

<b>W 108 Dev. LLC v Nour Found.</b>
2020 NY Slip Op 31174(U)
May 6, 2020
Supreme Court, New York County
Docket Number: 155443/2019
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM
Justice
INDEX NO. 155443/2019
W 108 DEVELOPMENT LLC
Plaintiff,
MOTION DATE 01/09/2020, 01/09/2020, 01/09/2020
- v -
MOTION SEQ. NO. 001 002 003
NOUR FOUNDATION,
Defendant.
DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for MISCELLANEOUS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52 were read on this motion to/for SEVER ACTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79 were read on this motion to/for ENFORCEMENT

Petitioner commenced this proceeding seeking a license pursuant to Real Property Actions and Proceedings Law Section 881, to access respondent Nour Foundation's building located at 322 West 108th Street, New York, New York.

At present, there are three (3) motions pending in this matter. In addition to the motion at bar there is Motion Sequence #1, brought by petitioner, seeking a license pursuant to RPAPL Section 881. Motion Sequence #2, also brought by petitioner, seeks to join FG-PH Corporation as a party respondent to respondent's counter-claim for property damage pursuant to CPLR 1003. That motion also requests that the Court sever respondents counter-claim for property damage and continue that counter-claim as a separate plenary action pursuant to CPLR 407; or in the alternative, permit disclosure in a special proceeding, pursuant to CPLR 408.

This decision will resolve all of the motions before the Court.

In this motion, Sequence 3, petitioner states that on September 25, 2019, the parties reached an agreement regarding the terms of the license agreement which would allow petitioner access to the respondent's adjacent premises.

According to petitioner, that agreement was memorialized in emails exchanged between counsel during the period of August 27, 2019 and October 7, 2019.

Petitioner claims that, within those emails, the parties negotiated the “release” portion of the license. The release portion concerned respondent’s counter claim requesting damages for work previously done on the premises by petitioner.

On October 7, 2019, petitioner claims that counsel for respondent “expressly, clearly and unequivocally, stated that the wording of the agreement and release were acceptable to his client” and that “his client was prepared to execute all documents on that basis”.

Petitioner argues that respondent’s statements in that email show that the terms of the settlement agreement and release were fully negotiated and confirmed in writing, thus creating a binding agreement between the parties.

Petitioner asserts that two months later, respondent’s counsel confirmed, in writing, the final terms of the settlement agreement and release. However, in that confirmation, petitioner states that respondent’s counsel proposed new changes to the settlement agreement, which “significantly altered the agreement’s terms which had been negotiated and agreed to by the parties in the emails.”

According to petitioner, between October 7, 2019 and November 25, 2019 respondent’s counsel gave no indication that he considered the email exchange of October 7, 2019 to be anything less than written confirmation of the final settlement of the property damage claims between the parties or that any additional terms had to be negotiated.

Petitioner, in support of this motion, argues that respondent’s counsel should not now be permitted to withdraw from the resolution of its application in an “apparent attempt to force petitioner to accept an “illusory” release of respondent’s damage counter-claims when the parties previously confirmed, in writing, the final details of the agreement.

Respondent opposes the motion, arguing that petitioner’s contentions are not supported by the applicable case law or petitioners conduct. Specifically, respondent asserts that the emails between counsel were not a substitute for the parties’ actual signing of the agreement. Respondent states that his client is not bound by an agreement which had not been duly executed by the parties, notwithstanding the exchanged emails.

Respondent further argues that this motion is an “improper diversion” from this Court’s directive which urged counsel to negotiate and finalize the agreement. Respondent asserts that it complied with this Court’s directive by circulating new language addressing issues raised by both parties. However, respondent claims that petitioner failed to respond to the proposed new language, other than responding with an outright rejection.

In response to petitioner’s claims, respondent states that in late September 2019 the basic terms of the agreement had been worked out. However, the plan showing the work that petitioner was to perform on respondents’ roof had not been worked out between them. When petitioner did submit the exhibits to the proposed agreement, petitioner failed to provide respondent with the plan that addressed the respondent’s concerns. Instead petitioner gave respondent a copy of the previously exchanged plans that respondent’s engineer had previously deemed insufficient.

What followed were a series of emails, resulting in petitioner’s withdrawal from the agreement itself. Apparently, that issue was not resolved until late November 2019.

In addition, respondent claims that as of September 2019, another issue remained unresolved. That issue concerned the terms of the release regarding respondent’s counter-claim for damages petitioner allegedly caused to respondent’s property during the period of petitioner’s previous construction activities.

Respondent’s counsel states that on October 7, 2019 in reference to the language of the release, he proposed changes to a letter regarding roof protection and then stated “if you’re

prepared to agree to these changes, we're prepared to execute all documents on that basis." However, petitioner was not prepared to agree to sign anything on that date.

Respondent argues that the emails between the parties, subsequent to October 7, 2019, demonstrate that both parties understood that issues remained to be resolved before the execution of the final agreement. Respondent states that the parties conduct and statements in the emails, specifically, those of October 11, 2019 and October 29, 2019 show that there was no final agreement.

Respondent points to the October 11, 2019 email, signed by petitioner counsel's associate, wherein a request was made for "an overview of the issues that remain" to be agreed upon. Later that same day petitioner responded to an email from respondent, in which counsel stated that he would possibly consider "settlement negotiations discontinued" if he did not receive a fully executed copy of the agreement by the close of business on Monday, October 14, 2019.

In the October 29, 2019 email, petitioner requested the return of the "proposed license agreement and a check of \$106,500.00 in escrow" and stated that "an agreement was never entered into". Respondent argues that these statements leave no question that the parties had not entered into a final agreement.

### DISCUSSION

In this motion, petitioner argues that pursuant to *Williamson v. Delsener*, 59 AD3d 291 (2009) and *Trolman v. Trolman, Glaser & Lichtmann P.C.*, 114 AD3d 617 (2014), that the exchange of emails between counsel gave rise to a binding agreement, which was memorialized in writing. According to petitioner, that agreement settled the property damage allegations outlined in respondent's counterclaim.

To support this argument, petitioner asserts the language of the emails referred to a document titled "Settlement Agreement and Release" which document was annexed to the emails and contained all of the terms necessary to settle respondent's counter-claims for property damage.

In *Trolman*, the Appellate Division, First Department, affirmed the trial court's decision that a memorandum agreed to by both counsel for plaintiff and defendant constituted a binding and enforceable settlement notwithstanding that the memorandum stated that the parties would promptly execute formal settlement papers. The Appellate Court held the agreement was not rendered ineffective simply because certain "non-material" terms were left for future negotiation or because the agreement stated that the parties would promptly execute formal settlement papers.

Petitioner also argues that the email communications between counsel confirm that in exchange for a settlement payment of \$40,000 respondent agreed to release petitioner from all liability for the damages related to the license agreement and that those damages which occurred prior to the date of execution of the release.

Respondent, in response to petitioner's arguments, asserts that petitioner's actions demonstrate that no final agreement was reached as of October 7, 2019. Respondent states that petitioner's post October 7, 2019 conduct demonstrates that both parties understood that issues remained to be resolved before the agreement's final execution.

To support this claim, respondent's counsel points to the email of October 11, 2019, signed by an associate at petitioner's counsel's firm. That email said, "I will get back to you on our availability ASAP. In the meantime, can you kindly provide an overview of the issues that remain?" Later that day respondent's counsel responded to petitioner's email, summarizing certain of the remaining unresolved issues, specifically the request that petitioner tender actual roof protection plans for consideration by its engineer.

Respondent then received an email from petitioner's counsel, on October 1, 2019, in which petitioner's counsel indicated that should counsel not receive a fully executed copy of the agreement "as is" with all exhibits in current format by the close of business on October 14, 2019, respondent should consider settlement negotiations discontinued. Petitioner's counsel went on to say that if he did not receive that "final executed settlement agreement, by October 14, 2019, he would make arrangements to have the check picked up."

On October 29, 2019, petitioner's counsel emailed respondent's counsel requesting the return of the "proposed license agreement and check for \$106,500.00 being held in escrow". The email also stated that "an agreement was never entered into". The email further stated that "it's disappointing that an agreement did not result from our hard work".

On December 26, 2019, respondent's counsel emailed plaintiff's counsel language concerning the last unresolved aspect of the settlement agreement, the scope of the release. Petitioner's counsel wrote back to respondent's counsel that he would confer with his client regarding the new language sent by respondent. Petitioner did not respond to the email but instead filed this motion.

Petitioner argues that the settlement agreement and release negotiated by the parties constitutes an enforceable contract. Petitioner asserts that the emails exchanged between counsel which contained their printed names at the end thereof, constitute signs writings (CPLR 2104), within the statute of frauds and entitle petitioner to judgment. Petitioner asserts that the emails were sufficiently clear and concrete to constitute an enforceable contract. Petitioner also claims that the email communications indicate that respondent was aware of and consented to the settlement agreement and release, and that the record contains no indication to the contrary.

Petitioner also states that, as in *Trolman supra*, that the agreement herein, agreed to by counsel for petitioner and respondent, constituted a binding and enforceable settlement agreement and that the agreement was not rendered ineffective simply because certain non-material terms were left for future negotiation.

Based upon the above, petitioner argues that terms of the agreement at issue and respondent's failure to execute the formal Settlement Agreement and Release is of "no consequence" and that the agreement should be enforced.

Petitioner finally states that the email communications between counsel confirm that in exchange for a settlement payment of four thousand dollars, respondent agreed to release petitioner from all liability for the damages listed in the license agreement and those damages which occurred prior to the date of the execution of the release.

In opposition, citing *Scheck v. Francis*, 26 NY2d 466 (1970), respondent argues that there was no final execution of the agreement. Specifically, respondent states that petitioner's reliance on a statement in an email stating: "if you're prepared to agree to these changes, we're prepared to execute all docs on that basis" is insufficient to prove the existence of a formally executed document between the parties. Here, respondent asserts that the aforementioned statement contemplates a formal execution of the agreement before the agreement would take effect. Thus, it was not the parties' intention to have a binding agreement at that time and the agreement would only take effect after the parties had signed that document.

Respondent states the parties continued to negotiate material terms of their agreement, which terms were so material that after October 7, 2019, petitioner threatened to withdraw and cease all negotiation.

Based upon the papers submitted, and the oral argument, the Court finds that the petitioner's motion is denied.


It is clear from the record that there was no final agreement was entered into by the parties. There is no evidence, either in the conduct of the parties or in their writings showing that they agreed to be bound by the "proposed agreement". The email exchanges clearly show that the parties continued to be in negotiations up to the date that this motion was made. This is evident by petitioner's threat to pull out and cease all negotiation of the agreement unless its demands were met.

The facts establish that no final agreement had been reached as of the October 7, 2019 email and for several weeks thereafter. Thus, the motion is denied.

Motion Sequence # 1 is granted and petitioner is granted a license pursuant to Real Property and Procedures Law 881

Motion Sequence # 2 is granted without opposition, to the extent that FG-PH is joined as a party respondent to Nour Foundation's counter-claim for property damage pursuant to CPLR 10003. That portion of petitioner's motion seeking severance of Nour Foundation's Counter-Claim for property damage is denied. However, the Court permits disclosure in a special proceeding of the issues contained herein, pursuant to CPLR 408.

This Constitutes the Decision and Order of the Court.

<u>5/06/2020</u>					
DATE			W. FRANC PERRY, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
		<input type="checkbox"/> DENIED			