

Garcia v 88th Ave. Owner LLC
2022 NY Slip Op 31647(U)
May 12, 2022
Supreme Court, Kings County
Docket Number: Index No. 516181/17
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of May 2022.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

-----X
BONIFACIO VILLARUEL GARCIA and LILIA
CADENA,

Plaintiffs,

-against-

Index No.: 516181/17

88TH AVENUE OWNER LLC, NY DEVELOPERS
& MANAGEMENT INC., and 150-13 89TH LLC,

Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Affidavits/ Affirmations in Reply _____
Other Papers:

55-56, 58, 94-95, 113-116
61, 69, 72, 117, 118
121

Upon the foregoing papers, plaintiffs Bonifacio Villaruel Garcia and Lilia Cadena move, by way of an order to show cause, for an order (1) directing that the law firm of Gorayeb & Associates, P.C. (Gorayeb & Associates) turn over the file in this case to the law firm of Proner & Proner, and (2) directing that a hearing be held in order to determine whether plaintiffs' discharge of Gorayeb and Associates

was for cause (motion sequence 5). Defendants 88th Avenue Owner LLC, NY Developers & Management Inc., and 150-13 89th LLC move for an order (1) pursuant to CPLR 2104, enforcing the terms of the settlement agreement reached at a mediation conducted on April 16, 2020, and (2) pursuant to 22 NYCRR §§ 130-1.1 and 130-1.2, awarding defendants costs and fees incurred in enforcing the settlement agreement since the date of the settlement (motion sequence 6). Plaintiffs' cross-move for an order vacating the post mediation settlement agreement dated April 16, 2020 (motion sequence 7).¹

BACKGROUND

Plaintiffs allege that on May 22, 2017, plaintiff Garcia was struck by a falling object, while working at a construction site owned and/or operated by the defendants. On August 18, 2017, plaintiffs commenced this action with the filing of a summons and complaint, alleging causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240 (1), 240 (2), 240 (3) and 241 (6); the complaint also alleges derivative claims on the behalf of plaintiff Cadena. Gorayeb & Associates, who represented plaintiffs from the commencement of the action, filed the summons and complaint and supplemental summons and amended complaint on plaintiffs' behalf. Further, the firm attended various court

¹ In an order dated August 20, 2021, the court resolved the portion of plaintiffs' motion requesting that Gorayeb & Associates turn over the file by directing Proner & Proner to pay disbursements to Gorayeb & Associates within 10 days of the date of the order and directing Gorayeb & Associates to turn over the legal file to Proner and Proner within 15 days of the date of the order (NYSCEF document number 75). The August 20, 2021, order did not address the issue of whether plaintiffs' discharge of Gorayeb & Associates was for cause.

appearances and represented the plaintiffs at the depositions conducted in May and July of 2019.

On April 16, 2020, Gorayeb & Associates represented the plaintiffs at a private mediation session with Susan Hernandez, a mediator with National Arbitration and Mediation (NAM), which was conducted remotely.² Roy Kuriloff Esq., an associate of Gorayeb & Associates, who appeared at the mediation for plaintiffs, and Amy Curley, who appeared for defendants, assert in their respective affirmations/affidavits, that they reached an agreement to settle the action for \$350,000, as outlined in NAM's "Post Mediation Agreement" form (NAM Agreement)³. This NAM Agreement, which was apparently filled out by Susan Hernandez, outlines the terms of the settlement. The form had a signature line for plaintiffs that is signed "Roy Kuriloff w/consent by SH," and a signature line for defendants that is signed "Amy Curley w/consent by SH" and has the signature of the mediator Susan Hernandez near the bottom of the document.

² The participants in the mediation do not specifically address whether the mediation was conducted remotely. However, in their affidavits/affirmations, the representatives of Gorayeb & Associates state that they were working remotely at the time of the mediations, and the mediation itself occurred during the period that the "New York State on Pause" executive orders, that generally required individuals to shelter in home during the pandemic, were in effect (*see Matter of Seawright v Board of Elections in City of N.Y.*, 35 NY3d 227, 239-241 [2020] [Rivera, J., dissenting]; *Nelkin v Wedding Barn at Lakota's Farm, LLC*, 72 Misc. 3d 1086, 1090-1093 [Civ Ct, Queens County 2020]; Executive Order [A. Cuomo] No. 202.14 [9 NYCRR 8.202.14] [April 7, 2020] [extending the shelter at home and other provisions of prior executive orders]). The remote nature of mediation is also suggested by the very fact that the mediator signed the attorneys' names to the document with consent, which would have been unnecessary if they had been present with the mediator. The court thus finds that the mediation was conducted remotely as a telephone or video conference.

³ NYSCEF document numbers 63 and 106.

In May 2020, plaintiffs refused to sign the release and other documents necessary to finalize the settlement. On or about May 24, 2021, the plaintiffs retained Proner & Proner as substitute counsel for Gorayeb & Associates. In moving for a hearing and cross-moving to vacate the settlement, plaintiffs contend that they did not give Gorayeb & Associates authority to settle the matter under the terms agreed upon during the mediation.

In opposition, Gorayeb & Associates assert that the attorney attending the mediation discussed the proposed settlement with plaintiffs and obtained plaintiffs' actual authority to settle under the terms reached during the mediation. Defendants, in moving to enforce the settlement, assert that the Post Mediation Agreement, together with the affirmation in opposition submitted by Gorayeb & Associates, constitute a written settlement agreement subscribed by the attorney in compliance with CPLR 2104 and that, regardless of whether Gorayeb & Associates had actual authority to settle the action on plaintiffs' behalf, they had apparent authority to do so.

DISCUSSION

Motion Sequence 5

“A client has ‘an absolute right, at any time, with or without cause, to terminate the attorney-client relationship by discharging the attorney’” (*Doviak v. Finkelstein*, 90 AD3d 696, 698-699 [2d Dept 2011], citing *Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38 [1990]). Where the attorney discharge is without cause, the attorney is entitled to recover the reasonable value of his/her

services, in quantum meruit (*Schultz v Hughes*, 109 AD3d 895 [2d Dept 2013]). “Where the discharge is for cause, the attorney has no right to compensation or a retaining lien, notwithstanding a specific retainer agreement (*Campagnola*, 76 NY 2d at 44). In general, a hearing is warranted to determine whether a client has cause for discharging his/her attorney. (*Doviak*, 90 AD3d at 699). However, a court may determine whether an attorney was discharged for cause, without a hearing, if the papers submitted fail to raise a factual dispute on a material point as to the attorneys conduct (*Sessa v Doxey*, 172 AD3d 939 [2d Dept 2019]).

Here, the plaintiffs’ order to show cause, which is supported only by an attorney affirmation, is insufficient to raise any factual dispute on a material point regarding whether the discharge of Gorayeb and Associates was for cause. Accordingly, that portion of the order to show cause seeking a hearing is denied.

Motion Sequence 6 and 7

In view of its representation of plaintiffs from the commencement of the action through the time of the mediation, Gorayeb & Associates undoubtedly had apparent authority to enter into the settlement on behalf of the plaintiffs (*see Hallock v State of New York*, 64 NY2d 224, 231-232 [1984]; *Amerally v Liberty King Produce, Inc.*, 170 AD3d 637, 638 [2d Dept 2019]). A Member of Gorayeb & Associates signed the verified summons and complaint, the supplemental summons and amended verified complaint, and appeared for the plaintiffs at the preliminary conference and the examinations before trial, all prior to the mediation in question (*Chae Shin Oh v Jeannot*, 160 AD3d 701, 702-703 [2d Dept

2018]). Gorayeb and Associates' participated in the negotiations, with the plaintiff's knowledge and authorization. "Even a party who is not present at the negotiation may still be bound by the settlement if he has cloaked his attorney with apparent authority" (*Stoll v Port Auth. of N.Y. & N.J.*, 268 AD2d 379, 380 [1st Dept 2000], citing *Hallock*).²

Therefore, the enforceability of the settlement here turns on whether it satisfies the requirements of CPLR 2104 (*see Herz v Transamerica Life Ins. Co.*, 172 AD3d 1336, 1337 [2d Dept 2019]). Where the parties do not enter into a settlement in open court, CPLR 2104 provides that "[a]n agreement between 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 [the party] or [the party's] attorney" (*see Herz*, 172 AD3d at 1337; *Kataldo v Atlantic Chevrolet Cadillac*, 161 AD3d 1059, 1060 [2d Dept 2018]; *see also Matter of Dolgin Eldert Corp.*, 31 NY2d 1, 7-11 [1972]).

Notably, "although CPLR 2104 says subscribed, not signed, subscription is defined as '[t]he act of signing one's name on a document; the signature so affixed'" (*Matter of Philadelphia Ins. Indem. Co. v Kendall*, 197 AD3d 75, 78 n2 [1st Dept 2021], quoting *Black's Law Dictionary* 1655 [10th ed 2014]; *see also Bonnette v*

² While the affidavits of plaintiffs are, as discussed below, sufficient to demonstrate a factual issue with respect to Gorayeb & Associates actual authority to settle the action for \$350,000, nothing in their affidavits suggests that Gorayeb & Associates was without authority to participate in the mediation or settle the matter.

Long Is. Coll. Hosp., 3 NY3d 281, 286 [2004] [“The plain language of the statute directs that the agreement itself must be in writing, signed by the party (or attorney) to be bound”]). As such, a writing not signed by the party or attorney to be bound will not constitute an enforceable settlement (*Kataldo*, 161 AD3d at 1060; *Headley v City of New York*, 115 AD3d 804, 807 [2d Dept 2014]; *Matter of Morse Hill Assoc., LLC*, 50 AD3d 906, 907-908 [2d Dept 2008]).

Despite the subscription requirement of CPLR 2104, few cases address how a document must physically be subscribed, other than those addressing settlements reached via email exchanges. The Appellate Division, Second Department recognized the reality that an email cannot be signed in the traditional sense and has held that the sender may sign by purposely adding his or her name to the email (see *Forcelli v Gelco Corp.*, 109 AD3d 244, 249-251 [2d Dept 2013]). The Appellate Division, First Department has gone even further than the Second Department, holding that, “if an attorney hits ‘send’ with the intent of relaying a settlement offer or acceptance, and their email account is identified in some way as their own, then it is unnecessary for them to type their own signature” (*Matter of Philadelphia Ins. Indem. Co.*, 197 AD3d at 80). While these cases stretch the meaning of a signature in order to adopt it to fit with a new technology, both of these approaches still require that the email come from the attorney of the party to be bound by the settlement (see *Matter of Philadelphia Ins. Indem. Co.*, 197 AD3d at 80; *Forcelli*, 109 AD3d at 250-251).

Although there is considerable flexibility relating to the form of the signature, where the signing of the document is performed by one other than the party to be bound, the cases generally require a showing that the person signing was an agent of the party to be bound or, that the party to be bound ratified or otherwise adopted the signature as his or her own (*see Fortes v Estate of Magoon*, 160 AD2d 756, 757 [2d Dept 1990]; *see also Titte v Butler*, 143 AD3d 808, 810 [2d Dept 2016]; *Leist v Tugendhaft*, 64 AD3d 687, 688 [2d Dept 2009]).

Here, the NAM Agreement itself shows that Roy Kuriloff, the Gorayeb & Associates' attorney who participated in the mediation, did not sign the Agreement himself and that his name was inserted into the signature line by the NAM mediator, Susan Hernandez. Under these circumstances, this court finds that the mediator's insertion of the attorney's name onto the Agreement fails to satisfy the subscription requirements of CPLR 2104. Although this court recognizes that the settlement occurred during the height of the Covid-19 pandemic in New York, and that many statutes, rules and procedures were modified by the Governor's executive orders in recognition of the difficulties arising from the pandemic – including those relating to acceptable methods of notarizing documents (Executive Order [A. Cuomo] No. 202.7 [9 NYCRR 8.202.7] [March 19, 2020]; Executive Order [A. Cuomo] No. 202.14 [9 NYCRR 8.202.14 [April 7, 2020]] - the defendants and Gorayeb & Associates have failed to identify any alteration to the subscription requirement of CPLR 2104 that would allow a mediator to sign on the behalf of a

party's attorney (see *Matter of Seawright v Board of Elections in City of N.Y.*, 35 NY3d 227, 234-236 [2020]).

Defendants argue that the affirmations and affidavits submitted by Gorayeb & Associates, in opposition to plaintiffs' motion seeking turnover of their legal file, support a finding that the parties reached a settlement subscribed by the attorneys in compliance with CPLR 2104. These affidavits and affirmations from Gorayeb & Associates, however, cannot be deemed to constitute a subscribed formal acceptance of the settlement under CPLR 2104, since those affirmations were prepared after plaintiffs had rejected the settlement and plaintiffs' current counsel had assumed representation of plaintiffs (see *Morris Cohon & Co. v Russell*, 23 NY2d 569, 573-574 [1969]; *Thanawala v Allstate Ins. Co.*, 73 Misc. 3d 143 [A], 2021 NY Slip Op 51217, *1 [U] [Appellate Term, 1st Dept 2021]). For the same reasons, these affidavits/affirmations do not establish that Kuriloff, of Gorayeb & Associates, adopted the signature entered onto the NAM Agreement by the mediator as his own (see *Fortes*, 160 AD2d at 757).

An authorized agent of either the party or the attorney may sign on their behalf (see *Forcelli*, 109 AD3d at 248-249 [insurance company representative acted as agent of defendants in agreeing to settlement]). A mediator, in acting as a neutral party to facilitate a settlement (see *Poly Software Intern., Inc. v Su*, 880 F Supp 1487, 1493-1494 [D Utah 1995]), however, is not someone who acts on the behalf of and under the control of either attorney, and thus cannot be deemed an agent of the attorneys for purposes of the signature requirement (24 NY Jur 2d,

Agency § 20 [online version]; *Faith Assembly v Titledge of New York Abstract, LLC*, 106 AD3d 47, 58 [2d Dept 2013]; *Bartley v Federal Express Corp.*, 179 Misc.2d 164, 166 [Sup Ct, Queens County 1998] [letter from mediator memorializing a settlement does not satisfy CPLR 2104]) Moreover, defendants and Gorayeb & Associates have submitted no evidentiary proof that Gorayeb & Associates granted the mediator any specific limited agency with respect to the signature on the NAM Agreement (*cf. William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 476-479 [2013]).

The court notes that, although there is no real dispute that a settlement agreement was reached at the mediation, the Court of Appeals in *Bonnette* emphasized that the lack of disagreement that a settlement was reached is immaterial if the settlement agreement fails to fully comply with the technical requirements of CPLR 2104 (*see Bonnette*, 3 NY3d at 285-286; *Delgado v Authentic Memorabilia, LLC*, 117 AD3d 674, [2d Dept 2014]). The only exceptions to these strict requirements are where the party seeking enforcement of the agreement shows prejudice warranting the application of estoppel (*see Delgado*, 117 AD3d at 674), or where a party shows that the agreement has been ratified in some manner (*see Friedman v Garey*, 8 AD3d 129 [1st Dept 2004] [wife implicitly ratified settlement by accepting substantial sums under its terms]). Defendants and Gorayeb & Associates have presented no proof suggesting estoppel or ratification would apply here. Accordingly, defendants' motion to enforce the settlement and the recovery of motions costs and fees must be denied, and

plaintiffs' motion to vacate the settlement is denied as moot because there is no enforceable settlement to vacate.

Accordingly, it is

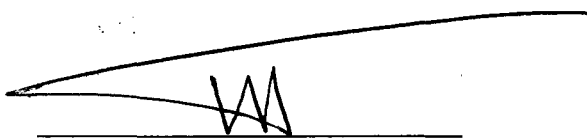
ORDERED that the portion of plaintiffs' order to show cause for a hearing to determine the issue of whether plaintiffs' discharge of Gorayeb & Associates was for cause (motion sequence 5) is denied; and it is further

ORDERED that defendants' motion to enforce the settlement and for costs and fees (motion sequence 6) is denied; and it is further

ORDERED that plaintiffs' cross motion to vacate the settlement (motion sequence 7) is denied as moot, as this court finds that the mediation held on April 16, 2020, did not result in a settlement enforceable under CPLR 2104.

This constitutes the decision and order of the court.

ENTER



J.S.C.

HON. WAVNY TOUSSAINT
J.S.C.

KINGS COUNTY CLERK
FILED
2022 MAY 16 AM 10:14