'Standard' Provisions Not Implied Into Settlement Agreement

by Thomas E.L. Dewey

We have often cautioned practitioners that under certain circumstances an oral agreement may constitute an enforceable settlement agreement. A recent Southern District of New York case offers the additional lesson that a writing other than a formal settlement agreement may constitute an enforceable agreement—even if one of the parties expects that additional "standard" provisions will be added to the agreement. Put another way, a party's expectation that "standard" provisions, such as a general release, will be included in a settlement agreement will not necessarily prohibit enforcement of a settlement; such provisions will not be "implied" in the agreement if they are not contemplated by the parties' writing.

In Scheinmann v. Dykstra, 16 Civ. 5446 (S.D.N.Y. April 21, 2017), plaintiff Noah Scheinmann had sued former baseball player Leonard Dykstra for (among other claims) breach of contract based on an agreement for Scheinmann to serve as a ghostwriter on Dykstra's social media accounts. Complaint, No. 16-cv-05446-AT, Dkt. #1. Dykstra counterclaimed for breaches of contract and of the implied covenant of good faith and fair dealing. Counterclaims to Plaintiff's Complaint, No. 16-cv-05446-AT, Dkt. #37. In March 2017, the parties' respective counsel exchanged emails regarding the settlement of the litigation. Scheinmann v. Dykstra, No. 16-cv-05446, slip op. at 1-2 (S.D.N.Y. April 21, 2017). Plaintiff's counsel sent his adversary an email stating

I propose settling this matter on the following terms:

- Mr. Dykstra agrees to an up-front payment of some amount. I realize that he has significant financial difficulties and I am not talking about a larger number. You tell me what he can come up with.
- Mr. Dykstra consents to a judgment being taken in favor of Mr. Scheinmann in the amount of $15,000 less the amount of the up-front payment, and
- Mr. Dykstra dismisses his counterclaim with prejudice.

Id.

Plaintiff's counsel gave defendant two days to respond. On the next day, defendant's counsel responded "My client can agree to the second and third terms, but he does not have money to pay towards the $15,000 … . Please let me know if we have a deal." Id. at 2. Plaintiff's counsel wrote back the next day "We have a deal. I will put together a consent judgment within the next week." Id.

Defendant's counsel asked several hours later whether plaintiff would send a settlement and mutual release. Id. Plaintiff responded there was no need for "another settlement agreement" because "the entirety of the [settlement] agreement" was defined in the prior email exchange and "[t]he judgment concludes the litigation." Id. He added that "no additional release is necessary." Id. (alternation omitted). Defendant's counsel contended that a mutual release was "a standard item" and he needed "something in the judgment to confirm that all disputes between the parties are resolved so that there is finality." Id. Plaintiff's counsel contended that the parties had concluded the settlement and "refused to 'reopen settlement negotiations.'" Id. at 2-3. Dykstra refused to sign the proposed consent judgment and Scheinmann then moved to enforce the settlement agreement. Id. at 3.

A Binding Settlement Contract

Analyzing the email exchange, Magistrate Judge Andrew Peck concluded that the parties had reached a mutual agreement to settle the case following an offer, acceptance, consideration, mutual assent and an intent to be bound. Id. at 5. The court held "[t]he judgment amount was specified with particularity as was the counterclaim dismissal, and no other term was ambiguous or left open for further negotiation." Id. The emails showed the parties' mutual assent and intent to be bound, id. at 5-6, and it was only after the parties had agreed to a deal that defendant's counsel sought a mutual release. Id. at 6.

The court therefore agreed with plaintiff that the judgment concluded the litigation and the agreement specified all the agreed terms, including the dismissal with prejudice of all parties' claims, and thus, the mutual general release was not "material." Id. Critically, although the court agreed that a mutual release is a "standard item" or provision in many settlement agreements, the absence of such a standard provision did not make it material or render the agreement ambiguous concerning the parties' intent to omit the provision. Id. Rather than a mutual release being "essential" to a settlement agreement, the court concluded it was merely an additional term that defendant, in hindsight, wished he had negotiated into the agreement. Id. at 6 n. 2.

It was irrelevant that the judgment itself had to be reduced to writing because that was a post-agreement formality and neither party indicated that it did not want to be bound in the absence of an executed writing. Id. at 7. The court also summarily dismissed a rescission argument based on defendant's counsel's unilateral mistake, holding that the court could not add terms not mutually agreed into an otherwise complete and unambiguous contract. Id. at 8.

The 'Winston' Test

The court analyzed the enforceability of the settlement agreement under the four elements of the Second Circuit's Winston test for settlement agreements in the absence of a writing. The four factors of the Winston test are

(1) whether there has been an express 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.

Winston v. Mediafare Entm't, 777 F.2d 78, 80 (2d Cir. 1985).

The court observed that the first Winston factor is the most important, and here, neither party had expressed any reservation, explicitly or implicitly, not to be bound absent a signed writing after plaintiff's counsel had accepted defendant's counteroffer. Scheinmann, slip op. at at 9.

The court held that the third and fourth factors weighed in favor of plaintiff as well, since the email exchange contained all the terms of the settlement agreement, there were no material terms missing (including the issue of mutual releases), and the agreement did not have the complexity of those settlement agreements that require a formal writing to memorialize the agreed upon terms. Id. at 9-10. The court observed that, in view of the fourth factor, defendant never requested a more extensive written settlement agreement, but instead only sought to add the general release term. Id. at 10-11. Moreover, the parties' email exchange was a writing memorializing the terms of the settlement. Id. at 11. Thus, although the second factor was neutral,1 the court held that the parties intended to be bound by the terms discussed in their email exchange, in accordance with the Winston test. Id. at 12.

Practice Tips

Magistrate Judge Peck's opinion offers several important lessons for a careful practitioner. First, even if a practitioner agrees to the general terms of settlement, she would be wise to make settlement expressly contingent on execution of a final, formal settlement agreement. Second, given the relative ease and informality of email, it is important to include a reservation of final agreement to settlement in all communications. The email exchange in this case proves that an offer of settlement can become a binding settlement agreement both quickly and somewhat unexpectedly. Last, a practitioner must explicitly include all terms intended for the settlement, even if such terms are "obvious" or "standard" items found in virtually all settlement agreements. As Magistrate Judge Peck explained, although there are provisions that are often included in settlement agreements, such provisions may not necessarily be material to the settlement, and certainly will not be implied in the agreement if not expressed by either party.

Endnotes:

1. The court found there was no partial performance by Defendant. Id. at 9.

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