

**Go N.Y. Tours, Inc. v Tour Cent. Park Inc.**

2022 NY Slip Op 33406(U)

October 6, 2022

Supreme Court, New York County

Docket Number: Index No. 655689/2021

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 42

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GO NEW YORK TOURS, INC.,

Plaintiff,

- v -

TOUR CENTRAL PARK INC.,

Defendant.

INDEX NO. 655689/2021

MOTION DATE 06/21/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

-----X

HON. NANCY M. BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for JUDGMENT - SUMMARY.

I. INTRODUCTION

The plaintiff brings this action to enforce a settlement agreement resolving a federal trademark infringement action the plaintiff commenced against the defendant in the United States District Court for the Southern District of New York, captioned Go New York Tours, Inc. v Tour Central Park, Inc., Civil Action No. 19-cv-09803 (the federal action). The defendant now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety. The plaintiff opposes and cross-moves, pursuant to CPLR 3212, for summary judgment on the complaint. The defendant opposes the cross-motion. For the following reasons, the defendant’s motion is denied and the plaintiff’s cross-motion is granted in part.

## II. BACKGROUND

The parties are competitor businesses offering bicycle rental and tour services in New York City near Central Park. The plaintiff uses the trademark and accompanying logo of “Bike Rental Central Park” (the BRCP marks) in commerce to advertise and identify its bike rental services. On October 23, 2019, the plaintiff commenced the federal action alleging that the defendant improperly used the BRCP marks and similar “Bike Rent NYC” marks in offering its own bike rental services. In the federal action, the plaintiff asserted claims sounding in trademark infringement, false designation of origin and unfair competition, and common law trademark infringement against the defendant. The plaintiff also sought to invalidate the defendant’s “Bike Rent NYC” marks.

On December 9, 2019, the federal court issued a Mediation Referral Order directing the parties to participate in good faith in a court-annexed mediation program. On February 25, 2020, the parties participated in an unsuccessful mediation conference with a court-appointed mediator. Thereafter, the parties agreed to a split the cost of a private mediator, Joseph DiBenedetto, Esq. (DiBenedetto), for a second session, which was ultimately conducted on October 28, 2020 (the October mediation). The October mediation was held via Zoom and was attended by the plaintiff’s principal, Asen Kostadinov, the plaintiff’s federal counsel, Maurice Ross, Esq. (Ross), the defendant’s principal, Mergen Sarryev (Sarryev), and the defendant’s federal counsel, Gregory A. Nahas, Esq. (Nahas).

After a full day of mediation, the parties reached an agreement as to the terms of settlement of the federal action. By email sent on October 28, 2020, while still at the mediation session, Nahas sent Ross an email providing as follows:

It is hereby agreed by the parties that subject to a formalized Settlement Agreement, subsequent to Mediation, the parties have agreed to resolve the matter styled *Go New York Tours Inc. v Tour Central Park Inc.*, SDNY Docket No. 19-cv-09803 (VEC)(KNF) as follows:

- Defendant shall not use the term “Bike Rental Central Park” in Defendant’s business capacity;
- Plaintiff shall not use the term “Bike Rent NYC” in Plaintiff’s business capacity;
- Both Plaintiff and Defendant may use the terms “Central Park Bike Rent” and “Central Park Rent Bike”;
- Both parties shall absolutely disavow any professional affiliation or relationship with the other;
- Tour Central Park shall pay Go New York Tours Ten Thousand Dollars (\$10,000.00);
- Neither Plaintiff nor Defendant admits any liability or wrongdoing.

The parties agree that each side participated in the subject Mediation with the assistance of and representation by counsel. The parties understand and agree to the terms of the settlement as contemplated at Mediation and consent that said terms are subject to the execution of a formal Settlement Agreement.

Ross responded by email a few minutes later, stating, “This is fine on condition that the parties complete documentation and payment is made within 30 days.” Nahas responded, “Yes, I agree.” Nahas then forwarded the email chain to his co-counsel and to Sarryev, writing the single word, “settled,” in his message. Nahas also circulated and discussed the terms in his email with DiBenedetto and Ross at the October mediation.

Two days later, on October 30, 2020, Nahas submitted a joint letter to the federal court stating, *inter alia*, that “the parties were able to reach an amicable resolution of this action” after the October mediation. Nahas further wrote, “The parties have agreed to a Term Sheet at the conclusion of the Mediation that contemplates the execution of a formal Settlement Agreement and subsequent discontinuance of the action.” Nahas requested an adjournment of a status conference scheduled for November 20, 2020, to December 4, 2020, “with the expectation that the above settlement will be finalized in the interim and the action discontinued.” Upon Nahas’s

representations in the letter that the parties “reached an agreement in principle resolving all issues,” the federal court, by an order dated November 2, 2020, dismissed the federal action with prejudice and without costs.

On November 6, 2020, Nahas wrote to Ross, representing that “there has been a misunderstanding with regards to the terms of the proposed settlement discussed at this matter’s October 28, 2020 Mediation.” Specifically, Nahas stated that the third term he circulated via email at the October Mediation, providing that “[b]oth Plaintiff and Defendant may use the terms ‘Central Park Bike Rent’ and ‘Central Park Rent Bike,’” was not “apprehended” by the defendant to mean what it plainly states. Rather, the defendant’s “understanding of the proposed agreement was that [the defendant] would retain historic use of the terms ‘Central Park Bike Rent’ and ‘Central Park Rent Bike’ exclusively” and that the defendant would “retain the right to pursue litigation for any unauthorized use of said terms.” Accordingly, Nahas claimed that “a settlement agreement was not reached.” On November 11, 2020, Nahas wrote to the federal court reiterating this claim and requesting that the federal action be reopened for litigation.

After an additional mediation session before DiBenedetto proved fruitless, the plaintiff moved to reopen the federal action so that the federal court could enforce the settlement agreement, or, in the alternative, to amend the complaint to add a breach of contract claim. By order dated August 20, 2021, the federal court found, *inter alia*, that it lacked subject matter jurisdiction to determine whether the parties reached a settlement agreement. The instant action ensued.

### III. DISCUSSION

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The “facts must be viewed in the light most favorable to the non-moving party.” Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id. (citing Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2<sup>nd</sup> Dept. 2013); O’Halloran v City of New York, 78 AD3d 536 (1<sup>st</sup> Dept. 2010).

#### A. Defendant’s Motion

In support of its motion for summary judgment, the defendant submits, *inter alia*, the unverified pleadings; an affirmation of counsel; a statement of material facts signed by counsel; an affidavit of the defendant’s principal, Sarryev; letters from the defendant’s counsel in connection with the federal action; email correspondence between counsel in connection with the federal action; the order in the federal action filed on November 2, 2020, dismissing the federal action with prejudice; an unsigned Memorandum of Understanding of Certain Terms of Settlement prepared by the plaintiff’s counsel in the federal action; and notes written by the

defendant's counsel in connection with the October mediation. The defendant contends that the foregoing evidence demonstrates the parties failed to reach a binding settlement agreement in the federal action, such that there is no contract to enforce in this action.

“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.” Ostojic v Life Medical Technologies, Inc., 201 AD3d 522, 523 (1<sup>st</sup> Dept. 2022) (citing Kowalchuk v Stroup, 61 AD3d 118, 121 [1<sup>st</sup> Dept. 2009]). Further, the parties' manifestation of mutual assent must be “sufficiently definite to assure that the parties are truly in agreement with respect to all material terms.” Stonehill Capital Management, LLC v Bank of the West, 28 NY3d 439, 448 (2016) (internal citations omitted). A formal contract executed by both parties is not required. “While an offer may be revoked at any time before acceptance, a contract is created at the moment that there is acceptance of the offer, and in order for an acceptance to be effective, it must comply with the terms of the offer and be clear, unambiguous, and unequivocal.” Ostojic v Life Medical Technologies, Inc., *supra* at 523 (citing Kowalchuk v Stroup, *supra* at 122). Thus, objective evidence establishing the elements of an enforceable agreement, including acceptance of an offer and intent to be bound, will suffice to render contractual obligations binding “unless the parties have agreed that their contract will not be binding until executed by both sides.” Ostojic v Life Medical Technologies, Inc., *supra* at 523 (citing Kowalchuk v Stroup, *supra* at 125). Settlement agreements resolving litigation must further be “in a writing subscribed by” the parties or their attorneys “or reduced to the form of an order and entered.” CPLR 2104.

Here, the evidence submitted by the defendant fails to demonstrate the absence of a meeting of the minds between the parties in the federal action regarding the terms of settlement. Indeed, Nahas's October 28, 2020, emails clearly delineate and agree to such terms, including

the plaintiff's proposed additional condition that the settlement agreement be formalized and payment made within 30 days. Accordingly, Nahas's October 30, 2020, joint letter notifies the federal court that the parties "agreed to a Term Sheet at the conclusion of the [October] Mediation." Even Nahas's November 6, 2020, letter admits that the term sheet was circulated among counsel and the mediator during the October mediation, where no objection was raised. In sum, the defendant's submissions, rather than proving that there was no meeting of the minds, serve to indicate convincingly that the parties had, in fact, agreed upon all material terms of settlement after protracted negotiations before a mediator. That such agreement was via email is of no import, since it is well-settled that email communications between counsel, if sufficiently clear, set forth an enforceable settlement agreement meeting the requirements of CPLR 2104. See, e.g., Philadelphia Insurance Indemnity Company v Kendall, 197 AD3d 75, 81 (1<sup>st</sup> Dept. 2021); Jimenez v Yanne, 152 AD3d 434, 434 (1<sup>st</sup> Dept. 2017); Williamson v Delsener, 59 AD3d 291, 291 (1<sup>st</sup> Dept. 2009); Herz v Transamerica Life Insurance Company, 172 AD3d 1336, 1337-38 (2<sup>nd</sup> Dept. 2019); Forcelli v Gelco Corp., 109 AD3d 244, 248 (2<sup>nd</sup> Dept. 2013).

Notwithstanding the foregoing, the defendant argues that mutual assent to the terms its own counsel transcribed was lacking because its principal subjectively understood that the defendant would retain exclusive rights to use the "Central Park Bike Rent" and "Central Park Rent Bike" marks in its business. This understanding is utterly contradicted by the language of the third term of the settlement agreement, which cannot be any clearer in its meaning: *both* parties are permitted to use the contested terms. Since the defendant cannot plausibly claim that third term is ambiguous, it relies on Sarryev's self-serving assertion that he did not agree to the terms his counsel documented at the October mediation because English is not his first language and he "wanted to be sure [he] had time to fully understand the terms of the agreement."

Sarryev's statement that he did not agree, like his subjective understanding of what the terms of settlement were, are completely belied by Nahas's October 28, 2020, email. Sarryev's suggestion that he did not understand what he was agreeing to is likewise unconvincing, since he was represented by able counsel at the October mediation and has made no assertion at any time that counsel lacked authority to bind him at such mediation. The court further notes that there is absolutely no indication in the record that the defendant's federal counsel conducted himself improperly in connection with his advocacy during the October mediation.

The defendant next contends that no settlement agreement was reached because Nahas stated in his October 28, 2020, email that the terms being agreed to were "subject to the execution of a formal Settlement Agreement."

"Under New York law, 'when a party gives forthright, reasonable signals that it means to be bound only by a written agreement,' that intent is honored." Kowalchuk v Stroup, *supra* at 123 (quoting Jordan Panel Sys. Corp. v Turner Constr. Co., 45 AD3d 165, 169 [1<sup>st</sup> Dept. 2007]). Thus, the law distinguishes between "a 'preliminary agreement contingent on and not intended to be binding absent formal documentation,' which is not enforceable, and a 'binding agreement that is nevertheless to be further documented,' which is enforceable with or without the formal documentation." *Id.* (quoting Hostcentric Tech., Inc. v Republic Thunderbolt, LLC, 2005 WL 137785, \*5 [SD NY 200]). The former requires an "explicit reservation that there would be no contract until the full formal document is completed and executed." *Id.* However, "the mere fact that the parties intended to draft formal settlement papers is not alone enough to imply an intent not to be bound except by a fully executed document." *Id.*

Where an agreement contains language indicating it is "subject to" a signed writing, it may indicate that the writing is a condition precedent that must occur before obligations under

the agreement become binding. Thus, in McGowan v Clarion Partners, LLC, 188 AD3d 497 (1<sup>st</sup> Dept. 2020), the Appellate Division, First Department, found that a term sheet stating “Agreed amongst the parties but subject to signed documentations,” and including “to be determined” material terms, was a preliminary agreement contingent on formal documentation. See also Weksler v Weksler, 163 AD3d 432 (1<sup>st</sup> Dept. 2018) (where counsel for both sides represented on the record that stipulation of settlement was subject to execution of formal agreement, which would be “extensive,” and a large number of open terms were not contemplated in the stipulation, the stipulation was an unenforceable agreement to agree). Conversely, in other instances, “subject to” language has been held to fall short of an express reservation of the right not to be bound absent an executed agreement. For example, in Bed Bath & Beyond Inc. v IBEX Construction, LLC, 52 AD3d 413 (1<sup>st</sup> Dept. 2008), the First Department found that “use of the language ‘subject to’” in a letter of intent and reference to the execution of a formal agreement as a “qualification” “do not amount to an express reservation of the right not to be bound ... or a condition precedent to the formation of a binding contract” where the letter of intent clearly set forth the terms of the parties’ agreement. See also Stonehill Capital Mgmt., LLC v Bank of the W., 28 NY3d 439, 451 (2016) (rejecting contention that use of language making agreement “subject to” a signed writing and deposit indicated an intent not to be bound); Nieborak v W54-7 LLC, 203 AD3d 439, 440 (1<sup>st</sup> Dept. 2022) (stipulation of settlement that included counsel’s statement that settlement was “in principle” and “subject to a more formal written agreement” did not render stipulation unenforceable since it did not “demonstrate that there was no agreement on material terms”); Emigrant Bank v UBS Real Estate Sec., Inc., 49 AD3d 382, 284 (1<sup>st</sup> Dept. 2008) (“subject to” in auction bid form “did not unmistakably condition assent on the execution of a definitive agreement at some later juncture”).

Relatedly, the First Department has found that explicit language other than “subject to” expressing the intention of the parties to formalize an agreement is likewise not determinative of intent to be bound. See Twenty 6 Realty Partners, Inc. v GSS N3 LLC, 192 AD3d 463, 464 (1<sup>st</sup> Dept. 2021) (letter of intent containing material terms was enforceable notwithstanding provision that parties were to “sign a contract asap”); Sustainable PTE Ltd. v Peak Venture Partners LLC, 150 AD3d 554, 555 (1<sup>st</sup> Dept. 2017) (agreement not rendered unenforceable because it stated that parties would execute a future agreement); Trolman v Trolman, Glaser & Lichtman, P.C., 114 AD3d 617, 618 (1<sup>st</sup> Dept. 2014) (handwritten memorandum following mediation was binding even though it stated that parties would promptly execute formal settlement papers).

Thus, the caselaw makes clear that “subject to” or other similar language in an agreement is not a talisman against enforceability, as the defendant suggests. Rather, it is one factor, among several, that the court must consider in determining whether the defendant intended to be bound. In this regard, courts assess whether the parties’ conduct evidenced an intent to be bound, whether all material terms of the contract have been agreed upon, whether the agreement at issue is the type of contract usually committed to writing, and whether there has been partial performance of the contract. Kowalchuk v Stroup, *supra* at 123-24.

Here, the defendant’s own counsel memorialized the material terms of the parties’ settlement, including the amount to be paid by the defendant and a clear agreement as to usage of disputed terms in the parties’ respective businesses, in an email sent during the October mediation, with the subject line, “Go New York v. Tour Central Park – Term Sheet – For review.” The plaintiff’s counsel responded that the terms were “fine” and proposed the additional term that documentation be completed and payment made within 30 days. The defendant, through counsel, agreed to that term as well. Counsel then advised his client that the

matter was “settled.” No reference is made in the October 28, 2020, email exchange to any additional terms to be negotiated or subsequently agreed upon. Nor is the “Term Sheet” labeled as “proposed” or “preliminary.” Further, the absence of nonmaterial terms left for future negotiation and the fact that the parties did not exchange releases is not relevant to whether the parties’ agreement was effective. See Nieborak v W54-7LLC, supra at 440; Sustainable PTE Ltd. v Peak Venture Partners LLC, supra at 555; Trolman, Glaser & Lichtman, P.C., supra at 618.

With regard to the defendant’s conduct and performance outside of the October 28, 2020, email exchange, the court notes counsel’s letter to the federal court expressly representing that “the parties were able to reach an amicable resolution” of the federal action and that the parties “agreed to a Term Sheet.” Again, no characterization of the Term Sheet as tentative is made; indeed, Nahas does not even state that the parties’ resolution is “in principle.” While Nahas states that execution and finalization of a “formal” settlement agreement is “contemplate[d]” and “expect[ed],” such language only reinforces the conclusion that “the execution of a contract was a formality.” Twenty 6 Realty Partners, Inc. v GSS N3 LLC, supra at 464. Additionally, Nahas’s November 6, 2020, letter, which characterized the Term Sheet as “Proposed” for the very first time, does not state that the parties failed to agree to any material terms. Rather, the letter merely represents that the defendant regrets one of the terms agreed to. However, “[a]n agreement is still binding if a party has a change of heart between the time of agreeing to the terms of the agreement and the time those terms are reduced to writing.” Kolchins v Evolution Markets, Inc., 128 AD3d 47, 63 (2015) (aff’d 31 NY3d 100 [2018]).

Finally, the format of settlement agreements is governed by CPLR 2104. As has been explained, the email correspondence submitted here suffices to meet CPLR 2104’s requirements

for enforceability. The defendant's attempt to challenge the sufficiency of the settlement agreement by characterizing the federal action as "complex...litigation involving intellectual property infringement," such that the parties needed a much longer agreement "to solidify the terms of their intellectual property rights in writing to grant enough protection to prevent future litigation," is unavailing. The settlement agreement, though brief, resolves all of the parties' disputes as to trademarks in the federal action. The defendant does not argue otherwise in any definite terms.

On the balance, the court finds that the evidence submitted by the defendant establishes a meeting of the minds with respect to the settlement agreement encompassed by the October 28, 2020, email exchange. Moreover, there was no express agreement between the parties that liability would not attach until the written settlement agreement had been formalized and executed.

The defendant does not make a *prima facie* showing of entitlement to dismissal of the plaintiff's breach of contract claim. Accordingly, the defendant's motion for summary judgment is denied.

**B. Plaintiff's Cross-Motion**

In support of its cross-motion for summary judgment on the complaint, the plaintiff submits, *inter alia*, the unverified pleadings; the affirmation of Ross, the plaintiff's counsel in this action and the federal action; a statement of material facts signed by the plaintiff's counsel; the same documentary evidence submitted by the defendant on its motion; excerpts from the deposition of Nahas in this action; and excerpts from a deposition of Sarryev in a prior action.

The record demonstrates the plaintiff's entitlement to judgment on the issue of liability on its sole cause of action sounding in breach of contract. The elements of a cause of action for

breach of contract are “(1) the existence of a contract, (2) the plaintiff’s performance under the contract, (3) the defendant’s breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1<sup>st</sup> Dept. 2010). For the reasons explained above, the plaintiff demonstrates the existence of a binding contract between the parties. Moreover, the plaintiff establishes the defendant’s breach of the contract inasmuch as the record demonstrates, and no party disputes, that the defendant failed to comply with any of the settlement agreement’s terms.

In its complaint, the plaintiff seeks specific performance of the settlement agreement as well as compensatory damages, including the \$12,000.00 the defendant promised to pay and monetary compensation for lost business and legal fees. However, the plaintiff has not presented any proof of damages or made any argument as to the necessity and appropriateness of specific performance on the instant motion. Thus, the issue of the plaintiff’s entitlement to specific performance and monetary damages shall be determined at trial. In that regard, the court notes that by requesting the equitable remedy of specific performance in addition to the legal remedy of monetary damages, the plaintiff may have waived its right to a jury trial. See CPLR 4101; Errant Gene Therapeutics, LLC v Sloan-Kettering Institute for Cancer Research, 176 AD3d 459 (1<sup>st</sup> Dept. 2019); Marko v Korf, 166 AD3d 545 (1<sup>st</sup> Dept. 2018); Zimmer-Masiello, Inc. v Zimmer, Inc., 164 AD2d 845 (1<sup>st</sup> Dept. 1990); compare Pac Fung Feather Co. Ltd. v Porthault NA LLC, 118 AD3d 472 (1<sup>st</sup> Dept. 2014); Cadwalader Wickersham & Taft v Spinale, 177 AD2d 315 (1<sup>st</sup> Dept. 1991).

#### IV. CONCLUSION

Accordingly, it is

ORDERED that the defendant's motion pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied in its entirety; and it is further

ORDERED that the plaintiff's cross-motion pursuant to CPLR 3212 for summary judgment on the complaint is granted to the extent that the plaintiff is awarded judgment on the issue of liability on its sole cause of action sounding in breach of contract, and the issue of the plaintiff's entitlement to specific performance and compensatory damages shall be determined at trial; and it is further

ORDERED that the parties shall complete discovery on the issue of specific performance and compensatory damages and, upon such completion, the plaintiff shall file the Note of Issue on or before November 30, 2022, as previously ordered; and it is further

ORDERED that the parties shall appear for a status conference on November 10, 2022, at 11:00 a.m., via Microsoft Teams, as previously scheduled.

This constitutes the Decision and Order of the court.

DATED: October 6, 2022

  
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NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**