

DT Net Lease I REIT v Coughlan
2022 NY Slip Op 31381(U)
April 26, 2022
Supreme Court, New York County
Docket Number: Index No. 652850/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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DT NET LEASE I REIT,	INDEX NO.	<u>652850/2020</u>
Plaintiff,	MOTION DATE	<u>04/18/2022</u>
- v -	MOTION SEQ. NO.	<u>006</u>
JAMES COUGHLAN, ROBERT COUGHLAN, RITA CASTAGNA, and RITA CASTAGNA,	DECISION + ORDER ON MOTION	
Defendants.		

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104 were read on this motion to/for COMPROMISE.

Upon the foregoing documents, it is

Defendants James L. Coughlan and Robert J. Coughlan¹ move pursuant to CPLR 2104 to enforce a settlement agreement with plaintiff DT Net Lease I REIT² and for attorneys' fees pursuant to the settlement agreement or sanctions pursuant to 22 NYCRR §§130-1.1(a) and 130-1.2 in repudiating the settlement agreement between counsel. The motion is granted.

This is an action to enforce a completion guaranty. (NYSCEF Doc. No. [NYSCEF] 1, Complaint ¶1.)

Defendants assert that plaintiff and defendants "settled this matter on January 25, 2022, the date on which [Behar], as counsel for the [defendants], accepted

¹ The Coughlans, along with defendant Tritec Building Company, Inc. in the related action, move for the identical relief in motion sequence 008. (*Castagna v DT Net Lease I REIT*, Index 652722/2020.)

² In the related action, the Coughlans' motion is also made against co-defendant DT-XCIII-IS, LLC. (Index 652722/2020 motion sequence 008.)

[plaintiff's] final draft of the fully-integrated settlement agreement . . . which undisputedly contained all material terms of the settlement.” (NYSCEF 71, Behar³ Aff ¶2.)

According to plaintiff, on December 10, 2021, Behar and Bonnie Lynn Chmil, counsel for plaintiff, negotiated and Chmil emailed Behar with plaintiff's “counterproposal which included a demand that the settlement be done by Christmas.” (NYSCEF 95, Chmil Aff ¶5; NYSCEF 97, 12/13/21 Email.) Despite plaintiff's alleged deadline, Chmil allegedly called Behar on December 27, 2021 “to provide a new counterproposal.” (NYSCEF 95, Chmil Aff ¶6.)

On January 6, 2022, Chmil emailed Behar that plaintiff “wants to wrap things up” and would settle at the defendants' number “provided that we have an agreement in principle by the end of the business day tomorrow and the settlement is documented by January 11, 2022.” (NYSCEF 98, 1/6/22 Email.) Defendants “did not confirm by the end of the business day, January 7, 2022, any agreement in principle and did not document a settlement by January 11, 2022.” (NYSCEF 95, Chmil Aff ¶7.) Plaintiff objected to the timing of the settlement payment. (*Id.*, at ¶7; NYSCEF 99, 1/19/22 Emails.) Nevertheless, on January 19, 2022, Chmil emailed Behar stating the 60-day payment window was a problem and “settlement amount was based on ‘quick payment.’” (NYSCEF 99, 1/19/22 Emails.)

On January 17, 2022, Chmil, emailed Behar a draft settlement agreement. (NYSCEF 72, 1/17/22 Email.)

³ Jarrett M. Behar is defendants' attorney who participated in the negotiation of the settlement agreement and thus has personal knowledge.

On January 18, 2022, Chmil emailed a revised draft to Behar. (NYSCEF 73, 1/18/22 Email.)

On January 19, 2022, Behar provided Chmil a redline of proposed changes including a proposed term of 60 days to pay the settlement amount. (NYSCEF 75, 1/19/22 Emails between 2:04 p.m. and 2:36 p.m.) Behar explained that he was gathering the settlement amount from multiple sources. (NYSCEF 71, Behar Aff ¶¶6; NYSCEF 74, 1/19/22 Email at 2:04 p.m.; NYSCEF 75, 1/19/22 Emails between 2:04 p.m. and 2:36 p.m.) Nevertheless, defendants allegedly agreed to 45 days to pay with interest accruing if the payment was not timely made and the addition of a prevailing party attorneys' fees provision. (NYSCEF 76, 1/19/22 Email at 3:25 p.m.)

Behar confirmed with defendants, Tri Tech, and their insurance carrier that the 45-day term was acceptable. (NYSCEF 71, Behar Aff ¶¶9.) For the next two weeks, Behar negotiated settlements with the various third-party defendants in the Related Action to fund the Settlement. (*Id.*; See *Castagna* Action NYSCEF 129, Notice of Discontinuance as to Third-Party Defendants.)⁴

On January 24, 2022, despite plaintiff's alleged deadline, Chmil checked with Behar on the settlement status by email. (NYSCEF 71, Behar Aff ¶¶10; NYSCEF 78, 1/24/22 Email.)

On January 25, 2022, Behar confirmed in an email that "the 45 days is acceptable, and this agreement can be executed." (NYSCEF 79, 1/25/22 Email.) In Behar's January 25, 2022, email, Behar stated that "[t]his is not a substantive issue, but

⁴ The court does not address defendant's estoppel argument as it was raised in the reply for the first time.

a timing issue in terms of syncing up all of the signatures.” (NYSCEF 101, Email Chain between 1/25/22 and 2/9/22, at 2.)

On January 28, 2022, Behar updated the court by email in which he stated that he was “hopeful that the settlement of the first-party action will be finalized next week.” (NYSCEF 102, Email Correspondence with Court.)

On February 8, 2022, Behar sent another email to the Court, stating:

“We have finalized the main settlement agreement as between my clients, defendants TRITEC Building Company, James L. Coughlan and Robert J. Coughlan, and defendants DT Net Lease I REIT and DT-XC-III-IS, LLC (collectively “iStar”) and are just awaiting signatures. It is my understanding that the plaintiffs and iStar have also finalized their settlement. In addition, we have worked out general releases between my clients and the plaintiffs. The only hold up as to the entire main action being discontinued at this time is the status of general releases and a discontinuance between my clients and defendant Cox Automotive Inc. against whom my clients have indemnity and contribution cross-claims. I have been unable, for over a week, to obtain feedback from counsel for Cox, despite numerous emails and voicemails.” (NYSCEF 95, Chmil Aff ¶¶19; NYSCEF 102, Email Correspondence with Court; NYSCEF 80, Email Chain with Court.)

On February 9, 2022, Behar emailed Chmil, stating that “we were simply going to discontinue against Cox Automotive and “having accepted your final draft, we are ready to coordinate signatures. Please let me know how you would like to go about this ministerial step.” (NYSCEF 81, Email Chain between 1/19/22 and 2/9/22.)

On February 14, 2022, Chmil renounced the settlement agreement because the settlement “was not concluded timely” and that “time was of the essence and that there was a short window to settle the claims.” (NYSCEF 82, Email Chain between 2/8/22 and 2/14/22.)

On March 3, 2022, Chmil responded to Behar’s opposition objecting to Chmil’s attempted repudiation stating:

“DT Net Lease I REIT cannot agree to a settlement at this time. As you know, [plaintiff] has announced a sale of assets that will be completed at the end of this

month. Until that sale is completed [plaintiff] is not in a position to have any further conversations regarding settlement. Please see Section 7.3 of the publicly-filed purchase agreement for confirmation of same.” (NYSCEF 84, 3/3/22 Email.)

Plaintiff’s settlement discussions with defendants were conducted against the backdrop of the Carlyle Group’s then-pending \$3 billion acquisition of plaintiff’s portfolio of assets including its shares in REIT. (NYSCEF 95, Chmil Aff ¶¶2.)

Plaintiff argues that the settlement is not contained in one writing subscribed by both parties in violation of CPLR 2104. Indeed, plaintiff notes that defendants have never signed the settlement agreement. Also, plaintiff argues that the objective circumstances establish that plaintiff did not intend to be bound to a settlement until the draft settlement agreement was signed by both parties. Plaintiff interprets Behar’s January 28, 2022, email to the court as acknowledgment that, as of January 28, no settlement was finalized. (NYSCEF 95, Chmil Aff. ¶ 18; NYSCEF 102, Email Correspondence with Court.) According to plaintiff, it contradicts defendants’ current contention that a settlement was made by email on January 25, 2022. (NYSCEF 95, Chmil Aff ¶¶18.) The statement that counsel was “awaiting signatures” indicates that defendants intended that signature on the draft settlement agreement was a further occurrence necessary to settlement. (*Id.*, at ¶¶19.) Despite the statement that defendants were “awaiting” signatures, defendants never tendered its own signature on the draft. (*Id.*)

The court finds that the email combined with the attached draft settlement agreement satisfy CPLR 2104. These documents contain the entire agreement and counsels’ signatures. The execution of releases (or a discontinuance in this case) does not change whether the parties have an enforceable settlement pursuant to CPLR 2104.

(See *Phila. Ins. Indem. Co. v Kendall*, 197 AD3d 75, 81 [1st Dept 2021]; see also *Rawald v Dormitory Auth.*, 199 AD3d 477 [1st Dept 2021].)

There is no evidence before the court that plaintiff informed defendants that there was a hard deadline related to its sale transaction. Indeed, Chmil repeatedly adjourned her target dates. Likewise, a deadline is not contained in the Settlement Agreement. Additionally, Chmil's conduct is entirely inconsistent with plaintiff's position. For example, after the December 25 deadline, Chmil called to provide a counterproposal. (NYSCEF 95, Chmil Aff ¶¶6.) Throughout January 2022, Chmil continued to correspond via email and on the phone with Behar. (See NYSCEF 98-101.) When the alleged December 25 deadline passed, there is no communication from plaintiff acknowledging the expiration of the offer. (NYSCEF 95, Chmil Aff ¶¶5-6.) Moreover, the words "time is of the essence" or words to that effect are never used.

Defendants do not dispute an intention to execute the agreement. However, an expectation to execute documents does not preclude an earlier agreement; there must be an express reservation not to be bound without a fully executed document. (*Kowalchuk v Stroup*, 61 AD3d 118, 123 [1st Dept 2009] [citations omitted].) The court finds no evidence of such an express indication to be bound only upon execution of the settlement agreement. Rather, Behar's statement "[t]his agreement can be executed" on January 25, 2022, is the equivalent of "confirmed" or "we are settled." (See *Phila. Ins. Indem. Co.*, 197 AD3d at 77 ["On that day, respondent's counsel emailed petitioner's counsel: 'Confirmed -we are settled for 400K.'"]; *Rawald*, 199 AD3d at 478 ["Please confirm we are settled." Sea Crest's counsel responded, "Confirmed. I'll have release information to you ASAP."]; *Kowalchuk*, 61 AD3d at 121 ["we have a settlement"].) Behar's emails to the court are not contrary; they are consistent with the court's finding

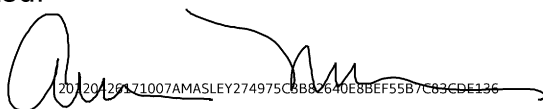
that counsel came to an agreement on January 25, 2022, on material terms in writing and subscribed by email signatures and had a plan to execute the agreement.

Finally, plaintiff's accepted offer cannot be revoked after acceptance. (See *Kowalchuk*, 61 AD3d at 122.)

Defendants' application for attorneys' fees under Rule 130 is denied, in the absence of frivolous conduct,⁵ but granted based on the settlement agreement which contains a prevailing party attorneys' fees provision. (Related Action, Index No. 652722/2020, NYSCEF 132, Settlement Agreement.) By May 3, 2022, defendants shall submit an affidavit of services with resumes, bios or descriptions for each timekeeper justifying their rates. Plaintiff may object by May 17, 2022. The court will notify the parties if a hearing is necessary.

Accordingly, it is

ORDERED that defendants' motion is granted.


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<u>4/26/2022</u> DATE			<u>ANDREA MASLEY, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input 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

⁵ This decision is made as a matter of law. The court did not have a hearing on the conflicting statements by the attorneys so there was no finding that plaintiff asserted a material factual statement that was false.