

<b>Grunberg 77 LLC v Cellular Tel. Co.</b>
2021 NY Slip Op 31847(U)
June 2, 2021
Supreme Court, New York County
Docket Number: 160060/2019
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

<b>PRESENT:</b>	<u>HON. BARBARA JAFFE</u>	<b>PART</b>	<b>IAS MOTION 12</b>
	<i>Justice</i>		
-----X		<b>INDEX NO.</b>	<u>160060/2019</u>
GRUNBERG 77 LLC,		<b>MOTION DATE</b>	_____
Plaintiff,		<b>MOTION SEQ. NO.</b>	<u>003</u>
- v -			

CELLULAR TELEPHONE COMPANY d/b/a AT&T  
WIRELESS n/k/a AT&T,  
  
Defendant.

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 67, 69, 70, 71, 72, 73  
were read on this motion to \_\_\_\_\_ enforce settlement \_\_\_\_\_.

By notice of motion, defendant moves pursuant to CPLR 2104 for an order enforcing an alleged settlement agreement between the parties. Plaintiff opposes.

I. PERTINENT BACKGROUND

By summons and verified complaint dated October 7, 2019, plaintiff commenced this action, alleging that defendant breached the parties' lease agreement. (NYSCEF 1).

On January 5, 2021, counsel for the parties discussed settlement, and the following is the relevant portions of their email exchange:

Defendant's counsel: Although AT&T still disputes all claims asserted by your client, in an effort to resolve the matter amicably, we are authorized to counter your \$285,864.60 demand with an offer of \$128,500. We would like to discuss our offer with you when you are available.

Plaintiff's counsel: I just tried to reach you and left a voicemail. Our client will accept your offer, provided we can get this done quickly.

Defendant's counsel: We have a deal. We will prepare a settlement agreement and release for the claims in this case and will send it to you for review within a day so

we can move this along quickly.

Plaintiff's counsel: My client advises that one of the principals who is intimately involved with AT&T was not informed of the proposed settlement and rejected it out of hand. I apologize for this misunderstanding, but we are still ready to have a dialogue about this case.

(NYSCEF 63).

## II. CONTENTIONS

Defendant contends that as plaintiff's counsel wrote that plaintiff will "accept your offer" in an email signed by him with his signature block, a binding settlement was reached, observing that plaintiff's acceptance was confirmed by subsequent emails. That an unnamed person disapproved of the settlement does not render the agreement null, as plaintiff had authority to settle and never claimed otherwise. That a formal release was not drafted is also immaterial, defendant argues, absent an explicit reservation not to be bound until formal settlement papers were executed. (NYSCEF 61-64).

Plaintiff denies that it accepted a settlement offer, claiming that the parties had a "tentative" settlement, observing that no formal settlement agreement was prepared or finalized, and that defendant indicated that no settlement would be final until the formal papers were drafted and sent to its counsel for review. And, having engaged in discovery after the purported settlement agreement, plaintiff argues, defendant waives its settlement claim. Plaintiff asserts that its counsel's communications with defendant were settlement negotiations and may not be offered as evidence of in support of defendant's motion pursuant to CPLR 4547. As the terms of the agreement were not fully set forth, including when and how payment would be made to plaintiff, the holding and exchange of documents, and the filing terms of the general release and stipulation of discontinuance, there is no enforceable agreement. (NYSCEF 69-71).

In reply, defendant contends that evidence of counsels' email exchange is not precluded

by CPLR 4547, as it is not offered as proof of liability or damages. It denies that it has waived its claim of settlement by participating in discovery, as defendant was obligated to comply with court-ordered discovery until the instant motion is decided. To the extent that not all terms of the agreement were set forth, defendant denies that those terms were material, and it reiterates that the intent to draft formal release papers does not render the settlement non-binding. (NYSCEF 72-73).

### III. ANALYSIS

#### A. Evidence of settlement

Pursuant to CPLR 4547, as pertinent here, evidence of offering or accepting a settlement is “inadmissible as proof of liability for or invalidity of the claim or the amount of damages,” but such evidence is admissible “when it is offered for another purpose.” As the email exchange between counsels is not offered as proof of liability or damages, it may be offered as evidence of settlement. (*See e.g. Jimenez v Yanne*, 152 AD3d 434 [1st Dept 2017] [relying upon email communications between counsels as evidence of an enforceable settlement agreement]).

#### B. Acceptance of settlement

Pursuant to CPLR 2104, as pertinent here, “[a]n 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.” Stipulations are to be construed “as an independent contract subject to settled principles of contractual interpretation.” (*McCoy v Feinman*, 99 NY2d 295, 302 [2002]). The existence of a binding contract is dependent on the “objective manifestation of the intent of the parties,” and when examining the parties’ intent, “disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these,

given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain.” (*PMJ Cap. Corp. v PAF Cap., LLC*, 98 AD3d 429, 430 [1st Dept 2012], quoting *Brown Bros. Elec. Contractors v Beam Const. Corp.*, 41 NY2d 397, 399–400 [1977]).

Where a party qualifies its acceptance of an order with conditions, it is deemed a rejection of the offer (*Silber v New York Life Ins. Co.*, 92 AD3d 436, 440 [1st Dept 2012]), and stipulations are not binding when a party manifests an intent to be bound only by a written agreement, which is established “by a showing that a party made an explicit reservation that there would be no contract until the full formal document is completed and executed.” (*Kowalchuk v Stroup*, 61 AD3d 118, 123 [1st Dept 2009]).

Here, plaintiff’s counsel’s statement that plaintiff “will” accept the offer “provided” that the execution would be done quickly reflects that plaintiff did not accept defendant’s offer, but only expressed a future intent to accept once the formal settlement papers were drafted. Moreover, while defendant’s counsel declares that a deal has been reached, he also writes that he will prepare a formal agreement for plaintiff’s counsel to review, so that they “can move this along quickly,” reflecting an acknowledgement that the execution of the papers is necessary for the settlement to be binding.

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant’s motion is denied; and it is further

ORDERED, that the parties either enter into a stipulation encompassing their compliance conference on or before September 1, 2021, or appear for the conference in room 341, 60 Centre Street, New York, New York, on September 1, 2021 at 2:15 pm or virtually if necessary.

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**BARBARA JAFFE, J.S.C.**

**6/2/2021**

**DATE**

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE