Weksler v Weksler
2018 NY Slip Op 31410(U)
January 23, 2018
Supreme Court, New York County
Docket Number: 603288/2007
Judge: Marcy Friedman

Redacted per Order dated 1-23-18 MF

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

LISA J. WEKSLER, individually and as a shareholder of Bruce Supply Corp. and a member of 6015 16th Avenue Realty LLC and in the right of and on behalf of Bruce Supply Corp. and 6015 16th Avenue Realty LLC,

Plaintiff,

-against-

JOSEPH WEKSLER, in his personal capacity and as guardian for Matthew Weksler and Ethan Weksler under the Uniform Gifts to Minors Act, et al.,

Defendants.

Index No.: 603288/2007

DECISION/ORDER

In the Matter of the Application of LISA J. WEKSLER,

Petitioner,

For the Judicial Dissolution of BRUCE SUPPLY CORP.,

Respondent,

and

For Surcharge against JOSEPH WEKSLER and BRUCE WEKSLER,

Respondents.

Index No.: 652843/2011

DECISION/ORDER

The above-captioned damages action (Index No. 603288/2007) and dissolution proceeding (Index No. 652843/2011) arise out of disputes between Lisa J. Weksler and her brothers, Joseph and Bruce Weksler, regarding a number of businesses and assets controlled by the Weksler family. Ms. Weksler is the plaintiff in the damages action and the petitioner in the dissolution

proceeding (plaintiff or Ms. Weksler). The remaining parties in the damages action are defendants Joseph Weksler, in his personal capacity and as guardian for Matthew Weksler and Ethan Weksler under the Uniform Gifts to Minors Act; Bruce Weksler, in his personal capacity and as guardian for Andrew Weksler and Andrea Weksler under the Uniform Gifts to Minors Act; 315 East 14th Street Manhattan Corp.; P&J Realty; 1839 Cropsey Avenue Associates, Inc.; 300 Smith Street Associates LLC; 6015 16th Avenue Realty LLC; L.B.J. LLC; Shanghai Global Trading, LLC; BPM Metals, Inc.; and Blue Print Metals, Inc. The respondents in the dissolution proceeding are Joseph, Bruce, and Bruce Supply Corporation (together with the damages action defendants, defendants).

Defendants now move for a judgment in accordance with a stipulation of settlement, placed on the record on November 10, 2016 and so-ordered nunc pro tunc on February 1, 2017. Defendants also seek to recover from plaintiff, pursuant to 22 NYCRR § 130-1.1 (c), the costs, expenses and attorneys' fees they have expended in litigating this motion. Plaintiff cross-moves for an order "vacating this Court's orders of the proceedings held on November 10, 2016 and February 1, 2017, respectively." (Notice of Cross-Motion, dated Mar. 21, 2017.) On February 1, 2017, a conference was held after the court was advised that the parties disputed the enforceability of the November 10, 2016 stipulation of settlement. The February 1 transcript, which was so-ordered on February 16, summarized the conference and confirmed that the cases had been marked settled. These motions, which are addressed to the enforceability of the settlement, followed.

Background

The following facts are not in dispute: After nearly a decade of litigation between the

parties, including three unsuccessful mediations, joint trial of the damages action and the dissolution proceeding was scheduled to commence on November 7, 2016 before the undersigned. Since the commencement of the litigation, defendants have been represented by the law firm Putney, Twombly, Hall & Hirson LLP—principally by Thomas A. Martin of that firm. Plaintiff has been represented by at least four law firms throughout this litigation. Michael M. Fay, of the law firm Berg & Androphy, represented plaintiff from approximately May 2015 until May 11, 2017, when the court granted his motion to withdraw as counsel based on a breakdown in his relationship with Ms. Weksler. He thus represented Ms. Weksler at the time of trial and, for a time, during the post-settlement dispute. At the February 1, 2017 conference, however, Ms. Weksler also appeared with David M. Levy of the law firm Kleinberg, Kaplan, Wolff & Cohen, P.C.[1]

In the week preceding the trial, counsel for the parties engaged in renewed settlement discussions by email and telephone. Several settlement offers were exchanged. (Martin Reply Aff., ¶¶ 13-16.)[2] These discussions were unsuccessful, and the parties appeared for trial on the scheduled date.

On the morning of November 7, 2016, the Weksler siblings and their respective counsel were all present in the courthouse. Rather than begin the trial, the parties asked the court for assistance with settlement. The undersigned presided over settlement negotiations and met, on

[1] Mr. Levy stated that he had been "engaged last week to assist the Plaintiff and her Counsel to turn the court-ordered settlement that your Honor presided over in November into the commercial transaction that I think springs from that settlement." (Feb. 1, 2017 Tr., at 3-4.)

[2] The recitation of the history of the settlement negotiations between the parties is derived largely from the affirmation of defendants' counsel. It is undisputed, unless stated otherwise.

consent, with counsel for both sides separately and together. Ms. Weksler was present in the courthouse and consulted with Mr. Fay between sessions. The following day, November 8, was Election Day and a court holiday. Counsel for the parties continued settlement discussions out of court. On November 9, counsel and their clients again appeared before the undersigned, and settlement negotiations continued under the court's supervision. At the end of this third day of settlement discussions, the matter was adjourned one final day to November 10. Unwilling to permit further delay of this extended litigation, the court informed counsel that if the matter were not settled by the morning of November 10, the court would expect the trial to then commence. Ms. Weksler was scheduled to be the first witness. (See id., ¶¶ 16-18.)

On the evening of November 9, counsel continued their negotiations by email and telephone. The parties acknowledge that they reached agreement that night on the key issue of the total amount to be paid by defendants to Ms. Weksler for the transfer of her interests in defendant companies. (Martin Reply Aff., ¶¶ 19-20 [stating that, after further efforts by Mr. Fay to increase this number were unsuccessful, the parties at last reached agreement on a number with a down payment and an installment schedule]; Email from Ms. Weksler to Mr. Fay, dated Nov. 9, 2006 [Pl. Aff. In Opp., Exh. C] [confirming "our coming to terms on a settlement number" which would be "finalized with the Judge tomorrow"].)

On the morning of November 10, 2016, counsel appeared in court and informed the undersigned privately in chambers that the parties had reached a settlement. The terms disclosed in chambers included a $[redacted] dollar total payment by defendants, to be paid in the form of a down payment of $[redacted] and fifteen annual installment payments of $[redacted], in exchange for plaintiff's transfer to defendants of her interests in a number of entities. As

reflected in the transcript of the November 10, 2016 appearance, the settlement was placed on the record. Defendants requested, and through her counsel, Ms. Weksler agreed, that the settlement amounts be kept confidential, due to the competitive nature of the business. As memorialized on the record, defendants' counsel also informed the court that the parties had reached agreement that

> "the broad outline of the terms, subject to a formal confidential settlement agreement and corporate documents, are that the Defendants/Respondents for a sum certain payable with a down payment prior to the – well, at the time of the signing of the formal documentation and then a term of single payments over 15 years. The Defendants/Respondents Bruce Supply Corporation and Joseph Bruce Weksler [sic] will acquire all of the interest of Lisa Weksler in Bruce Supply Corporation, 315 East 14th Street Manhattan Corporation, 1839 Cropsey Avenue Associates, Inc., 300 Smith Street Associates LLC, 615 16th Avenue Realty LLC[,] L.B.J. LLC, and P&J Richmond Corp."

(Nov. 10, 2016 Tr., at 5 [also quoted in an attached appendix, infra].) In accepting the settlement, the court specifically asked counsel to confirm, and counsel did confirm, that they were authorized to enter into the settlement on behalf of their respective clients, and that they were "agreeing to be bound by this settlement placed here on the record today, notwithstanding that the parties are going to reduce the settlement amount to writing setting forth the dollar amounts, and notwithstanding that they are going to execute written releases and any other written document[s]." (Id., at 5-9 [quoted in full in the attached appendix].)

Following the November 10 court appearance, the parties exchanged draft settlement agreements, but reached an impasse in negotiating the terms. (See Martin Reply Aff., ¶ 25.) On December 21, 2016, after the court was informed of the impasse, the court held another settlement conference with the parties, at which the court made recommendations as to resolution of certain outstanding disputes. The court urged the parties to continue negotiations. (Id.)

On February 1, 2017, the court held an in-court conference at which Ms. Weksler appeared with Mr. Fay, and Joseph and Bruce Weksler appeared with Mr. Martin. As stated above, a new attorney, David Levy, also appeared on behalf of Ms. Weksler. The parties made clear to the court that they continued to be unable to reach agreement on the documentation of their settlement, and that Ms. Weksler did not wish to accept the dollar figure agreed to at the time of the November 10, 2016 settlement. The court summarized the parties' dispute as follows:

> "I was advised on December 21 and I am advised again today by Mr. Fay, Counsel for Lisa Weksler, that she does not wish to accept the dollar figure for the settlement that was agreed to on November 10.
>
> From the Court's point of view, the matter has been settled on the terms set forth on the record on November 10 and for the dollar amounts stated to the Court by Counsel in chambers.
>
> It is noted that the dollar amounts were not stated on the record in order to protect the parties' interests in confidentiality due to the competitive nature of the parties' business. There is no dispute whatsoever as to the agreed to amounts, either the total or the installment payments.
>
> At this juncture the parties can either prepare and execute documents consistent with their settlement on the record or they can engage in what may be protracted, expensive litigation as to the enforcement of the settlement.
>
> . . . . At this juncture the case is marked settled."

(Feb. 1, 2017 Tr., at 5-6.)

The court subsequently granted Mr. Fay leave to withdraw from the case as counsel for Ms. Weksler and heard argument on the instant motions. (Order, dated May 11, 2017.)

Contentions

Defendants contend that the November 10 stipulation of settlement is binding on the parties and request that the court convert the stipulation into a judgment. (Defs.' Memo. In Supp., at 6-8.) They contend that plaintiff's recent demands for terms are "outside the terms" of

the November 10 stipulation of settlement. (Id., at 5.) They also contend that "the missing 'terms' she points to are not legally required terms, were never discussed and never agreed upon prior to the parties' November 10, 2016 agreement[,] and . . . [were] not raised in full to . . . Defendants until nearly two months after the November 10th settlement." (Defs.' Reply Memo., at 2-3, 6-12 [emphasis in original].)

Plaintiff contends that she only agreed to "begin the process of settling" the litigation on November 10, that both parties understood that the stipulation was subject to a formal confidential settlement agreement, and that the stipulation does not contain terms necessary to address the "Byzantine perplexities of the parties' business interests and ensuing litigations." (Pl.'s Memo. In Opp., at 1.) According to plaintiff, "myriad material terms were intentionally and conspicuously left open for continued negotiation between the parties" (id., at 3), including but not limited to:

1. "[T]he nature and scope of Ms. Weksler's security interest in the BSC [Bruce Supply Corporation] shares that she is selling and will be eventually transferring to the Defendants/Respondents, but which will be paid for over an extended period of years";

2. "[T]he acceleration of the annual installment payments in the event of a subsequent sale of the company or the company's (or the individual Defendants'/Respondents') insolvency";

3. "[T]he commencement date of the annual installment payments";

4. "[T]he terms of the parties' indemnification rights which each side is demanding from the other";

5. "[T]he company's distribution of funds to all shareholders of record during the year 2016 (including Ms. Weksler) sufficient to pay each such shareholder's pro rata portion of the company's 2016 corporate taxes in accordance with the company's historical practices"; and

6. "[T]he yet to be agreed upon rate of interest on each of the annual installment payments of the purchase price."

(Pl.'s Memo. In Opp., at 10; see also id., at 3-4 [different phrasing of the same purported "open terms" and issues].) Plaintiff contends that she and defendants were required to negotiate these items in good faith, and that she did so until defendants terminated negotiations. (Id., at 4-8, 12-13; Pl.'s Reply Memo., at 9.)

Discussion

This court's determination as to whether the parties made a binding agreement is governed by substantial authority. It is well settled that "[s]trong policy considerations favor the enforcement of settlement agreements." (Denburg v Parker Chapin Flattau & Klimpl, 82 NY2d 375, 383 [1993].) As explained by the Court of Appeals:

> "A negotiated compromise of a dispute avoids potentially costly, time-consuming litigation and preserves scarce judicial resources; courts could not function if every dispute devolved into a lawsuit. Moreover, there is a societal benefit in recognizing the autonomy of parties to shape their own solution to a controversy rather than having one judicially imposed. Additionally, a settlement produces finality and repose upon which people can order their affairs." (Id.)

"These interests are advanced only if settlements are routinely enforced rather than becoming gateways to litigation." (Id.) Thus, "[s]tipulations of settlement are favored by the courts and not lightly cast aside." (Hallock v State of New York, 64 NY2d 224, 228, 230 [1984].) "As with a contract, courts should not disturb a valid stipulation absent a showing of good cause such as fraud, collusion, mistake or duress; or unless the agreement is unconscionable or contrary to public policy; or unless it suggests an ambiguity indicating that the words did not fully and accurately represent the parties' agreement." (McCoy v Feinman, 99 NY2d 295, 302 [2002] [internal citations omitted]; Hallock, 64 NY2d at 230; Atlas v Smily, 146 AD3d 623 [1st Dept 2017]; Klauer v Abeliovich, 120 AD3d 1114, 1114–15 [1st Dept 2014].) "Clearly, after many

conferences, full representation by counsel, and discussions with the Court, a change of heart is insufficient." (Sontag v Sontag, 114 AD2d 892, 893 [2d Dept 1985] [internal quotation marks and citation omitted], appeal dismissed 66 NY2d 554 [1986].)

It is also well settled, however, that a stipulation of settlement must be "definite and complete" to be enforceable. (Matter of Dolgin Eldert Corp., 31 NY2d 1, 10-11 [1972] [Dolgin].) In order to be definite and complete, the stipulation must include "all the material terms of the settlement." (Bonnette v Long Is. Coll. Hosp., 3 NY3d 281, 285 [2004]; Town of Warwick v Black Bear Campgrounds, 95 AD3d 1002, 1003 [2d Dept 2012].) An agreement to leave certain material terms for future negotiation is not sufficient, as "it is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable." (Joseph Martin, Jr., Delicatessen, Inc. v Schumacher, 52 NY2d 105, 109–110 [1981].) As observed by the Court of Appeals, the requirement of definiteness relates to the principle that

> "before the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained. Otherwise, a court, in intervening, would be imposing its own conception of what the parties should or might have undertaken, rather than confining itself to the implementation of a bargain to which they have mutually committed themselves."

(Id.)

The list of terms which must be included in a contract is "not a defined one," but includes "those terms customarily encountered in a particular transaction" or, put another way, "all of the material terms which one would reasonably have expected to be included under the circumstances." (Argent Acquisitions, LLC v First Church of Religious Science, 118 AD3d 441, 444-445 [1st Dept 2014] [internal quotation marks and citation omitted]; Nesbitt v Penalver, 40

AD3d 596, 598 [2d Dept 2007];[3] see also Dolgin, 31 NY2d at 10-11 [settlement of two corporate dissolution proceedings was not "definite and complete" where, among other things, "[d]etails, hardly minor, with respect to molding the transfers to avail of tax advantages, involving 23 real properties, worth $6,000,000, owned by close corporations and partnerships, had not been resolved"].)

Applying these standards to the November 10, 2016 stipulation of settlement, the court holds that the stipulation is sufficiently definite as to the purchase price and payment schedule over a fifteen year period. The court is constrained to hold, however, that the stipulation does not include material terms relating to the effectuation and enforcement of the settlement or the protection of plaintiff's interests over the payment period.

As to the purchase price and payment schedule, the record demonstrates that Mr. Fay had apparent authority to consent on November 10 to a settlement in the total amount of $[redacted], with a $[redacted] down payment and installments of $[redacted] per year for fifteen years.[4] Ms. Weksler attended settlement proceedings at the courthouse with Mr. Fay appearing as her counsel, and does not dispute defendants' counsel's assertion that she never gave any indication to him that Mr. Fay was not authorized to settle on her behalf. (Martin Reply Aff., ¶¶ 12-21.) Although Ms. Weksler was not present in court when the stipulation was placed on the

[3] In Argent Acquisitions, LLC, the Court listed a number of material terms for a contract for the sale of real estate, including the price, the identity of the parties and parcel to be sold, the closing date, the quality of title to be conveyed, adjustments for taxes, and risk of loss. (118 AD3d at 444.) The court further held that the particular agreement at issue was unenforceable because it did not identify an escrow agent or provide, as required in a sale by a religious institution, that the defendant would seek approval of the transaction from the Attorney General in a diligent manner. (Id., at 444-445; see also Nesbitt, 40 AD3d at 597-598 [providing a similar list of material terms for a sale of an interest in real property, but also categorizing "the time and terms of payment" and "the required financing" as material terms].)

[4] This decision should not be construed as suggesting that Mr. Fay lacked actual authority. The issue of Mr. Fay's actual authority is not before the court, and no finding is made in that regard.

record on November 10, Mr. Fay also expressly represented to the court on the record that he was authorized by her to consent to the settlement. Under these circumstances, there is no question that Mr. Fay had the authority to bind Ms. Weksler to the stipulation of settlement. (See Hallock v State of New York, 64 NY2d 224, 228, 230-232 [1984] [holding that "[a] stipulation of settlement made by counsel in open court may bind his clients even where it exceeds his actual authority" if the client "clothe[s]" the attorney with apparent authority].)[5]

Nevertheless, plaintiff demonstrates on these motions that the stipulation that was placed on the record does not contain material terms "which would one would reasonably have expected to be included" in a transaction of this magnitude. (See Argent Acquisitions, 118 AD3d at 444.) For example, the stipulation fails to specify such basic matters as the order in which the parties' obligations are to be performed and the timing of such performance. The stipulation does not specify the dates by which defendants' annual installment payments are to commence and are to be made in subsequent years. In addition, although the stipulation provides that "[t]he Defendants/Respondents Bruce Supply Corporation and Joseph Bruce Weksler [sic] will acquire all of the interest of Lisa Weksler" in specifically-named entities, it does not specify when the

[5] Plaintiff asserts that the only settlement term that was placed on the record on November 10 was "an unidentified 'sum certain,' which was itself subject to an unidentified 'down payment,' with the unidentified remaining balance to be paid over a term of 15 years." (Pl.'s Memo. In Opp., at 1.) However, plaintiff inexplicably fails to acknowledge that these sums were not put on the record to protect confidential business information. Plaintiff acknowledges that she was aware of and consented to the $[redacted] total purchase price. (Weksler Aff. In Opp., ¶ 24 [stating that, given her understanding that she was agreeing only to a "gross purchase price, independent of any tax or payout issues," and that additional terms would be negotiated, she "consented to sell [her] shares and interests in the other family businesses for the $[redacted] settlement figure"].) Although she denies that she authorized the payment schedule (id., ¶¶ 3, 29), that denial does not bar a finding that the payment amount and schedule are sufficiently definite, given the court's finding that Mr. Fay had apparent authority to agree to those terms. Significantly also, plaintiff, through her current counsel, represents that she remains willing to settle the case, subject to execution of formal settlement agreements, for the exact amounts agreed to on November 10—a purchase price of $[redacted], with $[redacted] payable upon execution of the settlement agreements, and fifteen annual installments in the amount of $[redacted] each. (Id., at 3; Levy Aff. In Opp., ¶ 4.)

acquisition will occur, or in what percentages each of these defendants is to acquire those ownership interests.

Notably, the stipulation also fails to include any provisions protecting plaintiff's interests over the protracted period of the installment schedule. As indicated by the parties' negotiations after November 10 with respect to the terms of the formal settlement agreement, examples of such protections might include the retention by Ms. Weksler of a security interest in the transferred shares, acceleration of the installment payments upon a default or upon an occurrence such as the sale or bankruptcy of Bruce Supply Corporation, and a provision for interest upon the installments during the payment period. (See supra, at 10, items 1-2, 6.)

The parties, of course, had the right to contract for the sale and transfer of plaintiff's interests without any such protections. The omission, however, of so many of these apparently commonplace protections in a transaction for transfer of business interests of this magnitude, with payment to be made over such an extended period, warrants the conclusion that the November 10 stipulation of settlement fails to include material terms and therefore is not binding. (See Nesbitt, 40 AD3d at 598 [holding—where the parties' agreement for sale of an interest in real property "fail[ed] to set forth the manner of payment and financing, the closing date, the quality of title to be conveyed, the allocation of the risk of loss, and whether any adjustments apply for taxes and utilities"—that "the omission of so many material terms from the [alleged] instant agreement underscores the conclusion that it was not intended to be a complete contract containing all essential terms" (internal quotation marks and citation omitted, brackets in original)].)

The settlement, as set forth on the record on November 10, also supports the conclusion

that counsel and the parties did not understand their stipulation to represent the parties' full and complete agreement. Although both sides' counsel expressly represented to the court that the parties intended to be bound by the stipulation, including the numbers disclosed privately in chambers, they also each confirmed that the stipulation was subject to a formal written agreement. As noted above, defendants' counsel, Mr. Martin, framed his description of the settlement as a "broad outline of the terms, subject to a formal confidential settlement agreement and corporate documents." (Nov. 10, 2016 Tr., at 5.) Mr. Fay similarly stated that "[w]e obviously have to set this down in writing" (id., at 7), and that there would be "an extensive agreement because of the transfer of shares." (Id., at 9.)

Based on the colloquy at the time the stipulation of settlement was placed on the record and the omission of material terms from the stipulation, the court holds that the parties, at most, understood themselves to have finally agreed upon the amounts and installment schedule disclosed on the record and in chambers, but anticipated that "extensive" additional provisions remained to be negotiated and drafted. The stipulation thus amounts to no more than an agreement to agree on many material terms.[6]

In accepting the settlement of this longstanding family dispute, the court endeavored to avoid litigation over whether the November 10 stipulation of settlement was binding by requesting counsel to confirm that the parties intended to be bound by the stipulation. Upon consideration of the fully developed record on these motions, however, the court must hold that the parties' expression on the record of their intent to be bound cannot render the stipulation

[6] Whether or not some or all of these terms could "be supplied by common-law precepts" is of no moment, as "the issue is not whether the law can operate to flesh out the agreement, rather, it is whether there was a meeting of the minds in the first place." (Argent Acquisitions, LLC, 118 AD3d at 445.)

enforceable under these circumstances in which the stipulation omitted material terms as to its effectuation and enforcement. (Compare Trolman v Trolman, Glaser & Lichtman, P.C., 114 AD3d 617, 618 [1st Dept 2014], lv denied 23 NY3d 905 [holding that where the written agreement "expressed the parties' intention to be bound, and established a meeting of the minds regarding the material terms pertaining to the settlement of plaintiff's claim," it "was not rendered ineffective simply because certain non-material terms were left for future negotiation" (internal citation omitted)].)

In concluding that the stipulation of settlement is unenforceable, the court rejects defendants' apparent contention that the stipulation contained all material terms and that Ms. Weksler sought, in the process of drafting the formal agreement, to renegotiate the purchase price. Defendants persuasively argue that Ms. Weksler attempted to increase the $[redacted] total settlement payment by requesting the distribution, which she would have received had she not agreed to sell her ownership interests, of her pro rata share of 2016 corporate taxes. (See supra, at 7, request item 5.) The fact remains, however, that Ms. Weksler also requested terms—e.g., a security interest in the shares, protections upon default in payment, and interest (id., request items 1-2, 6)—that were material and necessary to effectuate the settlement and protect her interests during the fifteen year installment schedule.

The court further rejects defendants' contention that, after efforts to draft a formal settlement agreement reached an impasse, the court made rulings which supplied the omitted material terms. After the impasse, the court made recommendations, not rulings, on two issues—whether Bruce and Joseph Weksler should be jointly and severally liable for the settlement payments, and whether Ms. Weksler should receive distribution of her pro rata share of 2016

corporate taxes. (See Martin Aff. In Supp., ¶ 12; Martin Reply Aff., ¶ 25.) It is not claimed that the court addressed any of the substantive provisions regarding the effectuation of the settlement and protections in the event of default. (See id.)

Finally, given this court's holding that the parties did not make a binding agreement, the court rejects Ms. Weksler's apparent contention that the parties should be required to conduct good faith negotiations in an attempt to agree on omitted terms. This case does not involve an agreement like that in IDT Corp. v Tyco Group, S.A.R.L. (23 NY3d 497 [2014]) and IDT Corp. v Tyco Group, S.A.R.L. (13 NY3d 209 [2009]). There, the parties were held to have "enter[ed] into a binding contract under which the obligations of the parties [were] conditioned on the negotiation of future agreements." The Court held that the parties were therefore "obligated to negotiate in good faith." (23 NY3d at 502-503.) The settlement agreement at issue in the IDT cases was a "valid settlement agreement" (13 NY3d at 213) which required, as one of several elements, that the defendant furnish certain fiber optic capacity to the plaintiff on a to-be-constructed subsea cable. (Id., at 212.) The settlement agreement further provided, as a condition precedent to this obligation, that the terms on which this capacity would be furnished would be "documented pursuant to definitive agreements to be mutually agreed upon and, in any event, containing terms and conditions consistent with those described herein." (Id.) In discussing IDT, the Court of Appeals in Stonehill Capital Management LLC v Bank of the West (28 NY3d 439, 452 [2016]) clarified that "[t]here is a difference between conditions precedent to performance and those prefatory to the formation of a binding agreement." In the instant cases, as a result of the failure of the parties to reach agreement on numerous material terms, a valid and binding settlement agreement was never formed. The stipulation of settlement was at best an

agreement to agree, unlike the more sophisticated and "valid" agreement considered in IDT. A duty to negotiate additional terms therefore did not arise.

To apply a duty of further negotiation under these circumstances could also enable plaintiff to use the parties' lack of agreement on all material terms as a sword rather than as a shield. Having secured from defendants a promise to make substantial payments in return for settlement of this litigation, she should not now be permitted, by claiming that a further duty to negotiate exists, to compel defendants to accept a number of terms that could significantly increase the effective cost to defendants of the settlement.

Defendants' motion for a judgment and for sanctions will accordingly be denied, and plaintiff's cross-motion to vacate the November 10, 2016 stipulation of settlement and the marking of these cases as settled will be granted. Absent a definite and complete agreement by the parties to resolve their dispute between themselves, they must proceed to trial—with all of the risks and uncertainties that method of resolution entails. Although the court holds that the November 10 stipulation of settlement is unenforceable, this decision should not be construed as suggesting that the parties should abandon their efforts to resolve this litigation. On the contrary, the parties are urged to reopen their settlement negotiations while that option is still available.

It is accordingly hereby ORDERED that the motion of defendants in Index No. 603288/2007 and respondents in Index No. 652843/2011 (collectively, defendants) for a judgment in accordance with the stipulation of settlement placed on the record on November 10, 2016 and so-ordered nunc pro tunc on February 1, 2017 (the November 10, 2016 stipulation) and for sanctions pursuant to 22 NYCRR § 103-1.1 (c) is denied in its entirety; and it is further

ORDERED that the cross-motion of plaintiff in Index No. 603288/2007 and petitioner in

Index No. 652843/2011 (collectively, plaintiff) is granted to the following extent:

It is hereby ORDERED that the November 10, 2016 stipulation is vacated; and it is further

ORDERED that this court's February 1, 2017 order on the record marking these cases as settled is vacated, and both cases are restored to the court's calendar for trial; and it is further

ORDERED that the parties shall telephone chambers on a conference call on January 26, 2018 to schedule a date for trial.

This constitutes the decision and order of the court.

Dated: New York, New York
January 23, 2018

MARCY S. FRIEDMAN, J.S.C.