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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. NICHOLAS FIGUEROA, Justice PART 46

Index Number : 102800/2006

NADEL, ELIZABETH

VS

TOM CAT BAKERY

Sequence Number : 002

ENFORCE/EXEC JUDGMENT OR ORDER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	1
Replying Affidavits	1

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

See ATTACHED Decision AND ORDER.

FILED
NOV 16 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/12/09

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

ELIZABETH NADEL,

Plaintiff,

- against -

Index No. 102800/06
DECISION AND ORDER

TOM CAT BAKERY INC. and GLENN HALL,

Defendants.

----------X

Nicholas Figueroa, J.:

Plaintiff moves to enforce a purported oral settlement of her personal injury action, which was tried in this Part. The events that are central to this motion occurred after the jury had retired to deliberate. The relevant facts are as follows.

On March 5, 2009, on the eve of trial, defense counsel offered a $100,000 settlement. The offer was refused. On March 11th, after two days of testimony, defense counsel renewed her $100,000 offer, but it was again rejected. On March 16th, following additional testimony, defense counsel once again offered $100,000, but the offer was still refused. On the next day, after summations, defense counsel again renewed the $100,000 offer, and plaintiff again rejected it. In mid-afternoon, after the jury had been charged and sent out to deliberate, plaintiff's counsel advised his adversary that plaintiff was uncertain as to whether to accept the $100,000 offer. He added that she wanted to go to lunch to think about it. Defense counsel's affirmation in opposition to this motion recalls the following exchange between counsel:

> Shortly thereafter I again spoke to [plaintiff's counsel], in the presence of plaintiff, and stated, "It is my understanding that there is no settlement at this time. Is that correct?" And [he] said, "Yes." *I then stated that the offer was still available, "at this moment, but that could change. If something changes while*

> *you are at lunch, I will call you." [He] then gave me his cell phone number....* At no time did I represent that the offer would remain open until plaintiff and her counsel returned from lunch. To the contrary, plaintiff and her counsel were clearly put on notice that the offer could be withdrawn at any time (emphasis added).

Plaintiff's counsel does not dispute the above account. Nor does he dispute his adversary's recollection of the following developments less than an hour later:

> While plaintiff was at lunch, the jury continued deliberating. At approximately 4:25, we were advised that the jury sent out a note. At no time prior to receiving the note, did plaintiff's counsel contact me to accept the offer. When the jury sent out a note, I spoke with my client and advised them about the note. I was instructed to withdraw the offer if the note indicated that the jury had reached a verdict. When [plaintiff's counsel] returned to the courtroom, I again advised him that if the jury's note indicated that the jury had reached a verdict, I was instructed to take the verdict.

At this point, the court asked counsel to report on the status of their discussions. The following is a portion of the colloquy that was put on the record:

> [Defense counsel]: My understanding is that there's a note.... I was given an instruction that if the note is a verdict my client wants to take the verdict.
> [Plaintiff's counsel]: Well, can I ... consult with the client?
> [The court]: Of course....
> [Plaintiff's counsel]: My client will take the settlement. My client will take the settlement.

As it happened, the jury's note reported that there was a verdict, and it was in favor of defendant.

Plaintiff's motion to enforce "the settlement" has generated considerable debate between the parties as to whether such relief is available in view of the provisions of section 2104 of the CPRL, which in relevant part provides that, "An agreement between the parties or their attorneys

relating to any matter in an action ... is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered." Section 2104 is applicable to settlement agreements (*Klein v Mount Sinai Hosp.*, 61 NY2d 865, 866). Plaintiff asserts that, the statute notwithstanding, defendant is bound to a "settlement." Defendant for its part contends that, under section 2104, the absence of a signed writing is fatal to plaintiff's position on this motion.

In truth, the fatal flaw in plaintiff's position is more basic than the parties' 2104 argument suggests. Plaintiff's problem is that there was no "agreement" to speak of. To be sure, there was an offer from defendant. During the above-quoted colloquy, clearly there were also words of acceptance from plaintiff. But when the words, "my client will take the settlement" were uttered, it was too late for them to be effective (*compare Briggs v Weeks*, 88 AD2d 943). By that time, defense counsel had made it clear to her adversary that her client's offer – which she had earlier warned might be retracted – was now subject to a condition subsequent: if the jury had already come to a verdict, the offer was off the table. That condition overhung what was said during the colloquy, and it could not be simply ignored, as plaintiff's counsel proposed to do. Indeed, the verdict that would mean all bets were off had already been reached.

Nor for that matter could plaintiff have succeeded on this motion if defendant's offer had been accepted prior to its retraction. Simply put, no such agreement was ever committed to a subscribed writing or memorialized by an open-court transcript. However many precedents plaintiff may cite for the proposition that literal compliance with section 2104 is not always necessary (*see, e.g., Lowe v Steinman*, 284 AD2d 506; *Van Ness v Rite-Aid of New York*, 129 AD2d 931; *Rhulen Agency, Inc. v Gramercy Brokerage, Inc.*, 106 AD2d 725; *Hansen v*

Prudential Lines, Inc., 118 Misc 2d 568; *A.J. Tenwood Assoc., Inc. v U.S. Fire Ins. Co.*, 104 Misc 2d 467), this is not a kindred case. That would be so even if arguendo the parties had come to a meeting of the minds and had agreed upon all material terms. What would still be missing in this case is the element of reliance, upon which the foregoing rulings turned (*compare Bonnette v Long island College Hosp.*, 3 NY3d 281; *Bedrosian v McCollum*, 209 AD2d 778, 779). Having been told by his adversary that her client's offer was "on the table," but only until further notice, plaintiff's counsel had no basis for concluding that the offer would necessarily remain plaintiff's for the taking. In other words, when they left for lunch, plaintiff and her lawyer assumed the risk that, in so expressly fluid a situation, defendant's offer might flow away from them while they ate and conferred.

For the foregoing reasons, plaintiff's motion is denied.

This constitutes the decision and order of the court.

Dated: November 12, 2009

ENTER:

J.S.C.