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United States District Court, S.D. New York.

Rafael CRUZ, Plaintiff,

v.

ONESOURCE FACILITY SERVICES, INC., et al., Defendants.
 No. 03 Civ. 8233(LAP).

Nov. 4, 2005.

MEMORANDUM AND ORDER

PRESKA, J.

*1 Defendants OneSource Facility Services, Inc., f/k/a International Service Systems, Fred Surace, and James Silberger (collectively, "Defendants") presently move for an order to enforce the settlement allegedly reached with Plaintiff Rafael Cruz ("Plaintiff") on August 11, 2004. Because I find that the parties never entered an enforceable settlement agreement, Defendants' motion is denied.

I. Background

During the events described in the Complaint, Plaintiff was an employee at One Source Facility Services, Inc. Plaintiff originally instituted this action on October 8, 2003 seeking payment of back wages and overtime pay from his employer. The parties appeared for an initial status conference on April 23, 2004, and I suggested that counsel engage in settlement discussions. On May 10, 2004, Plaintiff made an initial settlement demand. (Affidavit of Felice B. Ekelman ("Ekelman Aff."), dated March 3, 2005, ¶ 3.) Two days later, Defendants responded with a counteroffer. *Id.*

On May 20, 2004, Plaintiff's counsel presented a new demand, and a day later Defendants responded with a counteroffer. (Ekelman Aff., ¶¶ 6-7.)

On June 14, 2004, the parties were able to agree on the settlement sum. (Ekelman Aff., ¶ 11.) However, the parties did not reach agreement on several key points, including release language and taxation. (Affirmation of Jason J. Rozger ("Rozger Aff."), dated March 22, 2005, ¶ 3.) On July 13, 2004, Defendants' counsel sent a draft agreement to Plaintiff's counsel. (Ekelman Aff., ¶ 14.) However, by August 10, 2004, the parties were still negotiating the language of the agreement. *Id.* Plaintiff's counsel, Jason J. Rozger, asserts that at no point did he ever inform the Defendants that they had a final agreement. (Rozger Aff., ¶ 3.)

On August 11, 2004, counsel again attended a conference. (Ekelman Aff., ¶ 18.) The conference took place in my robing room, and Plaintiff was not present. The parties informed me that the terms of an agreement had been reached and that the only outstanding matter was Plaintiff's signature on the document. The parties presented an unsigned copy of a proposed order of discontinuance which Mr. Rozger expected his client to sign. *Id.* Based on this representation, I instructed counsel to call me by August 16, 2004 with news of a memorialized settlement. *Id.*

Counsel did not call by the stated date. Though Defendants sent Mr. Rozger the settlement agreement which reflected the previous day's modifications, over the course of the next few weeks and several teleconferences, counsel was unable to locate Plaintiff, and consequently Plaintiff

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never executed the settlement agreement. (Ekelman Aff., ¶¶ 19-23.)

On August 26, 2004, Mr. Rozger requested a settlement conference before a magistrate judge (Ekelman Aff., ¶ 26), but on November 18, 2004, Mr. Rozger withdrew that request. (Ekelman Aff., ¶ 27.) On February 15, 2005, I again invited the parties into my robing room for a settlement discussion. Plaintiff was present on this occasion, and he informed me of his strong wish not to proceed further with any effort to settle the case.

*2 Nevertheless, on March 3, 2005, Defendants submitted the instant motion to enforce a settlement allegedly reached on August 11, 2004 in this case. Defendants argue that Plaintiff's counsel possessed the authority to enter into the settlement and that the parties intended to be bound by the settlement agreement. Plaintiff responds that at no time did he authorize his counsel independently to accept a settlement. Because I find that the parties have not reached a settlement agreement in this case, Defendants' motion is denied.

II. Discussion

The parties agree that Plaintiff never executed a written settlement agreement in this case. Therefore, it is left to me to decide whether the parties ever reached an oral agreement to which they intended to be bound. The factors which I must consider include: (1) whether there has been an express reservation of the right not to be bound in the absence of writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually commit-

ted to writing. *Winston v. Mediafare Entertainment Corp.*, 777 F.2d 78, 80 (2d Cir.1985). Each factor outlined in *Winston* weighs heavily against Defendants' argument that a binding agreement was reached in this case.

A. Express Reservation of the Right Not to Be Bound

"It is clear under New York law that if any party to an agreement does not intend to be bound until that agreement is in writing and signed, there is no contract until then even if the parties have orally agreed upon all the terms." *Stetson v. Duncan*, 707 F.Supp. 657, 665 (S.D.N.Y.1988). In this case, the draft settlement agreement contained a merger clause,^{FN1} which is a strong indication that the parties did not intend to be bound until the final written settlement agreement was executed. "The presence of such a merger clause is persuasive evidence that the parties did not intend to be bound prior to execution of a written agreement." *Ciamarella v. Reader's Digest Assoc. Inc.*, 131 F.3d 320, 324 (2d Cir.1997). Furthermore, the draft settlement agreement provided, at Paragraph 10, that Plaintiff could revoke the agreement within seven days "following the day he executes this Agreement." (Rozger Aff., Ex. A.) Parties to an enforceable oral agreement would clearly not include such a clause in a proposed settlement.

FN1. The Merger Clause reads:

This Agreement represents the complete understanding between Defendants and Plaintiff, and fully supersedes any prior agreement or understanding between the Parties. Plaintiff acknowledges that he has not relied on

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any representations, promises or agreements of any kind made to him in connection with his decision to sign this Agreement except for those set forth in the Agreement. No other promise or agreement shall be binding or shall modify this Agreement unless signed by authorized representative of Defendants and Plaintiff hereto, wherein specific reference is made to this Agreement.

(Rozger Aff., Ex. A.)

Defendants have argued that Mr. Rozger had apparent authority to accept the settlement agreement on behalf of Plaintiff at the August 11, 2004 meeting. However, "Second Circuit case law supports the view that apparent authority is created only by the representations of the principal to the third party and explicitly rejects the notion that an agent can create apparent authority by his own actions or representations." *Fennell v. TLB Kent Co.*, 865 F.2d 498, 502 (2d Cir.1989) (plaintiff was not bound by an agreement where he made no manifestation to defense counsel that his attorney had authority to settle); *see also Utsey v. American Bible Society, et al.*, 2004 U.S. Dist. LEXIS 24467 (S.D.N.Y.2004) (finding plaintiff lacked intent to be bound by settlement where agreement reached at the conference was to be reviewed by an attorney and required plaintiff's signature). There is no evidence in the record to show that Plaintiff ever represented to Defendants that Mr. Rozger possessed authority to accept any agreement without Plaintiff's express approval. In fact, Mr. Rozger affirms that the opposite was true, that Plaintiff instructed him *not* to accept a settlement without consulta-

tion. (Rozger Aff., ¶ 3.)

*3 Additionally, I note that at the August 11, 2004 conference, I ordered the parties to contact me when Plaintiff had signed the settlement agreement. Such a report would only be necessary if Plaintiff was reserving his right to be bound only by a written agreement. Therefore, I find Defendants' argument that Mr. Rozger had apparent authority to accept a settlement agreement on behalf of Plaintiff at the August 11, 2004 meeting unavailing. The record shows that Plaintiff expressed the intent not to be bound by any oral argument in this case.

B. Partial Performance of the Contract

The second prong of the *Winston* analysis evaluates whether the parties have partially performed the settlement agreement. While conduct tending to show that the parties are no longer engaged in a dispute favors finding an enforceable oral agreement, there has been no such conduct here. Any partial performance must be accepted by the party disclaiming the alleged contract. *See Ciaramella*, 131 F.3d at 325; *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 75 (2d Cir.1984). Here, Plaintiff has not accepted, and Defendants have never sent, any payment, and Plaintiff has not relinquished any right to pursue his claims against Defendants. Thus, the parties have not partially performed any alleged settlement agreement.

Defendants argue that the present lull in case activity constitutes partial performance of the alleged settlement agreement. Apparently, this argument is based on the fact that neither party has submitted anything to the Court recently (notwithstanding the present motion). However, it would be foolish to mistake

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the parties' current inactivity as they await the outcome of the present motion for partial performance of a settlement agreement. Under these circumstances, the relative calm in this case has absolutely no bearing on whether the parties have reached a settlement agreement.

C. Whether All of the Terms of the Alleged Contract Have Been Agreed Upon

Under the third prong of the *Winston* analysis I must determine whether the parties have agreed on all of the terms of the alleged settlement agreement. After the August 11, 2004 conference the parties differed on three terms in the proposed settlement agreement. First, the settlement agreement was changed after the August 11, 2004 conference when Mr. Rozger's law firm was added as a payee. Second, Mr. Rozger affirms, without objection by Defendants, that the release language in the settlement was never finalized. (Rozger Aff., ¶ 3.) The Court of Appeals has established that an oral settlement agreement is not complete where the parties cannot finalize general release language. See *Forden v. Squibb*, 63 Fed. Appx. 14 (2d Cir.2003) (oral settlement agreement unenforceable where the parties were unable to agree on a release). Third, Mr. Rozger affirms, also without objection by Defendants, that the parties had not resolved how the settlement amount payable to Plaintiff was to be taxed. (Rozger Aff., ¶ 3.) See also *Elements/Jill Schwartz, Inc. v. Gloriosa Co.*, U.S.P.Q.2D (BNA) 1446 (S.D.N.Y.2002) (settlement unenforceable when material terms are unresolved and agreement was not in writing).

*4 Defendants do not believe that any of these terms bear on whether a settlement was in fact reached with Plaintiff. They

contend that adding a new payee to the settlement agreement was a minor detail and had no overall effect on the finalization of the agreement. However, regardless of the magnitude of the changes, the Court of Appeals has held "that the existence of even 'minor' or 'technical' points of disagreement in draft settlement documents [are] sufficient to forestall the conclusion that a final agreement on all terms had been reached." *Ciaramella*, 131 F.3d at 325 (citing *Winston*, 777 F.2d at 82-83). Defendants also argue that February 15, 2005 was the first time Plaintiff objected to the release language or raised the issue of taxation. However, Defendants do not offer any legal rationale explaining why, as a matter of law, Plaintiff's right to object to terms in the proposed settlement was somehow extinguished before February 15, 2005. Defendants' objections are unpersuasive, and I therefore find that at the time the settlement agreement was allegedly reached, material terms of the agreement were still unsettled.

D. Whether the Agreement at Issue is the Type of Contract that is Usually Committed to Writing

Finally, the *Winston* analysis evaluates whether the type of settlement agreement between the parties in this case would usually be reduced to writing. "Settlements of any claim are generally required to be in writing or, at a minimum, made on the record in open court." *Ciaramella*, 131 F.3d at 326. The parties agree that no proposed settlement ever reduced to writing in this case. However, an oral agreement may become enforceable if it is read into the Court's record. "Under New York or federal law, an oral settlement is binding if it is made in 'open court,' e.g., formally memorialized in some manner on the court re-

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cord.” *Acot v. New York Medical College*, 99 Fed. Appx. 317, 317 (2d Cir.2004), see also *Monaghan v. SZS 33 Assocs., L.P.*, 73 F.3d 1276, 1283 n. 3 (2d Cir.1996) (the federal rule regarding oral stipulations does not differ significantly from the New York rule ^{FN2}). During the August 11, 2004 conference, no settlement was ever placed on the record.

FN2.NY C.P.L.R. Sec. 2104 reads:

An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

Defendants apparently contend that the parties reached an agreement in an open court. However, at a settlement conference it is my practice to invite the parties into the robing room to see if an agreement can be reached. If the parties are able to agree, we walk from the robing room to the courtroom where the terms of the settlement are read into the record. The parties reached no agreement before me on August 11, 2004, and we never read any agreement into the record. Further, the Court of Appeals has held that such informal meetings in a judge's robing room or chambers cannot be deemed to have occurred in “open court.” See *Murphy v. Gallagher*, 761 F.2d 878, 884 (2d Cir.1985) (citing *In re Dolgin Eldert Corp.*, 31 N.Y.2d 1, 9-10, (1972)

(oral agreement purportedly made in an informal conference before a judge in a judge's chambers is not made in an “open court” and therefore is not enforceable)). I therefore find that the alleged oral agreement was not made in open court.^{FN3} Thus, each of the *Winston* factors leads me to the conclusion that no binding settlement agreement exists between Plaintiff and Defendants in this case.

FN3. I also recognize that Defendants raise an additional argument in their motion, that Plaintiff is not now entitled to change his mind and reject the settlement reached between the parties. I do not address this argument at length because it presupposes an enforceable oral agreement, which, as shown above, is not present in this case.

III. Conclusion

*5 Accordingly, Defendants' Motion to enforce the settlement (Docket No. 24) is denied.

SO ORDERED

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