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Settlement and Compromise

Why Attorneys Must Take Negotiation Emails Seriously

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For the most part, contract negotiations conducted through emails are not unique. Certain nuances aside, they are subject to the same rules and principles that have long governed other types of communications, and they are more like letters than like back-of-the-courtroom bickering. This is just something that modern attorneys simply must come to terms with. Yet some practitioners still regard emails, even between opposing counsel, as informal and inconsequential. As a matter of etiquette, that may sometimes prove true (perhaps unfortunately). But as a matter of law, it overwhelmingly does not, even in the context of negotiating settlements.

A recent case in Westchester County Supreme Court provides a good example of why it is important to treat all settlement negotiations, even those conducted over email, as serious and potentially binding. The opinion penned by Justice Sam Walker shows how settlement agreements, like all contracts, can be formed through relatively informal communications, and how such communications can sometimes bind a litigant to settlement terms that they come to regret or perhaps never even wanted.

'Turner v. Caspian Realty'

Frederick W. Turner is a New York attorney whose practice focuses on land use law. One of his clients was Caspian Realty, a New York corporation. Turner represented Caspian under a written retainer agreement and sent it monthly invoices for the cost of his services. Turner alleged that he had provided extensive legal services to Caspian for which he had not been paid despite repeated demands, and that his unpaid invoices totaled \$41,766.

In December 2013, Turner sued. Representing himself pro se, Turner filed a verified complaint in Westchester County Supreme Court in which he asserted five causes of action, including breach of contract and unjust enrichment, for which he sought a judgment of \$41,766, plus interest, costs, expenses, and attorney fees. Caspian filed a verified answer that denied nearly all of Turner's allegations and asserted affirmative defenses.

Both parties then filed dispositive motions. Turner's motion for summary judgment was denied for the existence of disputed facts. Caspian's motion to dismiss was partially granted, and two of Turner's five claims were dismissed.¹ But three remained, and the case went on.

Within a month, on Oct. 17, 2014, Caspian filed another notice of motion, this time for leave to amend its answer, for dismissal based on the amended answer, and for sanctions. In particular, Caspian sought permission to assert new affirmative defenses, two of which related to its claim that the parties had entered into a settlement agreement.

According to Caspian's attorney, "Very simply, based upon a series of e-mail communications between the Plaintiff and I, a settlement agreement was proposed and agreed to."² Caspian attached those emails to its motion papers, arguing that they supported new affirmative defenses of settlement and of satisfaction and accord.³ Moreover, Caspian argued, the settlement agreement justified dismissal of the entire case, and Turner deserved to be sanctioned for ignoring the agreement and forcing Caspian to move the court.

Turner opposed Caspian's motion. He argued that through "deceit and chicanery," Caspian sought to "void" the court's earlier decision (which allowed three of Turner's claims to continue) and "force [Turner] to accept an unfair disposition of [his] claims."⁴

Settlement Discussions

Caspian's motion was based on settlement negotiations that had taken place after the parties submitted their first motions but before they were decided. Some of those negotiations were conducted over emails between Turner and Caspian's attorney. Three emails were of particular importance.

The first was sent by Turner, just five days before the court decided the first round of motions. In it, Turner rebuffed a previous offer from Caspian and outlined terms that he would accept to settle the case. He wrote that he could not "agree to discount the offer and take it in installments." Instead, he said he would either "accept a single payment of [a certain dollar amount, redacted in the motion papers]" or Caspian could "pay [a higher amount]...in 5 monthly installments provided that if [Caspian] missed an installment the whole debt...would be due."⁵ Turner also gave Caspian "permission to advise the Court we are negotiating a settlement and to please refrain from rendering any decision until" one of the parties informed the court that either a settlement was reached or settlement would not be possible.⁶

The following day, Caspian's attorney sent a reply email. She wrote, "Very well...\$[redacted amount] in full settlement, payable in 30 days. I'll call the Court to advise them, as well as draft the settlement agreement."⁷ Caspian's attorney then did both of these things. She prepared and forwarded a formal settlement agreement to Turner for his execution, and she advised the court of the settlement negotiations and requested that the court not render a decision on the parties' motions. But the court rendered a decision anyway, in which three of Turner's claims survived Caspian's motion to dismiss. (The court admitted, "Apparently, there was some mis-communication."⁸)

A few days after the court's decision, Turner, who had not yet executed the formal settlement documents, sent an email to Caspian's attorney. He wrote that he "found Judge Wood's decision very encouraging" and that it made him "very confident [he would] prevail in [his] claim."⁹ He also purported to "renew [his] initial offer to dispose of th[e] matter...for a single payment" in an amount that was \$2,500 more than the amount that the parties had previously discussed. Caspian refused to pay the increased amount, arguing that the parties had already settled. Turner disagreed, saying there was no settlement yet because he had not executed the formal settlement agreement prepared and sent by Caspian's attorney.

Caspian argued the case had been settled. Turner argued it had not.

The Court's Decision

On June 30, 2015, the court rendered its decision: The parties had executed a settlement agreement.¹⁰ The opinion relied on three holdings. First, the court held the parties had entered into an agreement through their emails, which together "clearly evinced a meeting of the minds."¹¹ Turner's email asked that Caspian make a lump-sum payment and inform the court of the negotiations. That was an offer. Caspian's attorney sent a response that agreed to Turner's terms in language that was not "unclear, ambiguous or equivocal."¹² That constituted acceptance. In the words of the court, "Once the defendant agreed to a single payment, payable in 30 days, the matter was settled."¹³

Second, the court held that the parties' agreement satisfied the requirements of CPLR 2104, which dictates, "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." The emails were the "writing." And Turner, a party appearing pro se, "subscribed" the email by placing his name at the end of it.¹⁴ Therefore, CPLR 2104 did not prohibit the email agreement from binding Turner.¹⁵

Third, the court held that the agreement was enforceable under New York's statute of frauds.¹⁶ As with CPLR 2104, the emails "constitute[d] 'signed writings' within the statute of frauds, since the plaintiff's name at the end of his e-mail signified his intent to authenticate the contents."¹⁷ Turner's protestations—that he had not signed the formal documents prepared by Caspian and that he had changed his mind after receiving the court's "encouraging" first decision—did not affect the parties' agreement. The emails created "a valid and enforceable agreement, despite plaintiff's refusal to execute the stipulation."¹⁸

Careful Negotiations

Settlement agreements are created in a unique context—litigation, battling attorneys, the courtroom. But they are still just contracts. They may be subject to some peculiar requirements—CPLR 2104 for example—but they are otherwise governed by the same objective theory of contract that applies to all agreements under New York law.¹⁹ Settlement agreements are formed when parties objectively manifest their mutual assent to all of an offer's material terms, and they are enforced so long as they satisfy New York's statute of

frauds. And also like other agreements, settlements can satisfy all of these requirements without being overtly formal. Run-of-the-mill communications may work just as well. So don't always expect a paper agreement, written in legalese, littered with whereases, then signed and sealed with wax. Just two emails may suffice.

As with any contract, parties (or their attorneys) who are negotiating a settlement must take care to not bind themselves to terms to which they did not intend to agree. Whether negotiated in the courtroom, in a letter, or in an email, settlement terms must be expressed clearly, and any caveat that a party has in mind must be articulated. As *Turner* demonstrates, to do otherwise is to risk being bound to a set of unintended and possibly unfavorable terms. So be careful. Take a second before you click send. Otherwise you or your client may get stuck with a settlement that you don't want.

Endnotes:

1. See *Turner v. Caspian Realty*, No. 70143/2013, slip op. at 1 (Sup. Ct. Westchester Cnty. Sept. 26, 2014) (Walker, J.S.C.) (Decision and Order: Mot. Seqs. 1 & 2).
2. Affirmation of Alireza Eatmadpour at ¶22, *Turner v. Caspian Realty*, No. 70143/2013 (Sup. Ct. Westchester Cnty. Oct. 17, 2014) ("Eatmadpour Affirm.")
3. Eatmadpour Affirm., Ex. E (proposed First Amended Answer) at ¶¶10-11.
4. Affidavit of Frederick W. Turner at ¶5, *Turner v. Caspian Realty*, No. 70143/2013 (Sup. Ct. Westchester Cnty. Nov. 25, 2014).
5. See Eatmadpour Affirm., Ex. F. Turner also required that, should Caspian agree to make installment payments, Caspian would have to secure the "obligation to accelerate the debt" with "a Judgment of Confession (CPLR 3218)." Id.
6. Id.
7. See Eatmadpour Affirm., Ex. G..
8. See *Turner v. Caspian Realty*, No. 70143/2013, slip op. at *5 (Sup. Ct. Westchester Cnty. June 30, 2014) ("Settlement Decision").
9. See Eatmadpour Affirm., Ex. H.
10. Settlement Decision, at *4.
11. Id. at *5.
12. Id. at *4-5 (quoting *King v. King*, 208 A.D.3d 1143, 1143-44 (3d Dept. 1994) ("As a general rule, in order for an acceptance to be effective, it must comply with the terms of the offer and be clear, unambiguous and unequivocal.")).
13. Settlement Decision, at *5.
14. Settlement Decision, at *4-5.

15. Although not addressed by the court, CPLR 2104 also dictates that "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."

16. See, e.g., *Zucker v. Katz*, 836 F.Supp. 137, 150 (S.D.N.Y. 1993) (applying the statute of frauds to a purported oral settlement agreement); *Anametrics Servs. v. Clifford A. Botway*, 159 A.D.2d 247, 247 (1st Dept. 1990) ("A subsequent oral settlement agreement, whose authenticity was established by unchallenged tape recording, was valid and enforceable, notwithstanding the Statute of Frauds, because it was capable of being performed within one year." (citation omitted)).

17. Settlement Decision at *4 (citing *Stevens v. Publicis*, 50 A.D.3d 253 (1st Dept. 2008)).

18. Settlement Decision at *5 (citing *Maria McBride Prods. v. Badger*, 46 Misc. 3d 1221(A), 2015 WL 819943, at *2 (N.Y. Civ. Ct. Feb. 26, 2015)).

19. See *Forcelli v. Gelco Corp.*, 109 A.D.3d 244, 248 (2d Dept. 2013) ("[S]ince settlement agreements are subject to the principles of contract law, 'for an enforceable agreement to exist, all material terms must be set forth and there must be a manifestation of mutual assent'." (citations omitted)).

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