] will resume no-fault payments due to [plaintiff] and not proceed with any direct legal action against him to recover the claimed overpayment."

Several months later, State Farm retained new counsel who, unaware of the parties' prior agreement, notified plaintiff that he had received an overpayment of over $19,000. Plaintiff's personal injury action eventually settled for $60,000.

Plaintiff sought an order precluding State Farm from pursuing recovery of its lien beyond the parties' agreement and represented that he relied upon State Farm's representation that the payment of $10,857 would constitute full satisfaction of its claim. Both the lower court and the Third Department agreed. The Third Department found that the parties' correspondence, taken together, established that the parties had entered into a settlement agreement regarding the overpayments made to plaintiff. These writings were clear, contained all material terms and were the product of a mutual agreement. The court noted that it was unpersuaded by State Farm's attempt to show the agreement did not comply with CPLR §2104, "particularly since plaintiff relied upon the agreement in settling his personal injury case."

Nonetheless, the language used in the parties' correspondence, unsurprisingly, matters. A party cannot claim that the parties' contemplation of a settlement, coupled with subsequent conduct that satisfies a hypothetical agreement is an enforceable settlement agreement. The Third Department considered this issue in *George W. & Dacie Clements Agric. Research Inst. v. Green*.[7] Petitioner, a

non-profit corporation, owned property in the Town of Lisbon, where it operated a farm, restaurant and bed and breakfast, and offered public training and educational information concerning organic and biodynamic farming and gardening. Petitioner filed an RPTL article 7 proceeding seeking tax-exempt status for its property pursuant to RPTL 420-a, and sought identical relief for the tax years 2007 and 2009-2011.

In 2012, petitioner and the town exchanged written correspondence regarding a potential settlement which would involve petitioner's payment of taxes in dispute, a refund to petitioner for the 2011 tax year, and a property tax exemption beginning in 2012. In October 2013, petitioner paid off his back taxes, and the town decided that the property was exempt. Afterward, the parties exchanged proposed stipulations; however, none were executed.

Petitioner moved for summary judgment in his remaining proceeding for a refund for the 2011 tax year based on the parties' binding settlement agreement. The motion was denied, as both the lower court and the Third Department held that the parties did not enter into a binding settlement agreement.

In contrast with the cases above, the Third Department explained that writings purporting to represent a settlement are not enforceable "if they expressly anticipate a subsequent writing that is to officially memorialize the existence of a settlement agreement and set forth all of its material terms." Here, the writings showed that the town's attorney described a settlement in hypothetical terms, repeatedly stated what a settlement "would" involve, and expressly contemplated later settlement papers after petitioner paid its taxes.

Although petitioner wrote several weeks later that it was "agreeable to the terms of the settlement as outlined in" the previous letter and that it was making arrangements to obtain funds to pay the taxes, the court held that these writings were merely "an agreement to agree to the amplified terms of a future writing."

Moreover, the language of the proposed stipulations exchanged later shows that the previous writings were not a binding agreement as the proposed stipulations contemplated an additional issue relating to a statutory conflict with respect to any refund that was not anticipated in the previous correspondence at issue.

Conclusion

In light of these rulings, we caution practitioners to ensure that settlement agreements are reduced to a clear writing signed by both parties. If a writing is not intended to be a final settlement agreement, it should make that plain and a party should reserve all its rights. If the parties have not all executed a clear settlement agreement, practitioners should monitor any efforts of an opposing party to comply with offered terms of settlement and voice any concerns regarding deficiencies in said efforts within a reasonable period of time. Finally, although the Second Department did not remark on the issue, we advise parties to follow up with opposing counsel regarding discontinuance of an action with prejudice after the parties have executed a settlement agreement.

Endnotes:Settlement and Compromise

1. 139 A.D.3d 1017 (2d Dept. 2016).

2. *Martin v. Harrington*, 47 Misc.3d 1211(A) (Sup. Ct. Westchester Cty. April 16, 2015).

3. 139 A.D.3d at 1017; 47 Misc.3d 1211(A).

4. 47 Misc.3d 1211(A).

5. 139 A.D.3d at 1018.

6. 45 A.D.3d 1090, 1090 (3d Dept. 2007).

7. 130 A.D.3d 1422 (3d Dept. 2015).

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