District Court Enforces Settlement Agreed to by Email Despite Absence of Formal Agreement

by Thomas E.L. Dewey

Parties typically expect that a settlement does not become enforceable until there is ink to paper on a formal written settlement agreement. But as a recent case in the U.S. District Court for the Eastern District of New York reminds us, settlements can be reached by email correspondence, even when certain terms of the settlement are excluded. For instance, a settlement agreement may be enforced even without defining the scope of a release or when parties merely agree to "usual and customary terms of a settlement agreement (including confidentiality and non-disparagement)."

In *McCalla v. Liberty Life Assurance Co. of Boston*, No. 18-cv-1971 (JMA) (SIL), 2020 WL 587003 (E.D.N.Y. Feb. 6, 2020), Judge Azrack enforced the parties' settlement agreement reached via email despite an attorney's email legend specifying that the correspondence was "for settlement purposes only without prejudice – not to be used in litigation," and a representation to the court that a settlement had been reached "in principle." The court rejected the plaintiff's attempt to back out of the settlement, holding that (i) there was a binding settlement agreement, (ii) plaintiff's counsel had authority to settle on plaintiff's behalf, and (iii) plaintiff agreed to the settlement amount.

Background

In McCalla, plaintiff Hensley K. McCalla filed an action in New York State Supreme Court asserting a claim for disability benefits against defendant Liberty Life Assurance Company of Boston. Liberty Life removed the case to the Eastern District of New York in April 2018. Liberty Life filed an answer and counterclaims, alleging an overpayment of McCalla's disability benefits. No. 18-cv-1971, ECF Nos. 10, 11.

In early stages of the litigation, the parties began to engage in settlement negotiations. By June and July 2018, McCalla's counsel had made two settlement demands via email, which were rejected by Liberty Life. ECF No. 23 at 1-2, Ex. A. McCalla's counsel then made two revised settlement offers on Sept. 13 and Sept. 14, 2018. ECF No. 23, Exs. B, C. In each email, McCalla's counsel stated: "[a]fter further discussion with our client, we have revised our settlement offer" and noted that the parties agreed that the settlement would also waive Liberty Life's counterclaims against McCalla. Liberty Life's counsel countered the Sept. 14 offer, stating "[i]n exchange for a release of all claims and an agreement to usual and customary terms of a settlement agreement (including confidentiality and non-disparagement), my client offers to waive its counterclaim against Mr. McCalla (approx. $35K) and pay Mr. McCalla an additional $9,000." ECF No. 23, Ex. D. A few days later, McCalla's counsel responded by email stating, "Mr. McCalla will accept $12,500.00. This is our best and final offer." *Id.*

Liberty Life's counsel emailed back, accepting the demand of $12,500 and indicating that Liberty Life would "draft the settlement agreement." Id. McCalla's counsel specified that the settlement check should be payable to his firm and sent a signed Form W-9. The following week, counsel for Liberty Life stated that he would "send a draft settlement agreement to you in the near future" and asked if in the meantime he could submit a letter notifying the court of the settlement, to which McCalla's counsel responded, "Letter is fine." *Id.*

On Sept. 26, 2018, the parties submitted a joint letter notifying the court that "the parties have reached an agreement in principle" and requesting that the court "vacate all dates *sine die*." ECF No. 17. That same day, counsel for Liberty Life sent a "draft" formal settlement agreement to McCalla's counsel and asked him to arrange for signatures. ECF No. 23, Ex. E. Hearing no response, Liberty Life's counsel followed up by email asking when he could expect the signed settlement agreement. *Id.* On Oct. 25, 2018, McCalla's counsel called counsel for Liberty Life and explained that McCalla did not intend to go through with the settlement and that he intended to file a motion seeking leave to withdraw from the representation. ECF No. 24 at 4.

The next day, Liberty Life's counsel emailed McCalla's counsel expressing his view that it would be unacceptable for McCalla to "renege" on their "binding settlement agreement." ECF No. 24, Ex. F. McCalla's counsel responded that he disagreed that there was a binding settlement agreement. *Id.*

On Nov. 1, 2018, McCalla's attorney filed a motion to withdraw as attorney citing "irreconcilable differences," which the court denied. ECF No. 18.

The District Court Enforces the Settlement

On Nov. 15, 2018, Liberty Life filed a motion to enforce the settlement, arguing that McCalla's counsel had authority to enter into a settlement on his behalf, that the parties' email exchanges constituted a valid binding settlement agreement, and that the emails contained the key settlement terms. ECF No. 22 at 5-15. Liberty Life pointed to the Second Circuit's *Winston* decision, which sets forth four factors to be considered in discerning whether the parties intended to be bound by a settlement agreement in the absence of a fully executed, written document. Id. at 8-14 (citing *Winston v. Mediafare Entm't Corp.*, 777 F.2d 78 (2d Cir. 1985)). The four *Winston* factors consider: (1) whether there has been an express or implied reservation of the right not to be bound in the absence of a 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 committed to writing. *Id.* at 8 (citing *Winston*, 777 F.2d at 80).

Liberty Life argued that under the first factor, McCalla's counsel had never reserved the right not to be bound until the point of signature on a formal settlement agreement. *Id.* at 8-10. Under the second

factor, Liberty Life asserted there had been partial performance of the contract since the parties had notified the court of the settlement, taken steps toward executing a written formal agreement, and abandoned discovery. *Id.* at 10-11. With respect to the third factor, according to Liberty Life, all materials terms had been agreed upon since the parties had agreed to a settlement sum, Liberty Life had waived its counterclaims, and McCalla had agreed to release claims and to the "usual and customary terms of a settlement agreement (including confidentiality and non-disparagement)." *Id.* at 12-13. Finally, Liberty Life cited case law holding that settlement agreements need not be in writing to be enforced, particularly in suits that are not complex or high stakes. *Id*. at 13-14.

McCalla's opposition to Liberty Life's motion to enforce the settlement agreement argued that no settlement had ever been reached because the parties had not agreed on all material terms. ECF No. 24 at 4-9. McCalla reasoned that the initial emails regarding the potential settlement had not included material terms regarding dismissal of the action or the scope of the release. *Id.* at 5-6. McCalla further argued that the parties had contemplated preparing a formal written settlement agreement, and that a settlement is usually committed to writing. *Id*. at 6-10. He pointed to his counsel's email correspondence, which contained a legend that said: "FOR SETTLEMENT PURPOSES ONLY WITHOUT PREJUDICE – NOT TO BE USED IN LITIGATION," and the letter to the court stating the parties had reached a "settlement in principle" as evidence that the parties did not intend to be bound by their email correspondence. *Id.* at 7.

McCalla's counsel then moved to be relieved as counsel for the second time, and included a signed stipulation from McCalla indicating that he would proceed pro se. ECF Nos. 36, 37. Judge Feuerstein granted the request. On Oct. 15, 2019, the case was reassigned to Judge Azrack. Judge Azrack reviewed the pending motion for settlement papers and scheduled a conference for Feb. 4, 2020, at which time the court granted Liberty Life's motion for settlement. ECF No. 40.

The court issued a written decision on Feb. 6, 2020. *McCalla*, 2020 WL 587003. The court held that McCalla's attorney had authority to enter into the settlement on his behalf because when McCalla submitted his opposition papers, he was still represented by counsel at the time, and never raised the claim so it is waived. Id. at *2-3. Next, the court looked to the Winston factors, and ruled that while "[n]o single factor is dispositive," the parties had entered into a binding settlement agreement. Id. at *3 (citing *Winston*, 777 F.2d at 80). The court also noted that it was particularly persuaded by the Pruiett case because it "presents a very similar set of facts." Id. (citing *Pruiett v. City of New York*, 2012 U.S. Dist. LEXIS 103793 (S.D.N.Y. May 31, 2012)). Finally, the court reasoned that "at the Conference, [Mr. McCalla] did not contest any terms of the settlement other than the settlement amount—his only defense to the Motion for Settlement was that he did not want to settle the case for $12,500.00, which was clearly agreed to in the email exchanges." *Id*. Accordingly, the court granted Liberty Life's motion to enforce the settlement. *Id.*

McCalla has recently filed an appeal in the Second Circuit. See *McCalla v. Liberty Life Assurance Co. of Boston*, No. 20-756.

Practice Tips

The *McCalla* case is a helpful reminder that settlement agreements reached by email can be enforced even in the absence of a formal executed settlement agreement. When negotiating the terms of a settlement via email, attorneys should specifically reserve the right not to be bound until their client signs a formal written settlement agreement. Counsel should also advise clients that they may be held to the terms of a settlement agreed to by email, even in the absence of a signed written agreement.

Notably, Liberty Life's Sept. 26 email to McCalla's counsel stated: "For your review, I have attached a draft settlement with the usual terms. Please review and let me know if you have any questions. Assuming you have no issues, please ask your client to execute…." No. 18-cv-1971, ECF No. 23, Ex. E (emphasis added). The court gave little weight to McCalla's argument that Liberty Life's use of the term "draft" to describe the written settlement agreement was an indication that no finalized agreement had been reached. As such, *McCalla* is a cautionary tale for practitioners who typically describe settlement agreements or other contracts as "drafts" to signal that there has not been a finalized agreement.

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