Supreme Court of New York
County of Kings
Part LL1

Index Number 511655/2022
(Seq. 001)

EMILSON DIAS DE ANDRADE,

Plaintiff,

against

MONADNOCK CONSTRUCTION, INC., HP H1H2 HOUSING DEVELOPMENT FUND COMPANY, INC.,

Defendants.

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered

Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	
Other	

Upon review of the foregoing papers, Monadnock Construction, Inc. and Hp H1h2 Housing Development Fund Company, Inc.'s (defendants) motion to enforce the purported settlement (Seq. 001) is hereby decided as follows:

Introduction

On March 1, 2022, plaintiff Emilson Dias De Andrade claims he was injured when he was caused to fall on construction and demolition debris while using a chipping gun at a worksite (*see* Complaint at 4). On April 22, 2022, plaintiff brought this action claiming that defendants were liable under New York State Labor Law §§ 200, 240 (1) and 241 (6) (*id.*).

On July 25, 2023, defendants filed a motion to enforce a purported settlement that had occurred between the parties on February 17, 2023. Defendants allege that on a telephone conference on February 17, 2023, plaintiff agreed to accept defendants' offer of $27,500 plus a waiver of the workers' compensation lien in full and final resolution of the action (Defendants Aff. at 3).

Defendants also submit an email exchange from February 17, 2023, where terms of the settlement are discussed. At the end of the exchange, plaintiff's counsel writes, "send the release and

make sure you include a full comp waiver" (Exhibit D). Defendants' counsel alleges his office sent the release several weeks later.

On April 18, 2023, defendants allege plaintiff's counsel advised that his client refused to sign the release. Further, plaintiff's attorney was fired, and a new attorney was hired (*see* Notice of Appearance by Weinstein Law Group).

Defendants now move to enforce the settlement. Defendants allege there was a binding agreement as evidenced by the telephone calls and email exchanges on February 17, 2023. Plaintiff has not submitted opposition to this motion.

Analysis

"To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms . . . [and] . . . courts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract" (*Express Indus. & Term. Corp. v NY State DOT*, 93 NY2d 584, 589 [1999]). [I]t is necessary to look . . . to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" (*LaGuardia v Brennan Beer Gorman/Architects, LLP*, 175 AD3d 1280, 1281 [2d Dept 2019]). "Although a party may agree to be bound to a contract even where a material term is left open, there must be sufficient evidence that both parties intended this arrangement" (*Knight v Barteau*, 65 AD3d 671, 672 [2d Dept 2009]).

Email exchanges that contain mutual assent and sufficient terms may constitute enforceable settlement agreements (*see Herz v Transamerica Life Ins. Co.*, 172 AD3d 1336 [2d Dept 2019]). "Where an email message contains all material terms of a settlement and a

manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be treated as a signature, such an email message may be deemed a subscribed writing within the meaning of N.Y. C.P.L.R. 2104 so as to constitute an enforceable agreement" (*Forcelli v Gelco Corp.*, 109 AD3d 244 [2d Dept 2013]).

Defendants allege that a February 17, 2023, telephone conference between counsel and an email chain dating from February 17, 2023, back to November 3, 2022, established a valid enforceable agreement. The relevant parts of the email exchange between counsel are outlined below (Exhibit D):

> November 22, 2022 –
>
> Defendants: "I spoke with my client, and they are willing to take their chances that your client won't find another lawyer. Having said that, I begged them to authorize me to offer your client $25,000 in exchange for a full release. They did. See if your client will take it. If not, we will wait to see if he finds another lawyer."
>
> November 29, 2022 –
>
> Defendants: "Did you have a chance to present the offer to your soon to be former client?"
>
> Plaintiff: "I need to speak with the comp [*sic*] carrier. I am hoping they won't take a piece to make this more attractive to him." "Is this by any chance a wrap policy [?] [sic]. Maybe you can help me in this regard. Thoughts?"
>
> December 19, 2022 –
>
> Defendants: "I am trying to convince comp to waive the lien so that the entire balance after attorneys' fees goes into your client's pocket. My pitch is essentially that while the comp claim is viable there is no real GL claim and there would be nothing to enforce the lien against. The settlement offer is basically a cost of doing business offer. Still waiting to hear whether they buy that or not. Should know in the next few days."

December 21, 2022 –

Defendants: "Comp [*sic*] approved waiver of the lien so we can settle for $25,000, all of which goes to you and your client. Let me know if that is acceptable."

January 31, 2023 –

Defendants: "What are we doing here? Are we settling or are you just going to seek leave to withdraw as counsel? My client is bugging me, rightfully so."

Plaintiff: "I will get back to you within a week or so. It's not an easy sell."

February 17, 2023 –

Plaintiff: ". . . please send the releases and make sure you include a full comp waiver. Thank you."

The Court cannot discern what was said over the telephone as no transcript or recording of those telephone calls is submitted with this motion. As a result, the Court does not consider this as decisive evidence in evaluating defendants' argument.

The email chain does show that settlement discussions took place. The chain states the amount of the settlement offer with a condition that the workers compensation lien be waived. Plaintiff's counsel sought a waiver of the Workers' Compensation lien to make the offer "more attractive." On January 31, 2023, defendants' counsel asks plaintiff's counsel, "what are we doing here?" Plaintiff's counsel responded, "I will get back to you [...] not an easy sell."

Based on these communications, defendants were aware that the plaintiff was reluctant to enter into an agreement. Plaintiff's counsel's February 17, 2023, correspondence must be read in context of the whole conversation. When counsel writes, "please send the releases and make sure you include a full comp waiver," he is responding to defendants' request for an update. He

is not affirmatively indicating he wants the releases and waiver because an agreement has been made. Unfortunately, since counsel does not include language that would unambiguously indicate a meeting of the minds, like "agreed" or "we have a deal," the import of the message cannot be determined.

In this context, plaintiff's counsel's emails do not amount to a clear assent to be bound by an offer. Rather, it is an ambiguous assent which generally does not constitute an acceptance absent other clear evidence of an intent to be bound (*see Sokoloff v Natl. City Bank*, 239 NY 158 [1924]). Counsel's emails illustrate a process of presenting offers to his client, which were apparently being repeatedly rejected based on counsel's statement that it was "not an easy sell" on January 31, 2023. This ambiguity militates against finding a meeting of the minds.

Therefore, there is no clear, expressed acceptance of defendant's offer.

For the foregoing reasons, defendants' motion to enforce the settlement (Seq. 001) is denied.

This constitutes the decision of the court.

December 7, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court