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Settlement and Compromise

Oral Settlements in Open Court Enforceable Without Follow-On Writing

Thomas E.L. Dewey, New York Law Journal

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An agreement to settle a case is generally not binding until it is put into writing and either signed or entered as a court order. But as a recent case in the U.S. District Court for the Southern District of New York illustrates, there is an important exception: Agreements made between counsel in open court are enforceable, even if one party changes her mind before an anticipated written agreement is complete.

In *Doe v. Kogut*, No. 15-CV-07726 (SN), 2017 WL 1287144, at *2 (S.D.N.Y. April 6, 2017), the plaintiff sought to scrap a settlement reached as part of a conference with Magistrate Judge Sarah Netburn. Among other things, she asserted duress on the part of her attorney, whom she had since fired. But the plaintiff's own statements in a colloquy with the judge—in which she affirmed her voluntary intention to enter a binding settlement contract—made the settlement enforceable.

Background

Plaintiff Jane Doe filed a lawsuit against her ex-boyfriend, New Jersey-based real estate investor Steve Kogut, in the Southern District on September 30, 2015. The complaint contained numerous explosive allegations, including repeated physical and sexual assault and threats. No. 15-cv-07726, Dkt. No. 1 (S.D.N.Y. Sept. 30, 2015). Kogut filed his own suit against Doe a year later, alleging physical assault, defamation, civil conspiracy to defraud, and racketeering under Federal Civil RICO. Doe removed that case to the Southern District on Oct. 6, 2016. *Kogut v. Doe*, No. 16-cv-07816, Dkt. No. 1 (S.D.N.Y.).

Judge Netburn held a settlement conference on Oct. 26, 2016. There, Kogut was represented by Christopher Joslin of David Horowitz P.C., and Doe was represented by Paul J. Campson of Campson and Campson. Earlier on the day of the conference, Judge Jesse Furman had granted Derek Smith Law Group's motion to withdraw as Doe's counsel and substitute Campson. *Doe v. Kogut*, 15-cv-07726, Dkt. No. 92.

Over the course of five-and-a-half hours negotiating with the parties in separate rooms, Judge Netburn reached terms that both parties indicated they would accept. Among the terms, Kogut would pay Doe $10,000, all existing claims would be dismissed with prejudice, and Doe would withdraw a related petition in family court for a permanent restraining order. The settlement would be confidential.

After reaching the agreement, Judge Netburn brought the parties into the courtroom and put the terms of the agreement on the record. She said, "I want to make sure that each party understands the terms of the settlement agreement, that each party accepts the terms of the settlement agreement, and that each party understands that he or she will be entering into a binding and enforceable agreement today." 2017 WL 1287144, at *2 (S.D.N.Y. April 6, 2017). (The transcript of the conference itself was filed under seal, and thus all quotations of the record of the settlement colloquy are taken from Judge Netburn's opinion.) She added that the parties "are entering into a contract today," and noted that they intended to memorialize the oral agreement in writing after the conference, at which point she would dismiss the cases with prejudice.

Judge Netburn then asked both parties to affirm on the record that they understood the terms and agreed to be bound. Doe's answers would become relevant in her later attempt to invalidate the settlement:

THE COURT: Do you accept these terms?

MS. DOE: I prefer it to go forward and let him win. Yes.

THE COURT: That's not an answer I can accept. So you have two choices.

MS. DOE: Yes.

THE COURT: The answer is either yes or no. So I need a—

MS. DOE: The answer is yes, Your Honor. Thank you.

THE COURT: Are you accepting these terms voluntarily?

MS. DOE: Yes, Your Honor.

THE COURT: Do you understand the terms of the settlement agreement?

MS. DOE: Yes, Your Honor.

THE COURT: Do you understand that by accepting these terms you are entering into a binding and enforceable oral contract right now?

MS. DOE: Yes, Your Honor.

Id. at *3.

A week later, on Nov. 2, 2016, Campson received an email from Doe stating she no longer wanted him to represent her in the matter. He wrote a short letter to Judge Netburn the same day asking for her to advise how he should proceed. No. 15-cv-07726, Dkt. No. 95. On

November 9, Campson wrote Judge Netburn again, formally moving to withdraw as Doe's counsel. No. 15-cv-07726, Dkt. No. 99. He stated that he had received subsequent emails from Doe indicating "a lack of trust in my representation" and noted that his client "appears to be reconsidering … the entire settlement." Judge Netburn scheduled a status conference for Nov. 16, 2016.

The day of the conference, Paul Verner of Verner Simon submitted an emergency motion to adjourn the conference in order to finalize his retention as plaintiff's new counsel, about which he had only been contacted a few days before. No. 15-cv-07726, Dkt. No. 102. Verner wrote: "I also have been instructed that the plaintiff intends to proceed forward to trial in this matter and will not finalize the settlement discussed on October 26, 2016." 2017, WL 1287144, at *5

At the rescheduled conference on November 30, Verner confirmed that Doe did not intend to honor the agreement, and stated several reasons he believed the oral agreement was not binding. No. 15-cv-07726, Dkt. No. 111. Defense counsel then moved to enforce the agreement, and the Court set a briefing schedule.

The Court's Decision

In an opinion on April 6, 2017, Judge Netburn granted the motion to enforce the oral agreement. She first noted that under both New York and federal law in the Southern District, an oral settlement will be binding "if it was made 'in open court,' that is, if it was formally memorialized in some way in the court's record." 2017 WL 1287144, at *4. She then applied the four-factor test originally set out in *Winston v. Mediafare Entm't*, 777 F.2d 78, 80 (2d Cir. 1985), to determine whether an oral settlement agreement is enforceable:

> whether (1) there has been an express reservation of the right not to be bound in the absence of a writing; (2) there has been partial performance of the contract; (3) all of the terms of the alleged contract have been agreed upon; and (4) the agreement at issue is the type of contract that is usually committed to writing.

Id.

With regard to the first factor, Judge Netburn found that neither party had reserved its right not to be bound. Verner had averred that Campson told him the in-court agreement included a 30-day "cooling off period," during which Doe could rescind the settlement. No. 15-cv-07726, Dkt. No. 120. But Judge Netburn found the existence of such an escape directly at odds with her "repeated reminders to the parties" that they were entering into a binding contract. 2017 WL 1287144, at *6.

The second factor was neutral, because although no partial performance had taken place, Judge Netburn found that that was a direct result of Campson's withdrawal before a written agreement could be completed, and Mr. Verner's subsequent statement that Doe did not intend to honor the settlement. "Accordingly, it would have been unreasonable for defense counsel to complete and submit the settlement agreement to either Mr. Campson, who was no longer representing plaintiff, or Mr. Verner, who, per plaintiff's instructions, would not have executed any settlement." Id.

With regard to the third *Winston* factor, Doe argued that at least one material term of the agreement was left unresolved: her promise to withdraw a petition for a restraining order, which had originally been brought in family court, but was thereafter referred to the criminal court, where Doe lost the ability to unilaterally withdraw it. Judge Netburn disagreed that this meant there was an unresolved term, finding instead that the parties treated the pending criminal proceedings as outside the plaintiff's control when they reached the oral agreement. Id. at *7.

Finally, to determine whether the agreement is of a type "usually committed to writing" under the fourth *Winston* factor, Judge Netburn looked to CPLR §2104, which states that an oral settlement agreement is only binding if it is made "between counsel in open court." Though Doe asserted that the rule was not satisfied because the parties were not sworn in during their in-court colloquy, Judge Netburn found that sufficient "metrics of formality" were satisfied: "the material terms of the settlement agreement were read into the record, the parties were each required to affirm their understanding of the binding nature of the agreement and the significance of the material terms, and a complete transcript documenting the oral agreement was generated afterwards." *Doe*, 2017 WL 1287144, at *8.

Judge Netburn therefore concluded that the *Winston* factors weighed strongly in favor of enforcement, and the record showed the parties' intent to enter a binding agreement. She then addressed Doe's assertion that she was under duress throughout the October 26 settlement conference.

Among Doe's arguments for duress, she claimed that her first statement during the allocution—"I prefer it to go forward and let him win"—demonstrated that she felt "scared, defeated, abandoned, unrepresented" and was thus unable to enter into the agreement voluntarily. Id. at 9.

Judge Netburn noted that during the conference's ex parte sessions, Doe had "at times, adopted a defeatist attitude," and that she interpreted the statement as consistent with that attitude. Id. at 10.

But regardless, Doe's subsequent statements that she accepted the terms "voluntarily" and understood that she was entering into a binding and enforceable oral contract were adequate to demonstrate that her entry into the agreement was not done under duress. Id.

Plaintiff's assertion that Campson was not sufficiently familiar with her claims during the settlement conference was also insufficient to demonstrate duress, because "an attorney's relative unfamiliarity with a case does not constitute the type of 'unlawful threat' necessary to support a claim of duress and is not a basis for refusing to enforce a settlement agreement." Id.

Having dispensed with the assertion of duress, Judge Netburn granted the defendant's motion to enforce the oral settlement agreement. Id. at 12.

Conclusions

The court's decision in *Doe v. Kogut* illustrates the finality of in-court agreements to settle. Attorneys should not count on the traditional requirement of a written agreement to release

them from an oral agreement stated on the record, even if a written agreement is expected to follow.

Additionally, attorneys must take care to ensure clients understand that there is little chance of backing out of a settlement once they agree to it in open court. A client's statement to a judge that he or she is entering into an agreement voluntarily and intends to be bound will override any equivocal statements that precede it.

Thomas E.L. Dewey is a partner at Dewey Pegno & Kramarsky. L. Lars Hulsebus, an associate of the firm, assisted in the preparation of the article.
