SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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KARI STOLWORTHY and MARK STOLWORTHY,

Plaintiffs,

- v -

BARON LONNER, M.D., SCOLIOSIS & SPINE ASSOCIATES, BARON S. LONNER, M.D., P.C., CHANLAND ROONPRAPUNT, M.D., ARKADY DUBOV, KYUSANG S. LEE, M.D., MOUNT SINAI BETH ISRAEL MEDICAL CENTER, THE MOUNT SINAI MEDICAL CENTER, INC., THE MOUNT SINAI HOSPITAL, and BETH ISRAEL MEDICAL CENTER,

Defendants.

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INDEX NO. 805423/2017

MOTION DATE 12/15/2020

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 123, 124, 125, 126, 127, 128, 130, and 131 (Motion 002)

were read on this motion to/for ENFORCE SETTLEMENT AGREEMENT.

In this action to recover damages for medical malpractice, the defendants Baron Lonner, M.D., doing business as Scoliosis & Spine Associates, Beth Israel Medical Center, doing business as Mount Sinai Beth Israel Medical Center, Arkady Dubov, and Kyusang S. Lee, M.D. (collectively the settling defendants), move to enforce a settlement agreement that they claim to have entered into with the plaintiffs. The plaintiffs oppose the motion, asserting that, although they agreed to the amount of the settlement, they did not assent to numerous additional conditions or terms that they characterize as the settling defendants' "counterproposals." The motion is granted, and the plaintiffs are directed to execute and provide the defendants with the documents necessary to effectuate the settlement pursuant to the terms described herein.

The underlying facts of this dispute are developed in detail in this court's December 15, 2020 order, issued in connection with MOTION SEQUENCE 001. In short, the plaintiff Kari

Stolworthy asserts that the defendants committed medical malpractice in treating her for lumbar stenosis and performing spinal laminectomy, decompression, and fusion surgery upon her.

As relevant to this motion, on May 26, 2020, the parties participated in a private mediation session via remote video conference, but the parties did not reach a settlement at that juncture. According to the settling defendants, settlement discussions nonetheless continued, as the plaintiffs' attorney and the attorney for the defendants' insurance administrator, Healthcare Risk Advisors (hereinafter HRA), participated in multiple telephone conversations and exchanged numerous emails.

There is no dispute that, on July 9, 2020, the plaintiffs and the settling defendants reached an agreement as to a sum certain that would settle the action, and that the attorneys for those parties memorialized that amount in email correspondence. Specifically, in an email bearing that date, one of the plaintiffs' attorneys, James Wilkens, wrote to the settling defendants' attorneys as follows:

> "OK guys – this case is settled for $[xxxx]. I am still going to file the stip adjourning [codefendant Roonprapunt's summary judgment] motion and will subsequently have office advise court of settlement.
>
> "COREY CAN YOU CALL ME ON MY CELL – . . . - IT IS ABOUT SOMETHING ELSE
>
> "JIM WILKENS."

According to the settling defendants, once that number was agreed upon, the plaintiffs' HRA's counsel stipulated, among other things, that the settlement fund would be paid by Beth Israel, Dubov, and Lee, and that the plaintiffs would discontinue the matter as against both Lonner and codefendant Chanland Roonprapunt, without contribution to the settlement proceeds from either of them. Although separately represented, Roonprapunt was insured by the same insurance carrier as the settling defendants. The court notes that, in its December 15, 2020 order, it denied Roonprapunt's motion for summary judgment dismissing the complaint

insofar as asserted against him. Roonprapunt now joins the settling defendants in requesting that the settlement agreement be enforced.

By email dated July 13, 2020, HRA's attorney, Valerie Froehlich, wrote on behalf of the settling defendants to another of the plaintiffs' attorneys, Elizabeth Montesano, as follows:

> "Hi Elizabeth,
>
> Please allow this e-mail to memorialize our telephone conversation last week regarding the above referenced matter. Namely, said matter has settled for $[xxx]. You and your clients agree to execute the closing papers required by HRA which includes stipulation of discontinuances; hold harmless agreement; general release; settlement agreement; waiver of CPLR 5003-a; and an affidavit of "no liens", "final lien" letters or "no lien" letters from lien holders, whichever is appropriate in this case and deemed necessary by HRA. In addition, as discussed part of the closing documents will contain language regarding the fact the settlement does not constitute an admission of liability on the part of the defendants and a confidentiality provision.
>
> "Lastly, as discussed HRA is working physically in the office but on a limited schedule. Settlement proceeds are currently being wired to plaintiff's counsel's IOLA account. A form requesting your firm's banking information will need to be completed and provided with the executed closing papers in order for the funds to be wired. Kindly respond to this e-mail to confirm the terms of the settlement. Thank you."

In a July 14, 2020 email, the settling defendants' litigation attorney, Corey Wishner, also wrote to Montesano, sending her the following:

> "Have you looked into the lien situation in this case?
> We had received a notice of lien from Optum on behalf of Price Waterhouse. They didn't specify a lien amount, but did provide a printout of payments totaling [$xxx]. Do you know if this is an ERISA lien subject to a right of recovery?
> Is it going to be paid?
>
> "Is [sic] there any Medicare, Medicaid or other municipal liens?"

By email dated July 16, 2020, Montesano, on behalf of the plaintiffs, responded to Froehlich with the following message:

> "Hello Valerie,
>
> "My understanding is that there is a 60 day waiver of CPLR §5003-a, there is a small lien that I have a final lien letter to provide to your counsel, there will be provisions in the documents that there is no admission of liability on the part of the defendants and a confidentiality provision. Additionally, I understand that the funds will be wired and you will provide a form for the banking information.

> Please forward your settlement documents so that I can review them.
>
> "Thank you.
>
> "Elizabeth."

Several minutes after receiving that message, Froehlich responded that "[m]y counsel is preparing the papers. If you have not already done so please send them the lien letters you have regarding this matter. Thanks."

On August 11, 2020, Wishner emailed Montesano a formal transmittal letter "and the several closing documents that need to be executed in connection with the settlement of this matter," requesting that she let him know if she had any questions. As set forth in the transmittal letter:

> "This will confirm the settlement of the above-referenced matter on behalf of defendants Beth Israel Medical Center, Dr. Kyusang Lee and Arkadiy Dubov in the total amount of [$xxx]. Attached please find copies of the following closing document forms that need to be executed prior to payment of the settlement funds:
>
> "1. Settlement Agreement
> 2. *Hold Harmless Agreement*
> 3. General Release
> 4. *Two Affidavits of Liens*
> 5. Five Stipulations of Discontinuance as to the defendants, *including codefendant Dr. Roonprapunt.*
> 6. Wire Transfer Information Form.
>
> "Please note that, due to Covid-19, HRA has elected to transmit the settlement funds by wire transfer directly to your firm's escrow account. Thus, the attached wire transfer information form must be executed by your office.
>
> "Once executed, please forward all signed documents, along with your firm's W-9, to my attention both by mail, and by email, and I will transmit them to HRA for processing. We will file the stipulations of discontinuance as to the non-settling defendants upon receipt of the executed documents, once they are also signed by codefendant counsel. We will hold off filing the stipulations of discontinuances as to the settling defendants until payment of the settlement funds has been made.
>
> "Thank you for your attention to the above. If you have any questions or concerns, please do not hesitate to contact me at your earliest convenience"

(emphasis added). The Settlement Agreement that was attached to the email provided that the settling defendants declined to admit liability, and that only Beth Israel, Dubov, and Lee would contribute to the settlement fund. It further provided that the plaintiffs would waive the 21-day prompt-payment provisions of CPLR 5003-a(a), the settlement proceeds would be wired to the plaintiffs' attorneys' IOLA account, any liens would be paid from the settlement proceeds, the parties would keep the terms of the settlement confidential, and that the parties represented that they hadn't assigned any interest in the claims. Later that same day, Montesano returned several of the agreements and documents to Wishner with proposed "blue-lined" amendments proposed by the plaintiffs.

In a responsive email dated August 13, 2020, Wishner wrote to Montesano as follows:

> "Attached please find my latest cover letter, as well as the closing papers including the revised versions of the General Release, Hold Harmless, Settlement Agreement and Wire Instruction Form. *HRA accepted all of your requested changes.* Please note that I changed the tense of the second time the word "exchange" is mentioned to "exchanged" in the last sentence of the Confidentiality Agreement clauses in both the Settlement Agreement and Hold Harmless Agreement as I believe that it what you intended. (The word exchange is mentioned twice in each sentence. Only the second time did I change it.)
>
> "Let me know if you have any questions.
>
> "Please confirm receipt as well.
>
> "Thanks,
>
> "Corey."

(emphasis added). The transmittal letter reiterated the substance of the email message, and concluded by requesting that

> "Once executed, please forward all signed documents, along with your firm's W-9, to my attention both by mail, and by email, and I will transmit them to HRA for processing. We will file the stipulations of discontinuance as to the non-settling defendants upon receipt of the executed documents, once they are also signed by codefendant counsel. We will hold off filing the stipulations of discontinuances as to the settling defendants until payment of the settlement funds has been made."

Later that same day, Montesano sent a confirmatory email to Wishner, indicating that the package of documents that he had previously forwarded to her "looks complete." Wishner replied to Montesano to inquire as to whether she required any further documentation. He did not receive any further email or regular mail correspondence in response to that inquiry.

On August 27, 2020, Montesano contacted Wishner, and informed him that the plaintiffs were no longer willing to accept the terms of the settlement. The plaintiffs provided no reason at the time. This motion ensued.

Settlements "are favored by the courts and not lightly cast aside" (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]). CPLR 2104 provides that "[a]n agreement between the parties or their attorneys relating to any matter in an action . . . is not binding upon a party unless it is in a writing subscribed by him or his attorney." Nonetheless, "a binding agreement may be assembled from more than one writing" (*Nolfi Masonry Corp v Lasker-Goldman Corp*., 160 AD2d 186, 187 [1st Dept 1990]).

Consequently, where all of the essential terms of a settlement agreement are set forth in documents and correspondence executed by counsel, including those executed electronically and exchanged via email, that agreement is enforceable (*see Jimenez v Yanne*, 152 AD3d 434, 434 [1st Dept 2017]; *Forcelli v Gelco Corp*., 109 AD3d 244, 248 [2d Dept 2013]; *Kasowitz, Benson, Torres & Friedman, LLP. v Duane Reade*, 98 AD3d 403, 404 [1st Dept 2012]; *Travelers Cas. Ins. Co. of Am. v J. Thomas Constr*., 2020 NY Slip Op 32764[U] [Sup Ct, N.Y. County, Aug. 25, 2020]; *cf. Mark Bruce Intl., Inc. v. Blank Rome, LLP,* 60 AD3d 550, 551 [1st Dept 2009] [terms set forth in e-mail exchange were too indefinite]). That is because email messages that acknowledge a settlement and are signed electronically by a party's attorney satisfy the requirement of a subscribed writing pursuant to CPLR 2104 (*see Gaglia v Nash*, 8 AD3d 992, 993 [4th Dept 2004]; *see also Wil Can (USA) Group, Inc. v Zhang,* 73 AD3d 1166, 1167 [2d Dept 2010], *Williamson v Delsner*, 59 AD3d 291, 291 [1st Dept 2009] ["e-mails exchanged

between counsel . . . constitute signed writings (CPLR 2104) within the meaning of the statute of frauds"]).

As the settling defendants correctly note, it is of no moment that an attorney's client is not present at the time that the attorney executes and dispatches a written settlement agreement (*see Pruss v Infiniti of Manhattan, Inc*., 180 AD3d 163, 168 [1st Dept 2020]; *Jimenez v Yanne*, 152 AD3d at 434; *Forcelli v Gelco Corp*., 109 AD3d at 248; *Williamson v Delsner*, 59 AD3d at 291; *Clark v Bristol-Myers Squibb & Co.[In re Silicone Breast Implant Litigation]*, 306 AD2d 82, 84-85 [1st Dept, 2003]), even where the attorney does not have actual, but only apparent, authority to settle the matter (*see Pruss v Infiniti of Manhattan, Inc.*, 180 AD3d at 168; *Wil Can (USA) Group, Inc. v Zhang,* 73 AD3d at 1167; *Clark v Bristol-Myers Squibb & Co. [In re Silicone Breast Implant Litigation],* 306 AD2d at 85). In any event, in the instant matter, the plaintiffs' counsel had complete authority to settle the case, and received permission to settle the matter for the amount agreed upon, subject to any conditions necessary to the effectuate the agreement (*see Kowalchuk v Stroup*, 61 AD3d 118, 122 [1st Dept 2009]; *see also Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC*, 80 AD3d 476, 477 [1st Dept 2011]; *Stevens v Publicis S.A.,* 50 AD3d 253, 255-256 [1st Dept 2008]).

There is no merit to the plaintiffs' suggestion that their personal refusal to sign the final documentation necessary to effectuate the settlement agreement obviates or negates the agreement. "When parties enter into a preliminary agreement, anticipating that a more formal contract will be executed later, the contract is enforceable if it embodies all the essential terms of the contract" (*Wronka v GEM Comm. Mgt*., 49 AD3d 869, 871 [2d Dept 2008]; *see Netherlands Ins. Co. v Endurance Am. Specialty Ins. Co*., 157 AD3d 468, 469 [1st Dept 2018]; *Banc of Am. Sec. LLC v Solow Bldg. Co. II, LLC,* 77 A.D.3d 533, 534 [1st Dept 2010]; *Bed Bath & Beyond Inc. v Ibex Constr., LLC,* 52 AD3d 413, 414 [1st Dept 2008]; *Pescatore v Manniello*, 19 AD3d 571 [2d Dept 2005]).

The settling defendants established that their attorneys' exchange of signed letters and emails with the plaintiffs' attorneys constituted a written agreement between them that constituted a meeting of the minds as to all of the terms of the settlement agreement, and not merely as to the settlement amount. They further demonstrated that the email offers and acceptances were electronically signed by the attorneys for all parties. They have also shown that their exchanges constituted an agreement binding upon their clients. The court rejects the plaintiffs' contention that, although they agreed to the settlement amount, they never agreed to many of the other terms and conditions of settlement, and that the delay in finalizing the settlement was too long in any event. Contrary to the plaintiffs' contention, the contractual language concerning (a) the payment and discharge of liens from the settlement proceeds, (b) the settling defendants' refusal to admit liability, (c) the plaintiffs' waiver of the prompt-payment provisions of CPLR 5003-a(a), (d) confidentiality, (e) the discontinuance of the action against Roonprapunt, and (f) the hold-harmless provisions, were not merely unaccepted counterproposals. All of those terms and conditions were expressly accepted by the plaintiffs' attorneys. Nor did the requirements that the plaintiffs execute both releases and stipulations of discontinuance constitute unaccepted counterproposals; rather, those are statutory requirements without which no settlement can be finalized (*see* CPLR 5003-a).

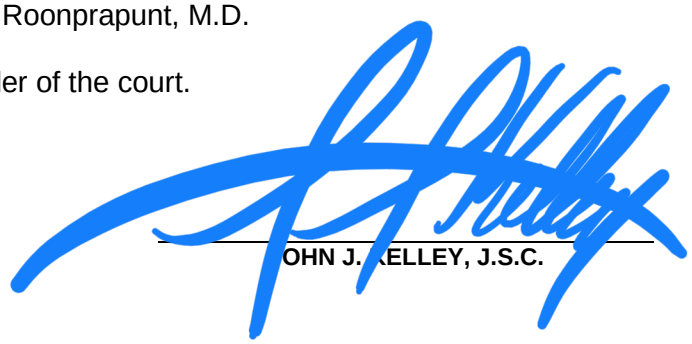
In light of the foregoing, it is,

ORDERED that the motion of the defendants Baron Lonner, M.D., doing business as Scoliosis & Spine Associates, Beth Israel Medical Center, doing business as Mount Sinai Beth Israel Medical Center, Arkady Dubov, and Kyusang S. Lee, M.D., to enforce the settlement agreement between them and the plaintiffs, entered into on or about August 11, 2020, is granted; and it is further,

ORDERED that the plaintiffs are directed forthwith to execute the settlement documentation, as agreed upon by their attorneys and the attorneys for the defendants Baron Lonner, M.D., doing business as Scoliosis & Spine Associates, Beth Israel Medical Center,

doing business as Mount Sinai Beth Israel Medical Center, Arkady Dubov, and Kyusang S. Lee, M.D., all in the forms previously agreed upon, including the Settlement Agreement, the Hold Harmless Agreement, the General Releases, two Affidavits of Liens, and Stipulations of Discontinuance as to all of the defendants, including Baron Lonner, M.D., individually and doing business as Scoliosis & Spine Associates, and Chanland Roonprapunt, M.D., without contribution towards the settlement by Baron Lonner, M.D., individually and doing business as Scoliosis & Spine Associates, and Chanland Roonprapunt, M.D.

This constitutes the Decision and Order of the court.



2/3/2021
DATE

JOHN J. KELLEY, 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		REFERENCE