Tentative Settlement Agreement Unenforceable Without Intent to Be Bound

by Thomas E.L. Dewey

Parties commonly agree on the monetary value of a settlement before beginning work on formal settlement documents. *Xie v. Caruso, Spillane, Leighton, Contrastano, Savino & Mollar*, No. 18-cv-12092 (JPO), 2022 WL 4547377 (S.D.N.Y. Sept. 29, 2022), illustrates that even if the parties reach an understanding on the settlement amount, a settlement agreement is not enforceable until it meets certain other criteria. When determining whether to enforce an unsigned settlement agreement, courts will closely examine drafts of the agreement and any unresolved issues between the parties. Enforceability of the settlement agreement will turn on whether the parties demonstrated an intent to be bound by the agreement. Courts will not enforce a draft settlement agreement that contains terms evincing an intent to be bound only upon formal execution, nor will they ignore the fact that parties had significant points of contention standing in the way of a final agreement.

Background

In December 2018, plaintiff Agnes Xie filed a legal malpractice action against the law firm Caruso, Spillane, Leighton, Contrastano, Savino & Mollar and two individual attorneys relating to their representation of her in a hearing before the New York State Workers' Compensation Board.

The parties began settlement discussions in 2019, and in January 2021, Xie emailed her lawyer, Andrew Bluestone, stating that she agreed to accept $47,500 to settle the case. Bluestone then informed the defendants' counsel by email that his client would settle for $55,000, accounting for his own fee of $7,500. The defendants' counsel confirmed by email that her clients consented to the $55,000 settlement and asked Bluestone to forward closing papers.

Xie's counsel submitted a joint letter to the court stating that the parties were preparing settlement papers and asking the court to cancel a conference scheduled the next day. The court issued an order dismissing the case based on the settlement in principle, subject to reopening within 30 days.

As the parties circulated revised drafts of the settlement agreement, a sticking point in the negotiations was Xie's insistence that she not incur tax liability for settlement proceeds. As discussions between the parties continued, Xie sought additional time to finalize the settlement. Xie proposed four provisions that the defendants ultimately rejected: a clause stating that the defendants would be in breach of the settlement agreement if they issued Xie an IRS Form 1099; a clause stating that the settlement sum would not be treated as part of Xie's gross income; a clause that would bind the defendants' insurance company to accept Xie's insurance claims; and a clause requiring the losing party to pay attorney fees if there was litigation over the settlement amount.

Negotiations came to a halt and no formal settlement agreement was ever signed. Xie petitioned the court to reopen the case and the defendants subsequently sought to enforce a $55,000 settlement.

The Court's Decision

Applying the four-factor test in *Winston v. Mediafare Entertainment*, 777 F.2d 78, 80 (2d Cir. 1985), the court determined that the settlement agreement was unenforceable. The four *Winston* factors are: "whether there has been express reservation of the right not to be bound in the absence of a writing; whether there has been a partial performance of the contract; whether all of the terms of the alleged contract have been agreed upon; and whether the agreement at issue is the type of contract that is usually committed to writing." *Xie*, 2022 WL 4547377, at *2 (quoting Winston, 777 F.2d at 80). The court noted that the *Winston* test is meant to discern intent of the parties and determine whether and when a contract was formed.

The court found that the first *Winston* factor, considered the most important of the four, weighed against enforcement of the settlement agreement. While this factor concerns whether a party "expressly" reserved the right not to be bound before execution of a written settlement agreement, the court observed that it must also consider whether there have been implied reservations of the right not to be bound. Here, the parties' conduct implied such a reservation: the draft agreements stated that settlement funds would not be disbursed until the execution of a written agreement, and all drafts included a merger clause stating that the agreement set forth the entire understanding of the parties and superseded all other agreements (either oral or in writing) between the parties regarding settlement.

The court held that the *second* factor—partial performance—came out neutral in this case. The defendants had not paid Xie any part of the alleged $55,000 settlement, which weighed against enforcement. However, favoring the defendants was the fact that the parties had abandoned litigation activities believing a settlement was imminent.

The third factor, which asks whether all terms of the alleged contract have been agreed upon, weighed against enforcement. The court noted that it must determine whether there was "literally nothing left to negotiate," and that even minor or technical points of disagreement were sufficient to show that a final agreement had not been reached. For Xie and the defendants, multiple substantive points of disagreement remained unresolved, including Xie's tax liability and representations by the defendants' insurance company. Notwithstanding the defendants' characterization of Xie's position as "unreasonable," "improper," and "likely unenforceable," the court deferred to Xie's intent and honored her right to enter into only the exact contract she desired.

The fourth factor—whether the settlement agreement is the type of agreement that would normally be reduced to writing—favored the defendants because the contemplated settlement was not complex, and involved a single lump-sum payment of $55,000 to resolve all of the plaintiff's claims.

The court concluded by remarking that, while the second *Winston* factor was neutral and the fourth factor weighed in favor of enforcement, the first and third factors of the test were the most important, as they bore on the question of whether Xie intended to be bound by the mere dollar amount component of the settlement.

Conclusion

The court's decision in Xie serves as a reminder that practitioners must pay close attention to the language they include in settlement agreements, even when they are in draft form and negotiations are ongoing. By including terms that reflect their position, such as a merger clause and a clause providing for disbursement of funds only upon execution, counsel and clients can reserve their right not to be bound prior to a final, executed agreement. Further, Xie affirms that an agreement on the monetary value of a settlement is unenforceable unless the parties also agree on other material terms and there are no remaining issues to be negotiated.

This article first appeared in the *New York Law Journal* on February 16, 2023. Thomas E.L. Dewey is a partner at Dewey Pegno & Kramarsky. Christine Kim, an associate at the firm, assisted in the preparation of the article.