

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF  
JOHN F. MALONE  
PRESIDING JUDGE, CHANCERY



COURTHOUSE  
ELIZABETH, NEW JERSEY 07207

April 16, 2012

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Re: Partners Pharmacy Services, LLC v. Halbert, *et al.*  
Docket No. C-72-09

Dear Counsel:

This letter is the court's decision regarding defendants' motion to enforce settlement in the referenced matter.

This matter involves the defendants' motion to enforce a settlement which defendants assert was reached as a result of mediation before a retired Judge. The plaintiff contends that the motion must be denied since defendants are attempting to rely upon correspondence which constitutes confidential mediation communications. Additionally, the plaintiff asserts that no settlement was reached since there was no meeting of the minds on essential terms. The dispute raises the conflict between the public policy favoring settlements and the policy respecting the confidentiality of mediation communications.

Defendants argue that they are entitled to enforce the settlement they reached with the plaintiff. Defendants note that settlements are strongly favored by the State's public policy. *Department of Public Advocate v. N.J. Board of Public Utilities*, 206 N.J. Super. 523 (App. Div. 1985). Defendants contend that the parties agreed on the basic terms of a settlement; however, did not prepare a formal settlement agreement. The defendants assert that they should not be denied the ability to enforce the settlement because the plaintiff subsequently reneged on the agreement. Defendants point to *Willingboro Mall Ltd. v. 240-242 Franklin Avenue, L.L.C.*, 421 N.J. Super. 445 (App. Div. 2011) for the proposition that an oral settlement reached during mediation may be enforced by the court. Recognizing that the court in *Willingboro* was dealing with the situation involving a waiver of confidentiality, the defendants assert that enforcement is appropriate here even in the absence of a waiver. It is defendants contention that even if the parties agreed that mediation communications were to be confidential, it could not be intended to extend to post mediation communications memorializing the settlement. It is defendants' contention that they achieved settlement and left the mediator with the understanding that a written agreement would be prepared and executed. Thereafter, e-mails were exchanged which evidence the essential terms of the agreement. Defendants assert that the settlement as set forth in the e-mails is enforceable by the court. It is defendants' contention that the e-mails are outside the scope of the confidentiality afforded to mediation

communications since mediation was complete and the attorneys were merely addressing the details of the settlement for purposes of drafting an agreement.

Plaintiff asserts that the parties were engaged in mediation governed by the Uniform Mediation Act which allows a party to the mediation to refuse to disclose mediation communications. *Lehr v. Afflitto*, 382 N.J. Super. 376 (App. Div. 2006). In this case, plaintiff indicates that it did not waive such privilege. Plaintiff contends that to support their motion, defendants rely solely upon inadmissible, privileged mediation communications. Plaintiff notes that defendants have submitted e-mail communications between the parties which plaintiff contends do not indicate that the mediation process had concluded. The e-mail communications according to plaintiff constitute communications within the continuing mediation and are therefore confidential. Plaintiff points out that under Uniform Mediation Act § 6(a)(1), the only writing which could establish the existence of a settlement agreement is one that is signed by all parties. Since no such writing exists, it is improper for defendants to attempt to prove the existence of a settlement by reference to attorney communications.

Plaintiff further argues that it is faced with an unresolvable dilemma of either violating the mediation privilege by submitting its own documentation to rebut that submitted by defendants and fully explain what occurred or allowing a decision to be made on incomplete information. It is plaintiff's position that the defendants' supporting documentation does not demonstrate a meeting of the minds, but only an exchange of offers and counteroffers.

Plaintiff argues that the court should not consider defendants' certification on the e-mails and that the motion to enforce settlement should be denied. In the alternative, plaintiff contends that the motion should be denied because the e-mails, if considered, do not demonstrate that the parties reach an agreement.

The question presented is whether the post mediation correspondence between the attorneys is confidential as mediation communications or outside the confines of mediation thus, subject to disclosure.

Settlements reached at a complementary dispute resolution session, such as mediation, must be reduced to writing expeditiously, but not necessarily at the mediation session. Clearly then following the completion of a successful mediation, an agreement would be prepared and executed by the parties. The process of preparing an agreement would reasonably include exchanges of drafts or suggested language for inclusion in the agreement. The *Willingboro* court acknowledged, but did not decide, the issue of enforcement of an oral agreement reach through mediation in the absence of waiver of confidentiality. The court noted that in such circumstances *N.J.S.A. 2A:23C-4* and *R. 1:40-4(d)* "presents obstacles to enforcement of an oral agreement." Whether such obstacles could be overcome was an issue left for another day.

The confidentiality of mediation communications is strongly expressed in the statute and rule creating the "obstacle" referred to in *Willingboro*. This issue has been addressed by Courts in other jurisdictions. In *Beazer East, Inc. v. The Mead Corp.*, 412 F.3d 429, 436 (3d Cir.2005), the court stated that in connection

with the resolution of a dispute claim that an oral agreement constitutes or defines a settlement; "a court typically investigates the negotiation process in order to explore the existence and nature of the alleged agreement. In the absence of evidentiary limitations, this probing is likely to infringe the parties' expectation of confidentiality." In *Ryan v. Garcia*, the California Appellate Court held that admission of statements made during mediation to prove that the parties orally settled a dispute violated the use of protected statement made in the course of mediation. 27 Cal. App. 4<sup>th</sup> 1006, 33 Cal. Rptr. 2d 158 (3d. Dist. 1994).

In order to consider defendants' claim that the case is settled not only would this court be required to review the e-mails presented, additional documents would need to be reviewed. Furthermore, it would be likely that a plenary hearing would be needed to determine if a settlement had been reached. *Harrington v. Harrington*, 281 N.J. Super. 39 (App. Div. 1985). Such review would improperly intrude into the mediation process.

The court concludes that in the absence of waiver of confidentiality by the plaintiff, the defendants' motion to enforce settlement must be denied.

This court is aware that the defendants in this case assert that they negotiated in good faith to reach a settlement. The mediator confirmed his understanding that a settlement was reached. The ruling of the court leaves defendants without a mechanism to enforce the settlement, if in fact a settlement was reached. The court must balance the harms presented. Either

the defendants must be denied the opportunity to present proof of settlement or the plaintiff's right to confidentiality must be abridged. This court has concluded that the expectation of confidentiality in the mediation process must be protected.

Very truly yours,

A handwritten signature in black ink, appearing to read 'J. Malone', written in a cursive style.

JOHN F. MALONE, P.J.Ch.

JFM/pfk