

**Travelers Cas. Ins. Co. of Am. v J. Thomas Constr.**

2020 NY Slip Op 32764(U)

August 25, 2020

Supreme Court, New York County

Docket Number: 153955/2018

Judge: Verna Saunders

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 36

Justice

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INDEX NO. 153955/2018

TRAVELERS CASUALTY INSURANCE
COMPANY OF AMERICA, a/s/o Getz
Photography, Inc. and THE CHARTER OAK
FIRE INSURANCE COMPANY a/s/o
Cortland Place Condominiums,

MOTION SEQ. NO. 001

Plaintiffs,

DECISION + ORDER ON
MOTION

- against -

J. THOMAS CONSTRUCTION,
Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24

were read on this motion to/for

ENFORCEMENT

Plaintiffs commenced this action seeking to exercise their subrogation rights against defendant, J. Thomas Construction. Plaintiffs allege that defendant was hired to perform, supervise, and manage demolition/construction work at the premises known as 81 Walker Street, Unit 2, New York, NY 10013, hereinafter "subject premises." On or about August 19, 2015, defendant's employees and/or contractors were using an angle grinder to cut a steel beam within the subject premises when a fire developed and spread causing fire, smoke, and water damage to the portions of the building operated by insureds Getz Photography, Inc. and Cortland Place Condominiums. Pursuant to the insureds' respective policies, plaintiffs paid \$17,696.00 for damage caused to common areas of Cortland Place Condominiums and \$296,116.45 to or on behalf of Getz Photography, Inc.

Plaintiffs now seek enforcement of a settlement agreement purportedly reached and confirmed by the parties across various e-mail exchanges. Specifically, plaintiffs allege the following: that on December 28, 2017, plaintiffs sent a settlement demand which was acknowledged by defendant's counsel on March 6, 2018. (See Movant's Exhibits 2 and 3). On March 29, 2018, plaintiffs sent damage proofs and at the conclusion of ongoing settlement negotiations, plaintiffs indicated that if the defendant were to offer \$30,000.00, plaintiffs would

1 Defendant was purportedly hired by Ilana Seid and Richard Richenthal, owners of 81 Walker Street, Unit 2, New York, NY 10013, for work pertaining to Unit 2. See Summons & Complaint; see also Contractor Letter to owners, annexed as Movant's Exhibit 1.

2 JT Stewart, contractor and owner of JT Construction, admitted that the fire was caused by his workers and accepted full responsibility for the accident. (See Movant's Exhibit 1.)

3 At the time of the fire, plaintiff Travelers Casualty Insurance Company of America ("Travelers") insured Getz Photography, Inc. and plaintiff Charter Oak Insurance Company ("Charter Oak") insured Cortland Place Condominiums.

4 The court also notes that a prior demand was sent on October 13, 2017, to defendant's insurer Mount Hawley who disclaimed coverage for the loss and declined to make a settlement offer.

accept same to settle the claims of Travelers Casualty Insurance Company of America (Travelers) and The Charter Oak Fire Insurance Company (Charter Oak). Then, in an e-mail exchange dated May 11, 2018, plaintiffs indicated that a payment plan of \$3,000.00 a month for ten months was acceptable to plaintiff Travelers; that there was no public adjuster on either insurance claim; and that only Travelers underwriting companies, as well as, Charter Oak would sign a release. (See Movant's *Exhibit 5*). In response, attorney for defendant J. Thomas Construction indicated that his client was "fine with the releases as ...describe[d] below," and that the first payment should be made on or before May 30, 2018, with subsequent payments to be made on the 30th of each month thereafter. *Id.* In an ensuing e-mail message dated May 24, 2018, defendant's attorney indicated that his client was being sued by insured Getz Photography, Inc.; that a copy of the complaint was sent to plaintiffs; and requested a breakdown of policy coverage, along with information as to whether a public adjuster was retained.

On August 23, 2018, plaintiffs sent a release memorializing the terms of the settlement as confirmed in the respective e-mail exchanges and signed by the plaintiffs. (See Defendant's *Exhibit 2*). After not receiving a response, plaintiffs followed up on August 31, September 7, September 14, and September 21, 2018 as to the status of the release. During the September 7, 2018 follow-up message, defendant's attorney indicated that the release was received and forwarded to his client and he had not yet had a response. In or around October of 2018, defendant's attorney indicated that circumstances changed as the defendant had been named in two additional lawsuits seeking two and three million dollars, respectively, in damages.

In opposition, defendant contends that the plaintiffs are not entitled to enforcement of any purported settlement outlined in the e-mail exchanges as a review of the release and settlement agreement sent in August of 2018, indicates that there were terms and conditions not present in the e-mail exchange.<sup>5</sup>

Pursuant to CPLR § 2104, an agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by the party or attorney or entered as an order. An exchange of e-mails may constitute an enforceable agreement if the writings include all of the agreement's essential terms, including the fee, or other cost involved. (See *Kasowitz, Benson, Torres & Friedman, LLP. v Duane Reade*, 98 AD3d 403 [1st Dept 2012]; see also *Jimenez v Yanne*, 152 AD3d 434 [1st Dept 2017]).

After a careful review of the papers submitted and due consideration of the arguments advanced by the parties, plaintiffs' motion is granted.

Defendant maintains that the e-mail exchanges are devoid of material and essential terms and thus, should not be enforced. But close examination of the record suggests otherwise. To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound. (See *Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). While defendant contends enforcement of the settlement should be denied as the terms at issue do not comprise the essential elements of a

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<sup>5</sup> The terms that defendant relies upon are included in the release signed by plaintiffs and sent to defendant on August 23, 2018. (See Defendant's *Exhibit 2*.)

contract,<sup>6</sup> this bald assertion cannot be the end of the inquiry as the e-mail exchanges do in fact support a finding that all the requisite elements of a contract are met. To illustrate: plaintiffs aver, and defendant does not deny, that at the conclusion of ongoing settlement negotiations plaintiffs indicated that if the defendant were to offer \$30,000.00, plaintiffs would accept same to settle the claims of Travelers and Charter Oak. The existence of this offer, acceptance, consideration, mutual assent, and intent to be bound are further supported by the e-mail exchange dated May 11, 2018, in which a payment plan was set at \$3,000.00 a month for ten months with the first payment to be made on or before May 30, 2018, and subsequent payments to be made on the 30th of each month thereafter. The precise nature of the fee agreement also supports plaintiffs' contention that the parties had a contract for which they intended to be bound. (See *Kasowitz*, supra, citing *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]).

In the same e-mail exchange dated May 11, 2018, plaintiffs notified defendant that any releases would be limited to Traveler's underwriting companies and Charter Oak thus, defendant knew or should have known that the insureds could still potentially pursue legal recourse. Despite these limitations, defendant's counsel responded in the affirmative indicating that his client was "fine with the releases as ... describe[d below]" thus, agreeing to the terms as proposed. (See Movant's *Exhibit 5*). This exchange suggests that defendant was made aware of the circumstances of the agreement and supports a finding of mutual assent and intent to be bound. Additionally, as the plaintiffs correctly point out, in a subsequent e-mail dated May 24, 2018, defendant indicates that insured Getz Photography, Inc. is suing defendant and requests relevant information but makes no indication that the settlement was retracted or modified thus, supporting the conclusion that the parties still intended to be bound. Defendant may argue that his subsequent refusal to sign the August 23, 2018 release<sup>7</sup> is evidence that the parties did not wish to be bound, but the court finds this argument unavailing as a subsequent failure to sign does not detract from a finding of an enforceable contract. (See *Williamson v Delsener*, 59 AD3d 291 [1st Dept 2009], citing *Cole v Macklowe*, 40 AD3d 396 [1st Dept 2007]); see also *Thomas v Thomas*, 70 AD3d 588 [1st Dept 2010]). Moreover, the proposed release did not specifically provide that it negated all preceding agreements and it was not signed by the defendant which suggests that the parties intended to be bound by the preliminary agreement as outlined in the e-mail exchange. (See *Options Group Inc. v Vyas*, 91 AD3d 446 [1st Dept 2012]).

Ultimately, essential terms are those terms without which the agreement fails. Based on the record before the court, the essential terms of a contract were outlined in the e-mail exchanges between the parties such that enforcement is warranted. Finally, the underlying facts, which include an admission of liability by the owner of defendant corporation,<sup>8</sup> are the very circumstances that encourage settlement. Hence, the court is inclined to serve the interest of efficiency in the final resolution of this dispute. (See *Mill Rock Plaza Assocs. v Lively*, 224 AD2d 301 [1st Dept 1996]). Based on the foregoing, it is hereby

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<sup>6</sup> The terms are outlined as follows: "It is understood and agreed that the payment herein made is in compromise of a disputed claim, and that the payment is not to be construed as an admission of liability on the part of the parties hereby released, by whom liability is expressly denied." "This Release contains the entire agreement between the parties hereto and the terms of this release are contractual and not mere recital and the parties to this Release hereby intend to be legally bound by it." (Defendant's *Exhibit 2*.)

<sup>7</sup> See Affidavit of Jonathan Stewart.

<sup>8</sup> See Movant's *Exhibit 1*, supra.

ORDERED that plaintiffs, Travelers Casualty Insurance Company of America and The Charter Oak Fire Insurance Company's motion for enforcement of settlement is granted; and it is further

ORDERED that the clerk is directed to enter judgment accordingly for said plaintiffs; and it is further

ORDERED that any relief not expressly addressed herein has nonetheless been considered and is denied.

August 25, 2020

  
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HON. VERNA L. SAUNDERS

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION			
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT		<input type="checkbox"/>	REFERENCE