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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

AGUSTIN R. FERNANDEZ,	:	
	:	**Civil Action No. 12-6079 (DMC)**
Plaintiff,	:	
	:	
v.	:	**REPORT AND RECOMMENDATION**
	:	
CORE EDUCATION & CONSULTING SOLUTIONS, INC., et al.,	:	
	:	
Defendants.	:	
	:	

CLARK, Magistrate Judge

Currently pending before the Court is Plaintiff Agustin R. Fernandez's ("Plaintiff") motion to enforce the parties' settlement agreement [Docket Entry No. 28]. Defendant Core Education & Consulting Solutions, Inc., ("Defendant") opposes Plaintiff's motion [Docket Entry No. 31]. The Court has fully reviewed all arguments made in support of and in opposition to Plaintiff's motion. For the reasons set forth more fully below, the Court recommends that Plaintiff's motion to enforce the parties' settlement agreement be GRANTED IN PART and DENIED IN PART.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff filed the instant action in state court on August 30, 2012, alleging various tort civil rights and discrimination claims. *See generally Am. Compl.*; Docket Entry No. 5. Defendant removed the action to federal court on September 27, 2012 and the parties thereafter engaged in a private mediation proceeding on September 5, 2013. As a result of the mediation, the parties

entered into a settlement agreement (the "Agreement") wherein Plaintiff would dismiss his complaint against Defendant and its officers with prejudice, and Defendant would make payment of $200,000.00 to Plaintiff, to be paid in six monthly installments. *Certification of Michael A. D'Aquanni, Esq.* at ¶¶3-4. The payments were to be made on the 4th of each month, beginning with October 4, 2013. *Id.* at ¶4. Plaintiff received the first payment as scheduled on October 4th, but did not receive the November 4th payment. *Id.* at ¶ ¶ 6-7. Upon Defendant's failure to make the second payment, counsel for both Plaintiff and Defendant agreed in good faith to a revised payment schedule, wherein "the November payment would be made by November 18, 2013, and the remaining payments would each be pushed back by two weeks." *Id.* at ¶ 10. Defendant failed to make the November 18th payment as well. *Id.* at ¶12. Counsel for Plaintiff advised Defendant's counsel that he would file the instant motion if payment was not received by November 22, 2013. *Id.* at ¶14. The second payment was not received by November 22nd, and indeed, no further payments have been received by Plaintiff as of the date of this Report. *See* Feb. 21, 2014 Letter from Howard M. Wexler, Esq. and Michael A. D'Aquanni, Esq. to Hon. James B. Clark, III, U.S.M.J. (the "2/21/14 Letter").[1]

II. LEGAL STANDARD

A settlement agreement is a type of contract. *See Mortellite v. Novartis Crop Prot., Inc.*, 460 F.3d 483, 492 (3d Cir. 2006) (citing *Borough of Haledon v. Borough of N. Haledon*, 358 N.J. Super. 289, 305 (App. Div. 2003)). Consequently, courts look to state contract law when determining whether an enforceable settlement agreement has been reached. *See Dep't of Pub. Advocate v. N.J. Bd. of Pub. Util.*, 206 N.J. Super. 523, 527-28 (App. Div. 1985); *Excelsior Ins.*

[1] While reference is made to submissions considered by this Court, they shall not be placed on the docket unless requested by a party.

Co. v. Pennsbury Pain Ctr., 975 F.Supp. 342, 348-49 (D.N.J. 1996) (holding that "state law governs the construction and enforcement of settlement agreements in federal court.")

Under New Jersey state law, "[a]n agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into[,] and which a court, absent a demonstration of 'fraud or other compelling circumstances,' should honor and enforce as it does other contracts." *Pascarella v. Bruck*, 190 N.J. Super. 118, 124-25 (App. Div. 1983) (internal quotations omitted). Further, in New Jersey, there is a strong public policy favoring settlements. *Nolan v. Lee Ho*, 120 N.J. 465, 472 (1990). Consequently, courts "strain to give effect to the terms of a settlement wherever possible." *Dep't of Pub. Advocate*, 206 N.J. Super. at 528. Nevertheless, courts should not enforce "[a] settlement . . . 'where there appears to have been an absence of mutuality of accord between the parties or their attorneys in some substantial particulars, or the stipulated agreement is incomplete in some of its material and essential terms.'" *Bistricer v. Bistricer*, 231 N.J. Super. 143, 147 (Ch. Div. 1987) (quoting *Kupper v. Barger*, 33 N.J. Super. 491, 494 (App. Div. 1955)). However, the mere fact that a settlement agreement fails to "contain every possible contractual provision to cover every contingency" does not render it any less enforceable. *Id.* Indeed, "a contract is no less a contract because some preferable clauses may be omitted either deliberately or by neglect. So long as the basic essentials are sufficiently definite, any gaps left by the parties should not frustrate their intention to be bound." *Id.*

III. ARGUMENTS

Through its motion, Plaintiff requests that the Court "enforce the terms of the Agreement, enter Judgment in the amount of $166,667.67 against Defendants and in favor of Plaintiff, and sanction Defendant Core in the form of a penalty imposed for each day remaining payment is later than agreed upon, as well as the imposition of counsel fees and costs associated with this motion."

D'Aquanni Cert. at ¶16. Plaintiff's counsel certifies that he has expended 7.5 hours since November 4, 2013 in an effort to correspond with Defendant's counsel to obtain payment. *Id.* at ¶23. As such, pursuant to New Jersey Rule of Professional Conduct 1.5, Plaintiff requests that this Court award Plaintiff $3,187.50 in attorney's fees in addition to the relief requested above. *Id.* at ¶¶24-25.

Defendant opposes Plaintiff's motion on two grounds. First, Defendant contends that the parties' settlement agreement did not include a "time is of the essence" clause and therefore, Defendant's failure to make the second payment was not a material breach of the agreement. *Defendant's Brief in Opposition* at 3; Docket Entry No. 31. Defendant claims that without a "time is of the essence" clause, a technical breach of a contract is subject to a test of reasonableness. *Id.* at 4, citing *Gorrie v. Winters,* 518 A.2d 515, 517 (N.J. Super Ct. App. Div. 1986) ("a date for performance…is subject to adjournment and, ultimately, to a test of reasonableness applied by a trier of fact"). Defendant admits that it has "fallen slightly behind in making the payments required by the Settlement Agreement based on its financial challenges" but contends that it "has, in good faith, made every effort to fulfill its obligations and to work with Plaintiff to determinate (*sic*) a suitable solution outside of Court." In this regard, Defendant submits that it be given a reasonable amount of time to remedy its breach, arguing that "[i]t remains [Defendant's] hope and expectation to come current before the Court has an opportunity to address this issue[.]" *Id.* at 5.

Alternatively, Defendant argues that even if the Court should find a material breach of the Agreement, the Court cannot order the relief that Plaintiff is seeking. *Id.* Defendant maintains that the Court is empowered only to enforce the terms of the contract as written, and is not authorized to rewrite the contract to the advantage of either party. *Id.* at 5-6. Because Plaintiff

failed to insert an "acceleration" provision or any condition providing for the imposition of attorney's fees, Defendant argues that the Court cannot order the entire judgment against Defendant and cannot sanction Defendant in the form of attorney's fees. *Id.* at 6. As such, Defendant submits that the Court allow Defendant a reasonable period of time to comply with the terms of the Agreement, and otherwise deny Plaintiff's motion.

Plaintiff replies by arguing that "Plaintiff is still entitled to enforce the terms of the Agreement" without an acceleration or "time is of the essence" clause. *Plaintiff's Brief in Reply* at 2; Docket Entry No. 33. Further, as to Defendant's argument that it be allowed a reasonable amount of time to make the settlement payments, Plaintiff argues that such a time period has already passed. *Id.* at 4. Lastly, Plaintiff argues that Defendant has "fail[ed] to offer any real explanation for their inability to make the payments they agreed to make." *Id.* at 5.

The Court requested an update from the parties on the status of payments under the Agreement, which was submitted on February 21, 2014. *See* 2/21/14 Letter. Defendant advised that it "has not been able to resume settlement payments as it remains in a perilous financial condition with mounting obligations that it is unable to meet." *Id.* at 1. Defendant explained its current financial situation, stating that its first monetary priority is its employees' payroll. *Id.* Defendant claims that it is still working towards its financing efforts and gaining additional capital. *Id.* at 2. Plaintiff responds by contending that Defendant should have made its payments to Plaintiff a priority with the financing that it received. *Id.* at 3. Plaintiff reiterates his position that sanctions are warranted for Defendant's willful breach of the Agreement and requests that the Court enter an Opinion and Order on March 8, 2014 (one day after the last payment should have been made) entering final judgment and other relief against Defendant.

IV. DISCUSSION

As a threshold matter, the parties do not dispute that an enforceable agreement has been created and that Defendant has breached the agreement. The issues for the Court to consider are whether such a breach was material and whether the Court can order the relief sought by Plaintiff.

A. Material Breach

At this juncture, with no payments having been made since the October 2013 payment and with the final payment deadline having passed, the Court finds Defendant has materially breached the Agreement. *See Magnet Resources, Inc. v. Summit MRI, Inc.*, 318 N.J. Super. 275, 723 A.2d 976, 981 (N.J. Super. Ct. App. Div. 1998) ("Where a contract calls for a series of acts over a long term, a material breach may arise upon a single occurrence or consistent recurrences which tend to defeat the purpose of the contract") (internal citation omitted). Defendant's argument that the Agreement did not include a "time is of the essence" clause is irrelevant now that the time period covering the entire Agreement has expired. Moreover, although the Agreement did not provide for accelerated payments, Plaintiff is still entitled to be made whole under its terms. Because Defendant materially breached the Agreement by having made only one of the six payments over the life of the Agreement, the Court should enter judgment in favor of Plaintiff in the amount remaining under the Settlement Agreement, or $166,666.67.

B. Sanctions

Plaintiff also requests that this Court sanction Defendant daily for each day that payment is not made and order Defendant to pay attorney's fees and costs associated with this motion. Courts have the "inherent authority to impose sanctions upon those who would abuse the judicial process." *Republic of the Philippines v. Westinghouse Elec. Corp*., 43 F.3d 65, 73 (3d Cir.1994) (emphasis omitted) (citing *Chambers v. NASCO, Inc*., 501 U.S. 32, 43-44, 111 S.Ct. 2123, 115

L.Ed.2d 27 (1991)). The Third Circuit has provided that the sanctioning court "must ensure that there is an adequate factual predicate for flexing its substantial muscle under its inherent powers, and must also ensure that the sanction is tailored to address the harm identified." *Republic of the Philippines*, 43 F.3d at 74. The Court finds that Defendant's material breach does not rise to the level of abuse of the judicial process which would thereby warrant sanctions. Defendant has explained its financial hardship and its efforts to improve its situation. As such, an award of sanctions in the form of attorney's fees or a daily penalty would do little to ensure future compliance. As such, Plaintiff's request for sanctions and other costs should be denied.

V. CONCLUSION

For the reasons set forth above,

IT IS on this 10th day of March, 2014,

RECOMMENDED that Plaintiff's motion to enforce the parties' settlement agreement be GRANTED IN PART and DENIED IN PART; and it is

ORDERED that the Clerk of the Court terminate the aforementioned motion [Docket Entry No. 28] and activate this Report and Recommendation.

Parties are advised that they may file an objection within 14 days of the date of this Order pursuant to Fed.R.Civ.P. 72(b)(2).

Respectfully submitted,

s/James B. Clark, III
JAMES B. CLARK, III
UNITED STATES MAGISTRATE JUDGE

Dated: March 10, 2014