

Estate of Wenger v Good Shepherd Communities, Inc.
2023 NY Slip Op 34459(U)
December 20, 2023
Supreme Court, Broome County
Docket Number: Index No. EFCA2021002915
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 25th day of September 2023.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF BROOME

Estate of Dolores M. Wenger aka Dolores Marie Wenger,
Patricia Ann Wenger executor/fiduciary

Plaintiff,

DECISION AND ORDER

vs.

Index No. EFCA2021002915

Good Shepherd Communities, Inc., aka Good Shepherd
Communities, and Good Shepherd-Fairview Home, and
Kathy Swezey,

Defendants.

APPEARANCES:

Plaintiff, self-represented litigant:

PATRICIA WENGER
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West Chester, PA 19382

Counsel for Defendants:

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EUGENE D. FAUGHNAN, J.S.C.

Plaintiff, Patricia Ann Wenger, is the designated Executor of the Estate of her mother, Dolores M. Wenger. She filed a Summons with Notice on December 14, 2021 and a Complaint on February 17, 2022, alleging that Defendants Good Shepherd Communities, Inc. a/k/a Good Shepherd Communities, and Good Shepherd-Fairview Home (hereinafter collectively “GSF”) did not provide adequate care to Dolores while she was a resident of their nursing home. Plaintiff filed an Amended Complaint on March 9, 2022, and Defendants filed a pre-Answer motion to dismiss on March 22, 2022. The return date was adjourned multiple times over the course of several months. Defendants’ counsel sent a letter to the Court on February 24, 2023 advising that the parties had settled the case. Accordingly, the Court continued to hold the motion in abeyance pending receipt of final settlement papers. However, no settlement agreement was signed as further disputes arose with respect to the terms of the settlement and, in particular, the execution of a General Release. Defendants filed another motion on June 26, 2023 (motion number 2) seeking to enforce the purported settlement and to compel Plaintiff to execute the General Release provided by Defendants. Plaintiff then filed her own motion (motion number 3) also seeking to enforce the parties’ settlement but with a choice of multiple proposed General Releases prepared by Plaintiff. The parties appeared before the Court on September 25, 2023 for oral argument on the pending motions related to the settlement. After due deliberation, this constitutes the Court’s Decision and Order.¹

BACKGROUND FACTS

Plaintiff’s decedent was admitted to GSF as a short-term resident on September 18, 2019 and became a long term nursing resident on or about October 2, 2019. She remained a resident at GSF until her passing on December 14, 2019. Plaintiff’s Complaint asserts causes of action for breach of contract, negligence, negligent infliction of emotional distress, medical malpractice, violations of local, State and federal regulations, and wrongful death.

Following Defendants’ motion to dismiss, settlement negotiations ensued, with Plaintiff providing a demand in July 2022. Defendants sent an email to Plaintiff on August 19, 2022

¹ All the papers filed in connection with the motions are included in the NYSCEF electronic case file and have been considered by the Court.

enclosing a sample standard General Release form that Defendants use in their settlements, but the General Release did not identify the parties or the particulars of this case. Defendants also advised they could not respond to Plaintiff's demand until lien information was obtained. After continued negotiations, the parties appeared to come to a resolution to settle this case for a certain sum of money. Specifically, Defendants sent an email to Plaintiff on February 7, 2023 that the parties agreed to settle the case with 5 conditions: 1) payment of a certain amount for resolution of all claims in the Complaint and Amended Complaint; 2) Defendants did not want to execute mutual Releases because only Plaintiff had made a claim, and it was noted that Plaintiff would get back to Defendants on that question, and that Defendants would provide a draft Release; 3) each party would be responsible for their own costs; 4) Defendant would provide an affidavit that there was no incident report on this matter, and 5) individual Defendant Kathy Swezey could be removed from the case but it would be irrelevant if the case was settled.

Plaintiff replied on February 13, 2023 stating that "[p]ending acceptance by the surrogate court, I agree to the following terms that you set forth on February 7" and then those items from Defendants' February 7, 2023 email were pasted into Plaintiff's email. Plaintiff concluded the email with this statement: "I have not received your draft Release. I have not agreed to a Release that will only be given by Dolores Wenger's estate, but rather, still request a mutual Release." Defendants provided the proposed General Release by email on February 13, 2023, and Plaintiff emailed on March 10, 2023 that she was making some changes to that document. On April 10, 2023, Plaintiff emailed her revisions, and Defendants replied that same day that Plaintiff's revised General Release was not acceptable, primarily due to language regarding liens. Thereafter, the Court also had virtual conferences with the parties to see if the outstanding issues concerning the Release(s) could be resolved, but those efforts were also unsuccessful.

Defendants again emailed a draft of the General Release to Plaintiff on June 13, 2023. Plaintiff replied by email on June 14, 2023 objecting to the proposed General Release stating that the Defendants' Release included language regarding a unilateral confidentiality requirement that went "beyond our Settlement Agreement of February 7, 2023." Nevertheless, Plaintiff stated that she would sign the June 13, 2023 General Release if the settlement amount was doubled.

Plaintiff contends that the parties reached a settlement agreement on February 7, 2023 and the Defendants' proposed General Release goes beyond the agreement of the parties. Plaintiff claims there was no agreement regarding Plaintiff's indemnification of Defendants, or a confidentiality and non-disparagement clause. Plaintiff does not believe those items were part of

the settlement agreement reached by the parties and reflected in the emails of February 7, 2023 and February 13, 2023. Defendants argue that the proposed General Release was always part of the negotiations and final settlement of this case, including the terms contained in the General Release.

LEGAL DISCUSSION AND ANALYSIS

“[S]tipulations of settlement are judicially favored and may not be lightly set aside.” *IDT Corp. v. Tyco Group, S.A.R.L.*, 13 NY3d 209, 213 (2009), quoting *Matter of Kanter*, 209 AD2d 365, 365 (1st Dept. 1994); *Hallock v. State*, 64 NY2d 224 (1984). If the parties are able to resolve their own disputes, then the courts will honor their agreement since “strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process.” *Hallock v. State*, 64 NY2d at 230. Strictly enforcing a settlement agreement is only appropriate if it is reasonably certain that the stipulation accurately reflects the parties’ agreement. Thus, the law requires some degree of formality with respect to settlement agreements, and in furtherance of that, CPLR 2104 provides that “[a]n agreement between the 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 him or his attorney.” Nevertheless, an enforceable settlement agreement does not require a single comprehensive document, and in appropriate situations, the settlement agreement can be pieced together from separate writings. See, *Henry L. Fox Co. v. William Kaufman Org. Ltd.*, 74 NY2d 136 (1989); *Crabtree v. Elizabeth Arden Sales Corp.*, 305 NY 48 (1953); see *Matter of George W. & Dacie Clements Agric. Research Inst, Inc. v. Green*, 130 AD3d 1422, 1423 (3rd Dept. 2015). As long as the essential terms of a settlement agreement are identifiable from the multiple documents and correspondence, then the agreement is enforceable.

Negotiations may take the form of numerous exchanges, written or verbal, between the parties before a settlement finally results. The original formulation of the rule that a settlement agreement can be established through separate writings undoubtedly has its foundation from the time when correspondence was conducted primarily through written letters; but as the manner in which people negotiate has changed over the years, the same principle has been applied to other forms of communication. Although the Court of Appeals has not ruled on whether emails can satisfy CPLR 2104, lower courts have generally permitted emails to be utilized to establish a

settlement agreement, as long as the material terms and agreement can be gleaned. *See, Matter of Philadelphia Ins. Indem. Co. v. Kendall*, 197 AD3d 75 (1st Dept. 2021); *Jimenez v. Yanne*, 152 AD3d 434, 434 (1st Dept 2017); *Forcelli v. Gelco Corp.*, 109 AD3d 244, 248 (2nd Dept 2013); *see also, Go N.Y. Tours, Inc. v. Tour Cent. Park Inc.*, 216 AD3d 455, 456 (1st Dept. 2023). Essentially, as technological advances have led to new ways to communicate, the law has also had to evolve to address these advancements.

In this case, both sides have submitted a series of emails indicting that the settlement agreement came about from multiple email exchanges. Generally, where there is a dispute about the terms and enforceability of a settlement agreement, there is one party arguing for finding a valid settlement agreement, and one party claiming they are not bound because there was not a valid agreement. In an unusual twist in this case, both parties are seeking to enforce a settlement agreement. While both parties believe there was a settlement agreement, they both seek to have their own Release utilized.

The main question presented is whether the parties' reached an agreement with respect to all the essential terms. That, in turn, calls into question whether the parties' agreement required the execution of a Defendants' Release, or whether the parties agreed to a settlement amount to resolve this case, following which there would be a Release provided as a ministerial-type act.

Basic contract principles apply to settlement agreements, and resolution of the current dispute requires evaluating how the Release is to be treated- whether it was an integral part of the parties' underlying settlement agreement, or just something to be done as a result of the settlement. The Court of Appeals has recognized that:

A condition precedent is "an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (Calamari and Perillo, *Contracts* § 11-2, at 438 [3d ed]; *see, Restatement [Second] of Contracts* § 224; *see also, Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 112-113). Most conditions precedent describe acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract, a situation to be distinguished conceptually from a condition precedent to the formation or existence of the contract itself (*see, M.K. Metals v Container Recovery Corp.*, 645 F2d 583). In the latter situation, no contract arises "unless and until the condition occurs" (Calamari and Perillo, *Contracts* § 11-5, at 440 [3d ed]).

Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co., 86 NY2d 685, 690 (1995); *IDT Corp. v. Tyco Group, S.A.R.L.*, 13 NY3d 209.

Applying those principles to this case shows the two possible scenarios: 1) the parties' herein have reached a settlement agreement, but Defendants do not have to pay the settlement

money until Plaintiff signs a Release; 2) the execution of the Defendants' Release is a condition precedent to the formation of the contract itself, and without execution of Defendants' specified Release, there is no settlement. Plaintiff claims that the parties' settlement does not require her to sign Defendants' preferred Release. Defendants claim that their Release was part and parcel of the agreement to settle.

If the Release was simply "further documentation of the binding agreement [resulting from] the parties' counsel's emails agreement to settle [the] claim" [*Matter of Philadelphia Ins. Indem. Co. v. Kendall*, 197 AD3d at 81], then there is no bar to a finding of a valid settlement agreement. Indeed, "[w]hen parties enter into a preliminary agreement, anticipating that a more formal contract will be executed later, the contract is enforceable if it embodies all the essential terms of the contract." *Wronka v. GEM Comm. Mgt.*, 49 AD3d 869, 871 (2nd Dept. 2008). On the other hand, if execution of the Release (and acceptance of the terms therein) was an essential component of the settlement, then the lack of agreement on the Release vitiates the purported settlement agreement.

In the present case, it appears that Defendants forwarded a sample Release to Plaintiff by email on August 19, 2022. The sample Release noted that the terms of the settlement would be kept confidential and that the "confidentiality clause is a material term of the settlement agreement." Similarly, there was a non-disparagement clause that was also designated as an essential term. Thus, per Defendants' characterization, the confidentiality and non-disparagement clauses are essential terms, so the parties had to agree on that before a settlement agreement could be found.

Defendants are attempting to show that the parties' agreement can be established by multiple emails, including the terms of their Release. To succeed, and to bind the parties to a settlement agreement, it must be shown that the emails establish an agreement by the parties as to all the material terms. In connection with that:

Writings between parties to an action or proceeding that discuss the possibility of settlement will be considered to constitute a binding agreement if "the settlement agreement was adequately described in [such] writings, namely, the agreement was clear, the product of mutual accord and contained all material terms" (*Palmo v Straub*, 45 AD3d 1090, 1092, 845 NYS2d 549 [2007]; see *Bonnette v Long Is. Coll. Hosp.*, 3 NY3d 281, 285, 819 NE2d 206, 785 NYS2d 738 [2004]). Settlement-related writings may be deemed to have contained sufficiently detailed terms to give rise to a binding agreement when, for example, these writings explicitly incorporate the terms of other documents prepared in anticipation of settlement (see *Eastman v Steinhoff*, 48 AD3d 738, 739, 852 NYS2d 396 [2008]). In contrast, settlement-related writings will not be found to have

created a binding agreement if they expressly anticipate a subsequent writing that is to officially memorialize the existence of a settlement agreement and set forth all of its material terms (*see Williams v Bushman*, 70 AD3d 679, 680-681, 894 NYS2d 94 [2010]; *compare Forcelli v Gelco Corp.*, 109 AD3d 244, 248, 972 NYS2d 570 [2013]).

Matter of George W. & Dacie Clements Agric. Research Inst., Inc. v. Green, 130 AD3d at 1423-1424.

The evidence convinces the Court that the parties did not reach an enforceable agreement due to the Plaintiff's lack of acceptance of Defendants' General Release, and its terms. Plaintiff submitted an affidavit dated June 26, 2023 in which she acknowledged that she received Defendants' August 19, 2022 email with the General Release, but at the time overlooked it, or believed it was not applicable as it had different names on it. Apparently, Defendants' sample was from a Release previously used in another case. Plaintiff claims that subsequent negotiations never involved discussion of the confidentiality and non-disparagement clauses, and she thought it had been dropped. It certainly was not specifically listed in the emails of February 7 and February 13. Defendants have not presented any evidence to dispute that, or to show that Plaintiff accepted the proposed General Release. Rather, the emails are devoid of any discussion regarding the Release. Following the Defendants' August 19, 2022 email attaching the proposed General Release, the parties' later discussions did not include any mention of the confidentiality and non-disparagement clauses, or the General Release. There is no email from Plaintiff even acknowledging receipt of the General Release, let alone agreement to the terms of the General Release. The settlement discussions focused on the amount of money that would be paid. Further, the actual draft of the Release (with case specifics) was not emailed to Plaintiff until February 13, 2023, after the Defendant's February 7, 2023 email and Plaintiff's February 13, 2023 "acceptance". Her acceptance recounted the 5 items that were in Defendants' February 7, 2023 email, but neither party made any reference to the confidentiality or non-disparagement clauses. Plaintiff's February 13, 2023 email also stated that she had not received the draft Release, further supporting the conclusion that her acceptance of the settlement offer did not include Defendants' Release and its terms.

Here, Defendants certainly did not incorporate the August 19, 2022 email or General Release in subsequent negotiations or in their February 7, 2023 offer, nor did they present evidence that Plaintiff ever agreed to that General Release and its terms. At best, when the August 19, 2022 email was sent, it was simply notification of a term (which Defendants

considered essential) that the parties would have to discuss and incorporate in some final agreement. It was not mentioned again and was not made part of the Defendant's February 7, 2023 email concerning the terms of the "settlement", or Plaintiff's acceptance. Plaintiff has provided evidence that she was unaware of the Release and its terms. The Court cannot conclude that the parties reached an accord as to all the material terms. Therefore, there was not a complete settlement agreement reached.

That finding also precludes a determination that Plaintiff can enforce the "agreement". Defendants considered the confidentiality and non-disparagement clauses to be essential terms, and conveyed that to Plaintiff in the August 19, 2022 email. Although Plaintiff contends that she did not review the email and Release at the time, she does not dispute that it was sent to her. Thus, Defendants' argument that they believed she accepted those terms is not untenable. Although the Court cannot find that Plaintiff agreed to the General Release, the Court also cannot conclude that Defendants dropped it from their demands as part of a final settlement. The Court is mindful that Defendants' February 7, 2023 email did not include discussion of the General Release, but the Court also takes note of the fact that Defendants did not, at any point, suggest that they were no longer requiring it as part of a settlement. Similar to the discussion above that the Court cannot infer that Plaintiff accepted the terms of the General Release because there is no direct statement that she rejected it, the Court cannot infer that Defendants dropped the General Release from its settlement demands when there is no direct statement to that effect either.

The Court cannot conclude that the parties had an agreement when Plaintiff did not agree to one of the essential terms, and Defendants did not withdraw that item from negotiations. Thus, Plaintiff cannot get the benefit of the terms of the February 2023 settlement, but utilize her preferred Release in place of the Defendants' General Release. Therefore, the Court cannot grant Plaintiff's request to enforce the February 7, 2023 and February 13, 2023 "settlement agreement."

The Court will not grant either party's motion to enforce the settlement agreement, as the Court concludes there was no enforceable agreement. That will resolve motion number 2 and motion number 3. However, that still leaves motion 1 undecided. If the motion to enforce a settlement agreement was granted to either party, then motion number 1 would have been moot. In light of the Court's conclusions, Defendants' motion to dismiss will need to be resolved. Although Defendants' motion to dismiss was made back on March 10, 2022 and Plaintiff did not

file any opposition papers, the parties' recent focus has been relative to attempting to enforce a settlement agreement which they both believed existed. In the interest of justice and in the Court's discretion, the motion to dismiss is adjourned and is now returnable at the Court's next motion term on January 26, 2024 at 9:30 am in Binghamton, NY.

CONCLUSION

Defendants have not shown that Plaintiff agreed that Defendants' proposed General Release (and the terms contained therein) would be part of the final settlement. As such, there has been no "meeting of the minds" with respect to all the essential terms, and therefore, no enforceable settlement agreement. Accordingly, Defendants are not entitled to enforcement of a settlement agreement. Further, Plaintiff has not shown that the parties' settlement agreement did not include Defendants' General Release, and as a result, she is also not entitled to enforcement of a settlement agreement.

Accordingly, it is hereby

ORDERED, that Defendants' motion to enforce the parties' purported settlement agreement (motion number 2) is DENIED; and it is further

ORDERED, that Plaintiff's motion to enforce the parties' purported settlement agreement (motion number 3) is DENIED; and it is further

ORDERED, that Defendants' motion to dismiss (motion number 1) is made returnable for January 26, 2024 at 9:30 am.

This Decision and Order is being electronically uploaded to the NYSCEF system, but does not eliminate the requirement for compliance with any entry and service requirements.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: December 20, 2023
Binghamton, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice