

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

IN THE COURT OF COMMON PLEAS

CASE NO. CV 11 771803

KYMBERLEE RENEE VINING)

)
)
)
Plaintiff)

vs.)

)
KOHMAN, JACKSON, &)

)
KRANTZ P.L.L. *et al.*)

)
Defendants)

OPINION

Shirley Strickland Saffold, Judge:

I. PROCEDURAL OVERVIEW

This matter has had quite a contentious and lengthy litigious history. On or about June 18, 2009, Plaintiff, Kymberlee Renee Vining (hereinafter "Plaintiff"), filed suit (Case No. CV 09-696130) against Defendants Kohrman, Jackson & Krantz (hereinafter "KJK"), Marc Krantz, Jon Pinney, Brett Krantz, and Sarah Gabinet asserting the following claims: 1. Pregnancy/gender discrimination against all defendants; 2. A Family and Medical Leave Act (FMLA) claim against all Defendants; 3. A legal malpractice claim against KJK and Sarah Gabinet; and 4. A fraud claim against Sarah Gabinet.

The matter was subsequently removed to Federal District Court of the Northern District of Ohio on or about June 23, 2009. The Honorable Patricia Gaughan dismissed with prejudice Plaintiff's FMLA claim on December 17, 2009 and the matter was remanded back to this Honorable Court on January 5, 2010. It is uncontested that throughout the litigation, the parties periodically participated in settlement discussions.

On September 24, 2010, counsel for the Plaintiff at the time (Robert J. Rotatori, Esq. hereinafter "Rotatori" and Richard L. Stoper Jr. Esq. hereinafter "Stoper") communicated a settlement demand to defense counsel. Subsequently, on September 29, 2010 counsel had a second settlement conference where defense counsel made a counter-offer to the demand. The counter offer was as follows: 1. A monetary payment of \$250,000 which Plaintiff's counsel represented would be acceptable to the Plaintiff; 2. Mutual releases by and among all parties; 3. Dismissal of the individual defendants with prejudice; and 4. Dismissal of the case with prejudice after the individual defendants were dismissed. *See Defendant's Motion to Enforce Settlement Agreement* p 3. At this point, counsel for the Plaintiff, acting on behalf of the Plaintiff, allegedly orally accepted said offer and the matter was settled.

In an effort to memorialize this agreement, and due to impending dispositive motion due dates, Plaintiff's counsel contacted this Honorable Court's Staff Attorney to notify her of the settlement. Counsel additionally asked that she not put an entry on the docket because the parties would submit their own entry and that no rulings needed to be made on the submitted dispositive motions due to the settlement.

At that point, after reaching an agreement, the parties needed to draft a journal entry and the other terms of the agreement. Based upon the testimony, the sides exchanged drafts of the terms, including a non-disparagement clause, between October 4, 2010 and October 8, 2010.

On October 8, 2010, Plaintiff's counsel notified defense counsel that Plaintiff no longer wished to move forward with the settlement after reviewing the tax implications and the additional terms of the agreement, i.e. a proposed non-disparagement clause. On October 12, 2010, defense counsel filed a Motion to Enforce the Settlement Agreement. This Honorable

Court set a hearing on said Motion for January 11, 2011. Prior to said hearing, Plaintiff voluntarily dismissed her claims pursuant to Civ. R. 41(A).

Plaintiff subsequently re-filed this matter on December 20, 2011, this time asserting the following claims: 1. Gender and pregnancy discrimination against all Defendants; 2. Legal malpractice against Sarah Gabinet and KJK. Plaintiff did not name Brett Krantz as a Defendant in the re-filing, however, she did add Robert Gilmore as a Defendant.

Defendants again filed a Motion to Enforce Settlement Agreement on February 1, 2012 along with a request for an evidentiary hearing. A hearing thus commenced on March 28, 2012. After nearly two full days of testimony, an evidentiary issue arose. The parties were given leave to file briefs on the evidentiary issue and after its resolve via journal entry on April 25, 2012, the hearing recommenced on April 30, 2012.

II. LAW & ARGUMENT

The Defendants allege in their Motion that it is undisputed that the parties in the initial filing entered into a binding and enforceable agreement on September 29, 2010. Plaintiff disputes this, and this Honorable Court finds Plaintiff's argument persuasive.

a. Plaintiff maintains that the settlement was contingent upon the execution of a written agreement that never came into existence.

It is important to note, that in situations like the one at hand, settlement is generally preferred by the courts. Generally, "If it is found that the parties intended to be bound, the court should not frustrate this intention, if it is reasonably possible to fill in some gaps that the parties have left, and reach a fair and just result." *Litsinger Sign Co. v. American Sign Co.* (1967), 11 Ohio St. 2d 1, *14. Furthermore, "A settlement agreement is a binding contract designed to terminate a claim by preventing or ending litigation....However, even though such agreements are preferred in the law, and a trial court should promote and encourage settlements, a court

cannot force parties to enter into a settlement agreement.” *Riordan’s Sporting Goods Inc. v. Riordan’s Sports & Equip.* (2003) WL 21689860, ¶11, citing *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, 376, 683 N.E.2d 337.

For her first assertion against an enforceable settlement, Plaintiff claims that any alleged agreement that may have been made was made contingent upon the parties drafting a signed, written agreement. As evidenced by the e-mail exhibits submitted, no such agreement was ever reached due to a battle over such issues as a non-disparagement clause and various tax implications.

To support her position, Plaintiff directs the Court to *Berjan v. Ohio Bell Telephone Co.* which states, “...[i]t is well-established that courts will give effect to the manifest intent of the parties where there is clear evidence demonstrating that the parties did not intend to be bound by the terms of an agreement until formalized in a written document signed by both...” *Berjan v. Ohio Bell Tel. Co.* (1978), 54 Ohio St. 2d 147, 151. It is clear from the evidence presented here, that any “settlement” was clearly contingent upon reduction of the agreement to writing. Plaintiff repeatedly stated that she needed to walk away with \$130,000.00 out of the overall \$250,000.00 settlement amount and that if she did not do so, she was not willing to settle for \$250,000.00.

Additionally, the Supreme Court of Ohio has stated that terms of a contract and intent can be determined from the words, deeds, acts, and silence of the parties. *Kostelnik v. Helper* (2002), 96 Ohio St. 3d 1. This is an important point. At the Hearing, the parties presented the Court with voluminous records of e-mail correspondence between the parties in the days following the settlement. Repeatedly, Plaintiff brought up the issue of her objection to the non-disparagement clause that Defendants wished to include as well as her objection to the amount of \$250,000.00 if

she walked away with anything less than \$130,000.00 after taxes. *See* Defendant's Exhibits Bates Nos. RJR 00004-00212. Furthermore, she raised her concerns about making sure that the Court was aware of the settlement negotiation in order to preserve her right to file her Brief in Opposition to the Defendants' Motion for Summary Judgment. Certainly a party who believed that his/her case was settled and final would not voice concern about being able to maintain a response date, as if the case was disposed of there would be no need for such a response date. As such, it can be gleaned from the actions of the parties and the evidence presented, that the parties did not in fact reach an agreement but instead were in the midst of negotiating all relevant, essential terms.

b. Plaintiff maintains the proposal of the Confidentiality/Non-Disclosure/Non-Disparagement clauses precluded creation of a binding settlement.

Next, Plaintiff contends that the Defendants Motion cannot be granted because the proposal of the confidentiality, non-disclosure, and non-disparagement clauses constituted a counter-offer and thus precluded the formation of a binding settlement. Plaintiff maintains, "A litigant must therefore prove consensus on all 'essential terms' of a contract before it can obtain judicial enforcement of the deal." Plaintiff's Brief in Opposition p. 11 *quoting Minster v. Farmers Coop. Exch. v. Meyer* (2008), 117 Ohio St. 3d 459.

In general, the elements of a contract include an offer, acceptance, contractual capacity, consideration, a manifestation of mutual assent, and legality of object and of consideration. *Tepper v. Heck*, 1992 WL 369283, ¶16. Furthermore, a meeting of the minds as to essential terms is also a requirement for the enforcement of a contract. *Id.* Aside from these essential elements of a contract, "Terms of an oral contract may be determined from 'words, deeds, acts, and silence of the parties.'" *Id.* at ¶ 15.

Here, Defendant undisputedly made an offer of \$250,000.00 and a staggered dismissal of the individual Defendants first, followed by the dismissal of the corporate Defendant. This offer was accepted by the Plaintiff. However, after this offer and acceptance the Defendants added into the proposed settlement agreement an additional term, the confidentiality/non-disclosure/non-disparagement. This term contained a liquidated damages clause in case of violation. Furthermore, in the proposal, Defendants stated that this new proposed term was "...a material term of KJK's agreement to settle." Vining Aff. ¶6.

This additional term, which has been described by the Defendants as a material term of the agreement to settle, negated the meeting of the minds between the parties. As stated, the Eighth District Court of Appeals has held that an essential element of an enforceable contract is a meeting of the minds as to essential terms. *See Tepper supra*. Seeing as the Defendants themselves defined the non-disparagement clause as an essential and "material" term of the settlement agreement, and the Plaintiff did not agree to said term, it cannot be stated that there was a meeting of the minds as to the essential elements of the agreement. Instead, it is clear to this Honorable Court that there was an offer and acceptance (\$250,000.00 monetary settlement and a staggered dismissal of the parties), followed by a subsequent offer by the Defendants (\$250,000.00 monetary settlement, the staggered dismissal of the parties, and a non-disparagement clause) which negated the initial meeting of the minds. As such, there is no enforceable agreement.

In support of the position that an agreement had been reached, the Defendants direct this Court to *Tepper*. There the Eighth District Court of Appeals found that while the parties failed to agree on inspection terms,

...It is apparent from a review of all the evidence that the parties had settled all the issues in the pleadings and merely had to come to an understanding on the issue of inspection

and agree to the *wording* of the resolution of all issues...To argue that there was no agreement until a written agreement was signed is to say that the parties merely suspended the trial of the case while they made a further attempt at negotiating...The stipulation belies that contention because it says that the case is dismissed...

Id. at *3.

However, the situation presented in *Tepper* is not analogous to the situation at hand. In *Tepper* all issues had been resolved and all that was being discussed was the *wording* of the settlement agreement. Here, much more than just the wording was being discussed. In fact, the Defendants introduced a brand new material term to the agreement. The proposition of this new material term constituted a new offer, not just proposed wording. Thus, the Plaintiff's argument that the non-disparagement clause precluded the creation of a binding, enforceable contract is well taken.

c. **The Plaintiff alleges that her original counsel, Rotatori and Stoper, lacked authority to enter into a binding settlement on Plaintiff's behalf.**

Plaintiff's final contention is that even if a settlement was reached, it was reached and accepted by counsel without the Plaintiff's authority. As her main support for this proposition, the Plaintiff attempted to introduce into evidence a secret recording of a post-settlement meeting between her, Rotatori, and Stoper. However, this Court sustained the objection of the Defendants finding that the recording was hearsay and was improperly proffered. It was this Court's finding that in order for the recording to be admissible it would have had to be introduced while Rotatori was on the stand in order to impeach his testimony pursuant to Evid. R. 613. However, Plaintiff failed to introduce the evidence at the appropriate time and instead attempted to introduce the evidence during Plaintiff's testimony. This was improper and thus prevented the recording from coming into evidence.

Because the Court found that the evidence was inadmissible, the allegation that Plaintiff's former counsel lacked authority to enter into an agreement is not at issue here, or in the underlying discrimination matter. It appears that this issue would be better suited in a malpractice action between Plaintiff and her former counsel, but has no place in this proceeding. As such, this Court will not further address this matter here or in any future proceedings.

III. CONCLUSION

After reviewing all of the evidence and the applicable law, it is the opinion of this Honorable Court that no binding settlement agreement was reached between the parties on September 29, 2010. The Defendants' Motion to Enforce Settlement Agreement is not well taken and is hereby denied. This matter is to move forward to trial in accordance with a trial schedule to be set by the Court at a subsequent Case Management Conference.

IT IS SO ORDERED.

6/11/12

Date



Judge Shirley Strickland Saffold

CERTIFICATE OF SERVICE

A copy of the foregoing OPINION was forwarded this 11th day of June, 2012

by regular United States mail to:

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