

Matter of Philadelphia Ins. Indem. Co. v Kendall

2020 NY Slip Op 34528(U)

May 27, 2020

Supreme Court, New York County

Docket Number: 657200/19

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8
Decision, Order & Judgment
INDEX NO. 657200/19

IN THE MATTER OF PHILADELPHIA INSURANCE
INDEMNITY COMPANY

MOT. DATE

- v -

MOT. SEQ. NO. 001

ERIKA KENDALL

The following papers were read on this motion to/for enforce settlement
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS DOC No(s).
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS DOC No(s).
Replying Affidavits ECFS DOC No(s).

Petitioner brings this special proceeding to enforce a purported settlement agreement between the parties. The parties were proceeding with Supplementary Uninsured Motorists Arbitration before the American Arbitration Association, AAA Case No. 01-17-0003-2425. A hearing in the arbitration was held on August 15, 2019 and the parties were awaiting a decision from the arbitrator. In the interim, the parties were engaged in settlement negotiations. Petitioner advances what it claims is a binding settlement agreement constituting an email dated September 19, 2019 from respondent's counsel, Bryan Barenbaum, Esq., to petitioner's counsel, Shelly K. Werbel, Esq., with the subject "Kendall, Erica" that states:

Confirmed -we are settled for 400K

Sincerely,

Bryan Barenbaum, Esq.
Law Offices of Bryan Barenbaum
[Address]
[Phone number]

Meanwhile, the arbitrator issued an award on September 16, 2019 which counsel for both parties as well as respondent herself were unaware of on September 19, 2019. The award was in respondent's favor for \$1,000,000 with a \$25,000 setoff in addition to filing fees.

Dated: May 27, 2020

[Signature]
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [X] DENIED [] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

Respondent maintains that there was no binding settlement between the parties. Respondent points to an email Attorney Barenbaum received from Attorney Werbel after the so-called settlement agreement which states:

Here is the Release and Trust Agreement for \$400,000. Get it signed quickly before any decision comes in, wouldn't want your client renegeing.

There is no dispute that neither the release nor trust agreement were ever executed by respondent.

Pursuant to CPLR 2104:

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. 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.

"To be enforceable, a settlement agreement must set forth all material terms, and there must be [a] clear mutual accord between the parties" (*Teixeira v. Woodhaven Center of Care*, 173 AD3d 1108 [2d Dept 2019] quoting *Martin v. Harrington*, 139 AD3d 1017 [2d Dept 2016]; see also *Options Group, Inc. v. Vyas*, 91 AD3d 446 [1st Dept 2012]).

Here, the court does not find that Attorney Barenbaum's email is sufficient to satisfy CPLR 2104 as it does not appear to be subscribed (see *i.e. Forcelli v. Gelco Corporation* (109 AD3d 244 [2d Dept 2013]) nor does it contain all the material terms of a settlement agreement between the parties (*cf. Birches at Schoharie, L.P. v. Schoharie Senior General Partner LLC*, 169 AD3d 1192 [3d Dept 2019]). The body of Attorney Barenbaum's emails are followed by prepopulated text starting with Sincerely, Bryan Barenbaum, Esq. As a result, the body of the email petitioner relies upon was not actually subscribed by respondent or her attorney.

Further, the only term the parties seemed to agree upon was a sum of money, and just like in *Teixeira, supra*, Attorney Barenbaum's email was followed by an email from Attorney Werbel with "a discussion of further occurrences necessary to finalize the agreement." Attorney Werbel even evidenced an understanding that the settlement may not be binding. On this point, the facts here are also distinguishable from *Forcelli, supra*, where a confirming email was sent but releases were then signed and executed.

Accordingly, it is hereby **ADJUDGED** that the petition is denied and this proceeding dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision, Order and Judgment of the court.

Dated: May 27, 2020
New York, New York

So Ordered:



Hon. Lynn R. Koller, J.S.C.