

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DORETHA M. WILLIAMS as Guardian)	
For BEULAH M. WILLIAMS,)	
)	
Plaintiff,)	C.A. No. 06C-05-146 MMJ
)	
v.)	
)	
CHANCELLOR CARE CENTER OF)	
DELMAR,)	
)	
Defendant.)	

Submitted: March 23, 2009

Decided: April 22, 2009

On Counsel for the Plaintiff's Motion to Enforce Settlement.

GRANTED.

MEMORANDUM OPINION

Doretha M. Williams, Wilmington, DE, Guardian for Plaintiff

Gary S. Nitsche, Esquire, Wilmington, DE, Weik, Nitsche & Dougherty, Attorney for Plaintiff

Bradley E. Goewert, Esquire, Wilmington, DE, Marshall, Dennehey, Warner, Coleman & Goggin, Attorney for Defendant

JOHNSTON, J.

FACTUAL BACKGROUND

Before the Court is plaintiff's counsel Gary S. Nitsche's Motion to Enforce Settlement. Mr. Nitsche was hired by Doretha M. Williams ("Ms. Williams") to represent her mother, a disabled person (Beulah M. Williams "plaintiff"), in a personal injury action against Chancellor Care Center ("defendant"). Ms. Williams alleged that defendant was negligent in its care of plaintiff.

While under the defendant's care, plaintiff suffered a stroke and a hip fracture from a fall.¹ As a result of her advanced age and dementia, she has no memory of either incident. Plaintiff underwent a successful surgery for the hip fracture. At her deposition, plaintiff was unable to testify to any pain suffered either at the time of the fall or at any time thereafter.

After plaintiff's deposition, settlement negotiations began. On either April 2nd or 3rd of 2008, Mr. Nitsche presented Ms. Williams with a settlement offer from defendant for \$125,000. Mr. Nitsche stated that Ms. Williams verbally agreed to accept the offer. Immediately thereafter, Mr. Nitsche accepted the offer on behalf of his client.

By letter dated April 3, 2008, Mr. Nitsche informed the Court that the matter had been resolved. On April 9, 2008, Mr. Nitsche wrote to defendant to confirm that Ms. Williams had accepted its offer of \$125,000. Also, on April 9, 2008, Mr.

¹ Ms. Williams and Mr. Nitsche do not agree as to the scope of Mr. Nitsche's representation. However, the scope of the representation is irrelevant to the very narrow issue before the Court – whether a valid settlement agreement exists.

Nitsche wrote a letter to Ms. Williams confirming that she had accepted defendant's offer of \$125,000 and that she would be contacted when the settlement documents were available for execution. By letter dated May 8, 2008, Mr. Nitsche informed Ms. Williams that he was "awaiting a hearing date from the Superior Court for the approval of the settlement of \$125,000, as agreed."

On June 2, 2008, Mr. Nitsche met with Ms. Williams to review the settlement figures and to discuss the guardianship account. For the first time, Ms. Williams voiced that she was dissatisfied with the settlement and with Mr. Nitsche's performance. Ms. Williams requested that Mr. Nitsche cut his fee in half. Mr. Nitsche declined. Thereafter, Ms. Williams continuously refused to execute the settlement documents.

On February 13, 2009, Mr. Nitsche filed the present Motion to Enforce Settlement. Defendant filed a response consistent with Mr. Nitsche's position. On February 25, 2009, Ms. Williams submitted a letter and related documentation opposing Mr. Nitsche's motion. The Court heard testimony from all parties on February 26, 2009. Thereafter, Mr. Nitsche was provided with a copy of Ms. Williams' initial submission to the Court. Ms. Williams claims, *inter alia*, that she was under "duress" on April 3rd. On March 6, 2009, Mr. Nitsche filed a response to Ms. Williams' claims and submitted supporting documentation. On March 23, 2009, Ms. Williams filed a response to Mr. Nitsche's submission.

THE PARTIES' CONTENTIONS

Plaintiff's Counsel

Mr. Nitsche contends that a valid settlement agreement exists. Mr. Nitsche asserts that on April 2, 2008 he presented Ms. Williams with a settlement offer in the amount of \$125,000. Mr. Nitsche states that, after discussing the settlement offer with Ms. Williams, she verbally consented. Mr. Nitsche asserts that Ms. Williams' claim of duress on April 3, 2008 does not excuse or negate her acceptance on the previous day.

To support his position, Mr. Nitsche provided a copy of his case notes from April 2, 2008. The case note details that "[defense counsel] said his top [number] is \$125,000, spoke to client she said she would accept it, explained to her we tried to get them as high as possible, and this is as high as they are going to go. Client agrees to take it." Additionally, Mr. Nitsche provided copies of his April 3rd, April 9th and May 8th letters. Mr. Nitsche submits that the letters illustrate that Ms. Williams not only knew that Mr. Nitsche believed she had verbally accepted the settlement offer; but also, that Ms. Williams' acceptance of the offer had been conveyed to defendant.

To further support his contention that Ms. Williams verbally agreed to the offer, Mr. Nitsche submitted a letter dated June 24, 2008 written by Ms. Williams

and addressed to Mr. Nitsche.² While under the assumption that Mr. Nitsche had tape-recorded their conversation regarding the offer, Ms. Williams writes: “I believe no conversation is final until you sign.” Mr. Nitsche asserts that the statement illustrates that Ms. Williams did in fact verbally agree to the offer. Further, Mr. Nitsche asserts that Ms. Williams’ position – that because she did not sign anything her acceptance was not binding or valid – is contrary to law and fact.

Mr. Nitsche suggests that Ms. Williams first expressed dissatisfaction with the settlement when she went over the net recovery with Mr. Nitsche on June 2, 2008. Ms. Williams requested that Mr. Nitsche reduce his fee by one half, which he declined. At that time, Ms. Williams focused on the legal requirement that the net settlement proceeds must be deposited into a trust account for the benefit of her mother.

Mr. Nitsche contends that the settlement offer is fair and reasonable. Mr. Nitsche explains that the pain and suffering portion of the claim was limited in scope and duration. Mr. Nitsche states that the medical records and plaintiff’s testimony indicate that she made an excellent recovery from her hip surgery; and plaintiff was unable to attest to any ongoing pain related to the fall. Mr. Nitsche concludes that the settlement is in the best interest of plaintiff.

² Ms. Williams also submitted a copy of this letter in her packet of materials.

Mr. Nitsche requests that the Court approve the settlement petition and require Ms. Williams to execute the settlement documents. In the alternative, Mr. Nitsche requests that the Court order by operation of law that the settlement is approved and appoint an alternative guardian *ad litem* to oversee the administration of the settlement.

Defendant agrees with Mr. Nitsche. Defendant asserts that a valid settlement agreement exists. Accordingly, defendant requests that the Court enforce the settlement agreement.

Plaintiff's Guardian

Ms. Williams contends that she never accepted the \$125,000 settlement offer, either verbally or in writing. Ms. Williams asserts that Mr. Nitsche contacted her on April 3, 2008 to discuss the settlement offer. Ms. Williams states that April 3, 2008 was a happy, but frantic day, because she had to transfer plaintiff to a new nursing home that was 100 miles away.

During the call, Ms. Williams states that she discussed the settlement offer with Mr. Nitsche but informed him that she was busy and would get back to him. Ms. Williams claims that she had made Mr. Nitsche aware that she would not agree to a final number until she saw evidence of the defendant's counsel's view of the case. Ms. Williams asserts that weeks later she contacted Mr. Nitsche to talk further about whether the defendant had provided the documentation she wished to

review. Ms. Williams states that when she contacted Mr. Nitsche he informed her that she had already agreed to the settlement offer. Ms. Williams asserts that she was shocked by this information.

Ms. Williams claims that Mr. Nitsche's notes from April 2nd are fraudulent and that no conversation took place that day. Further, Ms. Williams asserts that Mr. Nitsche "targeted" April 3rd, the day plaintiff was transferred to a new home, to play on Ms. Williams' happy emotions in order to coerce a settlement. Additionally, Ms. Williams believes that Mr. Nitsche filed the present motion in an effort to avoid accountability.

Ultimately, Ms. Williams contends that the settlement offer of \$125,000 is unfair and unreasonable. Ms. Williams claims that plaintiff did not make an excellent recovery from her hip surgery and that she continues to be in pain. Ms. Williams believes that the correct settlement amount should be between \$125,000 and \$500,000.

Allegations of Ethical Misconduct

Throughout Ms. Williams' submissions and oral testimony, she has alleged numerous instances of attorney ethical misconduct. As the Delaware Supreme Court held in *In re Appeal of Infotechnology, Inc.*³,

[u]nless the challenged conduct prejudices the fairness of the proceedings, such that it adversely affects the fair and

³ 582 A.2d 215 (Del. 1990).

efficient administration of justice, only [the Delaware Supreme Court] has the power and responsibility to govern the Bar, and in pursuance of that authority to enforce the Rules for disciplinary purposes.... Rules are to be enforced by a disciplinary agency, and are not to be subverted as procedural weapons.⁴

The Court will not consider any of Ms. Williams' attorney misconduct claims because they are irrelevant to the very narrow issue of whether a valid settlement agreement exists. Further, this Court is not the appropriate entity to review claims of attorney misconduct.⁵

DISCUSSION

Delaware law favors the voluntary settlement of cases.⁶ A settlement agreement is enforceable as a contract.⁷ The party seeking to enforce the settlement agreement must demonstrate by a preponderance of the evidence that a valid contract exists.⁸

Attorney's Authority to Accept Settlement Offer

A contract is created upon the valid acceptance of an offer. Where an attorney of record accepts a settlement offer on behalf of his client, either orally or in writing, a binding contract is created.⁹ The attorney is presumed to have the

⁴ *Id.* at 217-220.

⁵ The Office of Disciplinary Counsel reviews and prosecutes allegations of attorney misconduct. Supr. Ct. R. 64.

⁶ *Clark v. Ryan*, 1992 WL 163443, at *5 (Del. Ch.) (citing *Neponsit Inv. Co. v. Abramson*, 405 A.2d 97 (Del. 1979)).

⁷ *Montgomery v. Achenbach*, 2007 WL 1784080, at *2 (Del. Super.).

⁸ *Id.*

⁹ *See Clark*, 1992 WL 163443, at *5.

lawful authority to make such an agreement.¹⁰ While an attorney lacks the inherent authority to accept a settlement offer, an attorney acquires lawful authority when the client either gives special authority or subsequently ratifies the agreement.¹¹ It is the client's burden to rebut a presumption of lawful authority.¹²

Here, Mr. Nitsche accepted defendant's offer on behalf of his client. Mr. Nitsche is presumed to have had the lawful authority to settle. Thus, the burden is on Ms. Williams to show that Mr. Nitsche lacked the authority to accept the offer.

Ms. Williams has failed to meet her burden of showing that Mr. Nitsche lacked lawful authority to accept defendant's offer. The documentary record, demonstrates that Mr. Nitsche presented Ms. Williams with the settlement offer and she verbally agreed to accept it. Ms. Williams' contention -- that oral agreements are not valid until placed in writing and signed -- is legally incorrect. While some agreements must be in writing to be enforceable under the Statute of Frauds, settlement agreements, like the one here, may be oral.¹³ Where an oral agreement is valid and in compliance with the Statute of Frauds, Delaware courts repeatedly have upheld the agreement.¹⁴

¹⁰ *Id.* (citing *Aiken v. Nat'l Fire Safety Counsellors*, 127 A.2d 473, 475 (Del. Ch. 1956)).

¹¹ *Aiken*, 127 A.2d at 475.

¹² *Id.*

¹³ The Delaware general statute of frauds, 6 *Del. C.* § 2714(a), requires the following contracts to be in writing: (1) agreements upon consideration of marriage; (2) contracts for the sale of lands; (3) agreements that cannot be performed within one year; and (4) agreements to answer for the debt of another. Additionally, 6 *Del. C.* § 2-201 requires contracts "for the sale of goods for the price of \$500 or more" to be in writing.

¹⁴ See *Scarborough v. State*, 945 A.2d 1103, 1112-113 (Del. 2008); *Deene v. Peterman*, 2007 WL 2162570, at *5 (Del. Ch.); *Eaton v. Eaton*, 2005 WL 3529110, at *4-5 (Del. Ch.); *In re Lot No. 36*, 2004 WL 3068348, at *5 (Del. Ch.); *Lowe v. Bennett*, 1999 WL 750378, at *2-3 (Del. Super.).

Ratification

Even if the Court were to find that Ms. Williams had not verbally accepted defendant's offer at the time it was presented to her, Ms. Williams' actions following Mr. Nitsche's conveyed acceptance ratified the contract. Ms. Williams received letters in both April and May from Mr. Nitsche stating that the case was settling for the \$125,000, as agreed. Ms. Williams did not contact Mr. Nitsche in either April or May to express her objection to the settlement. Instead, Ms. Williams waited until June 2nd to object. Ms. Williams' objection, two months after the settlement agreement was accepted, was untimely and insufficient to render the contract unenforceable. The Court finds that Ms. Williams gave Mr. Nitsche the lawful authority to accept defendant's offer. When Mr. Nitsche accepted the offer on behalf of his client, a valid and binding settlement agreement was created.

Duress

However, like any other contract, a settlement agreement may be invalidated under certain circumstances including fraud, illegality, duress, undue influence and mistake.¹⁵ Ms. Williams contends that Mr. Nitsche placed Ms. Williams under duress at the time he presented her with defendant's offer. Ms. Williams asserts that Mr. Nitsche specifically "targeted" the day Ms. Williams transferred plaintiff

¹⁵ *Clark*, 1992 WL 163443, at *5.

to a new nursing home in an attempt to take advantage of Ms. Williams' happy emotional state.

Ms. Williams' accusations do not constitute coercion or duress. In order to demonstrate duress sufficient to invalidate a contract, the conduct of the party alleged to have coerced the transaction must be "(1) a 'wrongful' act, (2) which overcomes the will of the aggrieved party, (3) who has no adequate legal remedy to protect himself."¹⁶

There is no evidence that Mr. Nitsche coerced Ms. Williams into accepting defendant's settlement offer. Mr. Nitsche's prompt presentation of the offer to Ms. Williams, even if it occurred on the day Ms. Williams' transferred plaintiff, was not a wrongful act. As an attorney, Mr. Nitsche is under an obligation to promptly inform his client of any settlement offers.¹⁷ There is no indication that Mr. Nitsche's actions were designed to overcome Ms. Williams' will. Mr. Nitsche did not threaten Ms. Williams with force or economic duress. Ms. Williams was free at all times to obtain new counsel. The Court finds that Ms. Williams was not under duress at the time she entered into the contract. The settlement agreement is valid and binding.

¹⁶ *Cianci v. Jem Enter., Inc.*, 2000 WL 1234647, at *9 (Del. Ch.).

¹⁷ *DLRPC 1.4(a)(1)* ("[a] lawyer shall: promptly inform the client of any decision or circumstance with respect to which the client's informed consent ... is required").

CONCLUSION

The Court finds that Mr. Nitsche and defendant have established by a preponderance of the evidence that a valid settlement agreement exists. Ms. Williams has failed to meet her burden to show that Mr. Nitsche lacked the authority to settle the case. Additionally, the Court finds that Ms. Williams was not coerced into accepting the settlement offer. Further, the Court finds that the offer of \$125,000 for plaintiff's hip fracture is just and reasonable compensation under the circumstances of this case.

THEREFORE, Mr. Nitsche's Motion to Enforce Settlement is hereby **GRANTED**. The settlement is hereby **APPROVED**. A substitute guardian *ad litem* shall be appointed to oversee administration of the settlement

IT IS SO ORDERED.

The Honorable Mary M. Johnston