'Final Version' of Settlement Agreement Not Enforceable When Client Withholds Signature

by Thomas E.L. Dewey

A party can withhold his signature and remain unbound by a settlement agreement, even when his attorney had actual authority to approve material terms of the settlement and approved a "final version" of the settlement draft. That was the court's conclusion in a recent case in the Southern District of New York.

In *Fernandez v. HR Parking*, 16-cv-2762, the court denied a motion to enforce a written settlement agreement that attorneys on both sides had approved, after two of the five plaintiffs refused to sign. Using the four-factor test from *Winston v. Mediafare Ent.*, 777 F.2d 78, 80 (2d Cir. 1985), the court concluded that the parties had communicated an intent not to be bound until a written agreement had been fully executed.

Background

Plaintiffs were five former employees of HR Parking who had brought claims under the Fair Labor Standards Act for failure to pay overtime in their jobs as valets. Defendants included HR Parking, its owner, and Open Road Audi of Manhattan, a car dealership that had contracted with HR Parking for valet services. The complaint was filed on April 13, 2016. After years of litigation before Judge Gabriel Gorenstein, the case was set for a jury trial on Monday, June 21, 2021.

On the Thursday before trial, plaintiffs' attorney John M. Gurrieri notified the court, via letter, that "[t]he plaintiffs have settled in principle with all defendants." The court adjourned the trial and gave the parties time to submit both a written settlement agreement and a fairness letter, as is required to settle FLSA cases under Second Circuit precedent.

Over the next several days, the parties exchanged draft settlement agreements. By June 30, a draft was circulated that all the attorneys referred to as the "Final Version." On July 7, Gurrieri emailed opposing counsel: "My clients are scheduled to come in today and tomorrow to sign the agreement." The following day, he circulated a new version of the agreement reflecting a few changes. All five defendants signed that document; two of the plaintiffs did not.

On July 29, Gurrieri notified the court that "two plaintiffs are refusing to sign the settlement agreement." One of the holdouts objected to the payment terms. The other objected to the release provision, believing he had a possible retaliation claim against the owner of HR Parking.

The court responded by ordering Gurrieri to submit a sworn statement addressing whether, when he wrote the court that the case had "settled in principle," he had actual authority to settle on his clients' behalf. Gurrieri responded that he had actual authority to settle for the amounts in the agreement. As the court would later find, however, it was not clear that Gurrieri had authority to agree to particular non-monetary terms.

On Sept. 21, 2021, Open Road filed a motion to enforce the settlement agreement, arguing that the essential terms of the agreement had been reached as of July 8, and that the plaintiffs intended to be bound by that agreement, even though they hadn't signed it. On October 22, the court held a conference to "obtain a clearer factual narrative of what took place between the parties." At the end of that conference, Judge Gorenstein "explained that the defendants had failed to come forward with evidence from which the court could justify a conclusion that an enforceable agreement had been reached." The judge re-scheduled the case for trial in March 2022. A formal order denying the motion came down on Dec. 28, 2021.

The Court's Decision

In a 10-page opinion, the court began its analysis by noting "that if the dollar amounts of the settlement were the only material terms, the court would have no trouble concluding that there had been an agreement as to those amounts." However, because the non-monetary terms in dispute were also material terms, the court was required to ask whether the proposed "Final Version" of the agreement, as agreed to by the attorneys, was enforceable without signatures from both sides.

Citing *Winston*, 777 F.2d at 80, the court laid out the four factors used to "determine whether the parties intended to be bound in the absence of a document executed by both sides": "(1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing."

For the first *Winston* factor, the court found several indications that the parties had reserved the right not to be bound prior to the document's execution. First, the document contained the phrase "it is hereby agreed as follows." Quoting *Ciaramella v. Reader's Dig. Ass'n*, 131 F.3d 320, 324 (2d Cir. 1997), the court found that "language such as 'hereby' shows that 'only the terms of the settlement agreement, and not any preexisting pact, would legally bind the parties.'"

Second, the draft agreement included a provision wherein plaintiffs were to represent that they discussed the agreement with counsel and fully understood and agreed to its terms.

Third, a clause in the draft prohibited modification except by signed writing. The court said this pro

vision was less persuasive than a merger clause, but still indicated "that a signed writing was contemplated for the underlying contract of which it is a part."

Fourth, the draft contained a "counterparts" provision, which stated that "[t]o signify their agreement to the terms of this Agreement and Release, the parties have executed this Agreement on the date set forth opposite their signatures." The court found that clause's reference to execution "strongly indicates that the parties did not intend to be bound in the absence of such execution."

Finally, the court reviewed the parties' correspondence, and found it instructive that the attorneys referenced needing to send the agreement to their clients for execution. Thus, the court found the first *Winston* factor favored non-enforcement.

For the second *Winston* factor, the court found there had been no partial performance of the draft agreement. Judge Gorenstein noted that although at least one previous case had found a request for adjournment constituted partial performance, the June 17 letter in this case only referenced an agreement "in principle." Such an agreement could not be used to enforce the particular terms of the so-called "Final Version."

The third *Winston* factor considers "whether there was 'literally nothing left to negotiate.'" *Winston*, 777 F.2d at 82. Here, the court found that the monetary terms had been agreed to, notwithstanding one holdout plaintiff, whose refusal the court called "the legal equivalent of buyer's remorse." However, the terms of the release provision had not been assented to by the other holdout plaintiff. The defendants made it clear at the October 22 conference that they would not agree to a settlement that did not include the release provision.Therefore, the court concluded that the release provision was of sufficient importance that failure to agree counseled against enforcement.

Finally, for the fourth *Winston* factor, the court noted that agreements to settle FSLA claims are virtually always memorialized in writing, because of the Second Circuit's requirement that such settlements be approved by the court.

Thus, the court found that all four *Winston* factors weighed against enforcement of the draft agreement. It denied the defendants' motion to enforce the "Final Version" never signed by plaintiffs.

Conclusions

The court's decision in *Fernandez v. HR Parking* offers a number of lessons. It demonstrates that signatures often still matter when it comes to creating an enforceable settlement. It serves as a reminder that the language is extremely important, both in settlement documents—where seemingly innocuous phrases like "it is hereby agreed" may be read as decisive—and in communications—where an attorney's characterization to opposing counsel or the court may be scrutinized to determine the contours of an

agreement. Finally, the decision highlights the importance both of keeping clients informed of all material provisions of an agreement as the details are being worked out, and of getting clarity about the scope of authority.

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