SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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INDEX NO. 655675/2017

E & O TAX LIEN FUND LLC, YEHOSHUA FRENKEL, YOSEF MICHAEL, ISRAEL GERLITZ,

MOTION DATE 10/23/2019

Plaintiffs,

MOTION SEQ. NO. 002

- v -

AAD PARTNERS, INC., HEZI TORATI,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this motion to ENFORCE SETTLEMENT AGREEMENT.

Law Offices of Solomon Rubin, Fort Lee, NJ (Solomon Rubin of counsel), for plaintiffs.
William J. Fallon, Esq., Rockville Centre, NY, for defendants.

Gerald Lebovits, J.:

Plaintiffs seek enforcement of a settlement agreement under CPLR 2104, under which they would be entitled to $85,000 plus certain attorney fees. Plaintiffs' enforcement motion is granted.

Background

In 2017, plaintiffs, E & O Tax Lien Fund LLC, Yehoshua Frenkel, Yosef Michael, and Israel Gerlitz, brought a fraud action against defendants, AAD Partners, Inc. and Hezi Torati. In early 2019, counsel for both parties began to exchange emails discussing terms of a potential settlement.[1]

On February 18, 2019, William Fallon, attorney for the defendants, emailed Solomon Rubin, attorney for the plaintiffs, stating that his client had advised him that "this case settled for $70000 beginning in March so please confirm we can have an agreement before depositions."

[1] These emails are attached as exhibits to plaintiffs' motion. (*See generally* NYSCEF Nos. 35-47.) Defendants do not dispute the authenticity of these emails. At most, defendants assert that they cannot verify a text message exchange between the parties that was attached to one of the emails (*see* NYSCEF No. 50, at 2); but they do not state affirmatively that the text message exchange as reproduced is inaccurate or inauthentic.

Rubin responded that plaintiffs had not yet agreed to a settlement but were willing to settle for $100,000 in ten monthly payments of $10,000 each.

On the morning of March 4, 2019, the day before a scheduled deposition, Rubin emailed Fallon to follow up on the status of settlement. Fallon stated in response that his client would be calling Rubin's client to work out a settlement. Later that day, Rubin wrote Fallon again, indicating his understanding that their clients had decided to settle for $7,000 per month for ten months; and that plaintiffs would need a clause in the settlement agreement providing that in the event of a default, plaintiff would be able to enter a judgment for the full amount originally sought.

In the afternoon of March 4, Fallon asked Rubin to send him the draft settlement agreement, which Rubin then provided. The draft provided that defendants would pay make a number of payments over the course of a year, totaling $70,000. The draft also provided, though, that in the event of any default by defendants, plaintiffs would be entitled to immediately enter judgment without notice for the full amount of $115,000 (plus interest), less any payments already made. Forty-five minutes after receiving the draft agreement, Fallon responded that the draft appeared acceptable to him, subject to a few small-scale edits and client review.

On the morning of March 5, Fallon emailed back a redlined copy of the draft with his proposed changes. Fallon indicated that the agreement was still subject to client review; but he also proposed that Rubin confirm that Fallon's edits were acceptable and return a final clean copy for execution—or, alternatively, contact Fallon to discuss any changes to which Rubin objected. Fallon's most significant edit was reducing the amount that plaintiffs could obtain in the event of default from $115,000 to $70,000. Rubin responded that Fallon's proposed changes were acceptable except for the judgment-upon-default reduction. Rubin proposed instead leaving that amount at $115,000, but adding a five-day cure period before plaintiffs could enter the $115,000 judgment. Fallon stated that this change sounded reasonable to him, but that he would need client approval.

On March 6, Fallon informed Rubin that his client was not willing to consent to a $115,000 judgment in the event of a default. After an ensuing phone conversation, the two attorneys agreed on March 26 that the amount of the judgment that could be entered in the amount of default would be $85,000, and revised the draft agreement accordingly.

On April 1, Fallon's clients raised a new objection: that as drafted, that same event-of-default provision appeared to be tantamount to a confession of judgment, because it would permit plaintiffs to enter judgment without further notice to defendants. Rubin quickly replied that his clients were not seeking a confession of judgment, but a provision entitling his clients to *move* for a money judgment once a default occurred and went uncured. On the evening of April 1, Rubin sent Fallon a new version of the settlement agreement modifying the event-of-default provision so that it would merely permit plaintiffs to move on notice to defendants for the $85,000 judgment (less payments), rather than entitle plaintiffs to enter judgment for that amount.

On April 3, the parties appeared before this court for a scheduled status conference in the case. At the conference, the parties agreed to hold depositions in the case on April 17, and scheduled the next status conference for the morning of June 5. (*See* NYSCEF No. 29.)

On the morning of April 16, Fallon emailed Rubin what appears to be a screenshot of a text message exchange between their respective clients reflecting that they were on board with a settlement under which defendants would pay plaintiffs in monthly installments of $7,000. That afternoon, Rubin emailed Fallon asking for an update on settlement. Fallon told Rubin that he assumed that the parties were settling and that the scheduled deposition therefore would not go forward. Rubin replied that his understanding was that the deposition would go forward until the agreement was reduced to a signed writing.

That evening, at Fallon's request, Rubin sent Fallon another copy of the settlement agreement, under which defendants would pay the $70,000 settlement amount in ten monthly installments of $7,000 (as defendants had discussed with plaintiffs). Exhibit A to the settlement agreement was a stipulation discontinuing the action in light of the settlement. The next afternoon, on April 17, Fallon emailed Rubin a copy of the settlement agreement in which he had signed the stipulation of discontinuance; Fallon said that he was "[w]aiting on clients to sign" the settlement agreement itself. The parties did not hold the depositions scheduled for April 17.

Defendants did not, however, then sign the settlement agreement or make any payments required by its terms. On May 15, Rubin emailed Fallon to ask why defendants had not signed the agreement. Fallon did not contest the existence of a settlement. Instead, on May 16 he replied that he was "[l]ooking into it," and inquired whether Rubin's clients had signed the settlement (and whether they had received payment). Rubin informed Fallon that his clients had signed but not been paid.

On May 20, Fallon emailed Rubin to request that Rubin revise the agreement (again) to push back the payments schedule in light of the delay in execution, and also send Fallon a copy of the agreement signed by Rubin's clients so that Fallon's clients could countersign. Rubin protested this request on the ground that the parties' previous emails had created a binding settlement agreement, but agreed to send an updated agreement in the interests of avoiding motion practice. On May 22, Fallon objected again to the new schedule that Rubin had included in the latest version of the settlement. Rubin's reply emphasized that the difference between what Fallon was requesting and what Rubin had provided was minimal, and warned that if Fallon's client did not sign the agreement soon, Rubin would be moving to enforce. Fallon replied on the evening of May 22, stating that he "understood" Rubin's position that Fallon would "urge" his clients "to sign and make payment."

Fallon's clients did neither. On May 24, and again on May 28, Rubin wrote Fallon to follow-up, without response. On the morning of June 5, the parties appeared for the scheduled status conference, set new deposition dates, and agreed to appear for another conference in August. (*See* NYSCEF No. 30.) That evening, Fallon wrote Rubin to say that "[c]lient will sign and pay now," and asked Rubin to "please amend payment schedule." Rubin declined to make the changes without a firm commitment from defendants to make the first scheduled payment by June 11. Fallon did not make that commitment.

Defendants never did execute any version of the settlement agreement or make any settlement payments. On July 22, Rubin moved to enforce the settlement agreement under CPLR 2104.

Discussion

CPLR 2104 provides that an out-of-court agreement "between parties or their attorneys relating to any matter in an action" is binding on a party only where "it is in a writing subscribed by him or his attorney."

To be enforceable under CPLR 2104, a settlement must reflect mutual assent by the parties to all material terms of the agreement. (*See Forcelli v Telco Corp*, 109 AD3d 244, 248 [2d Dept 2013].) The manifestation of such assent may be satisfied by emails between counsel. And those emails, where they contain the attorneys' printed names at the end, will also satisfy CPLR 2104's requirement that the agreement is reduced to a signed writing. (*See Williamson v. Delsener*, 59 Ad3d 291, 291-292 [1st Dept, 2009].)

Here, the record reflects that counsel for each party engaged in an extensive, iterative negotiation about the terms of the settlement that had resolved all material disagreements between the parties by April 16—in particular, the means by which plaintiffs could seek a judgment in the event of default and the amount of the judgment that they could seek.

On the evening of April 16, counsel for plaintiffs sent counsel for defendants an email that attached the agreement and stipulation of discontinuance for execution, and that was signed at the end by counsel. In the afternoon of April 17, counsel for defendants manifested his assent to the agreement by returning a signed copy of the stipulation of discontinuance, again in an email that he signed with his full name at the end.[2] Counsel for each side also manifested their mutual understanding that a binding settlement had been reached by cancelling the depositions scheduled for April 17, after counsel for plaintiff had expressly stated that he would insist on going forward with depositions unless the parties had reached a settlement agreement that was committed to writing.

This evidence establishes that as of April 17, 2019, the parties had agreed on all of the material terms of a settlement agreement by writings subscribed to by their attorneys. This court concludes, therefore, that the agreement is binding on defendants and enforceable under CPLR 2104.

Defendants make two principal arguments against enforceability. First, they assert that there was no meeting of the minds as to the final terms of the proposed settlement in light of defendants' request "that the settlement agreement be revised to reflect payment dates further into the future in May 2019." (NYSCEF No. 50, at 2.) This assertion, though, overlooks that the parties had plainly agreed in *April 2019* about the final terms of the agreement. The disagreement

[2] There is no indication in the record that counsel for defendants lacked authority to execute the stipulation of discontinuance on behalf of his clients.

on which defendants now rely arose only after they failed (or refused) to execute the agreement notwithstanding their agreement to its terms.

Second, defendants claim that plaintiffs' counsel's appearance at a scheduled status conference on June 5, 2019, manifested his understanding that there remained disagreements between the parties and that the litigation remained ongoing. This court is not persuaded. In late May 2019, counsel for plaintiffs had expressly stated his clients' position that the parties had already reached a binding settlement. That an attorney appeared for plaintiffs less than two weeks later at a scheduled conference—rather than move in that short time period to enforce the agreement—does not without more reflect a view by plaintiffs that settlement negotiations remained ongoing.

It is undisputed that counsel for plaintiffs first notified counsel for defendants on May 16, 2019, that defendants had failed to make payments under the settlement agreement—and that notwithstanding repeated urgings by both plaintiffs' counsel and their own counsel, defendants have made no payments to plaintiffs since then.

Accordingly, it is

ORDERED that plaintiffs' motion to enforce the settlement agreement between the parties is granted; and it is further

ADJUDGED AND DECREED that plaintiff shall have judgment for $85,000.00, with interest at 9% per annum running from May 16, 2019, plus costs, disbursements, and reasonable attorney fees; and it is further

ORDERED that the issue of the amount of reasonable attorney fees and disbursements is referred to a Special Referee to hear and report; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of its entry on all parties and upon the Special Referee Clerk in the General Clerk's Office (room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

1/17/20
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	X	REFERENCE