Valid Claim for Breach of Oral Settlement Agreement Even Where Party Stated Need To 'Paper' the Deal

by Thomas E.L. Dewey

Many counterparties have reached settlement terms and closed the conversation by stating the need to "paper" the agreement later. But does this caveat preclude enforcement of the oral agreement? A recent decision by the Judge Hurley in the Eastern District of New York, *Westside Winery v. SMT Acquisitions*, No. 2;19-cv-4371, 2021 WL 21668 (E.D.N.Y. Jan. 4, 2021), provides a good warning to counsel that such statements may be insufficient to preclude an action to enforce a settlement agreement.

Background

Plaintiff Westside Winery, a California wine producer, and defendant SMT (a wine merchant), were parties to a series of agreements that Westside claimed SMT had breached, and Westside ultimately filed suit. (Another defendant, Palm Bay International, guaranteed some of SMT's obligations to Westside. See *Westside Winery v. SMT Acquisitions*, No. 19-CV-4371, 2020 WL 8413554, at *2 (E.D.N.Y. Nov. 5, 2020) (Report & Recommendation).) The parties resolved that lawsuit in a May 2019 settlement agreement, which required, among other things, that SMT take delivery of certain of Westside's wine products. Just two months later, SMT allegedly breached the settlement agreement by failing to take possession of some of the wine, which SMT claimed were "smoke tainted" from California wildfires. Thus, Westside commenced another action in July 2019, seeking damages for breach of the May 2019 agreement. See Report & Recommendation, at *2.

Hoping to reach an amicable resolution of the dispute, counsel arranged a no-lawyers call between their clients, which, Westside alleged, resulted in a new, oral settlement agreement in December 2019. *Westside Winery*, 2021 WL 21668, at *1. This agreement allegedly required SMT to accept the previously-rejected wine. SMT's lawyer emailed Westside's lawyer, noting her understanding that the parties had agreed to a settlement in principle and stating "'we will have to paper this and of course each confirm the details with our clients.'" Id. at *3 (quoting Dkt. No. 41-6). Despite this, SMT once again rejected some of the wine, and Westside amended its complaint to allege breach of both the May 2019 and December 2019 settlement agreements. Id.

SMT moved to dismiss, arguing (1) that the December 2019 settlement agreement was an oral agreement that was not enforceable under the standards set forth in *Winston v. Mediafare Ent.,* 777 F.2d 78 (2d Cir. 1985); and (2) that the settlement discussions were barred under Federal Rule of Evidence 408. Magistrate Judge Locke recommended that the motion be denied, and Judge Hurley agreed.

No 'Express Reservation Not To Be Bound'

The so-called *Winston* factors are used to determine whether an oral agreement is enforceable. The first of these—and the primary focus of analysis in this case—is "'whether there has been an express reservation of the right not to be bound in the absence of a writing.'" *Westside Winery*, 2021 WL 21668, at *2 (quoting *Winston, 777* F.2d at 80-81).

SMT's counsel argued that the email cited above—"'we will have to paper this and of course each confirm the details with our clients'"—sufficiently demonstrated an intent not to be bound absent a writing. Judge Hurley, however, disagreed, relying primarily on the standard on a motion to dismiss under Rule 12(b)(6). He noted that SMT's "reliance on this document [was] misplaced at the pleadings stage," which prohibits reference to documents and factual evidence outside the four corners of the complaint. Id. at *3.

But Judge Hurley also noted that, even if the email were properly considered on a motion to dismiss, "[r]ead in a plaintiff-friendly light, the email merely reflects … an intention to memorialize the agreed-upon terms in writing … and not … a reservation not to be bound until then." Id.

SMT's Partial Performance

Judge Hurley held that, based on the allegations in the complaint, the second *Winston* factor also favored Westside. The second *Winston* factor is whether there is partial performance, which "is an unmistakable signal that one party believes there is a contract; and the party who accepts the performance signals, by that act, that it also understands a contract to be in effect." Id. at *4 (quotation marks and citation omitted). Here, Westside alleged that SMT had paid Westside and accepted some of the wine it had delivered, all in accordance with the December 2019 settlement agreement terms. Id. Because, as Judge Hurley noted, both parties "partially performed their ends of the" oral agreement, it suggested they both believed an agreement was in place. Id. at *4.

Other 'Winston' Factors

The other Winston factors required less analysis. The third is "'whether there was literally nothing left to negotiate.'" Id. (quoting *Winston*, 777 F.2d at 82 (further citations and quotation marks omitted). Judge Hurley noted that SMT did not identify any such unnegotiated terms. And the fourth factor, whether this is the type of contract usually committed to writing, Judge Hurley assumed, "without analysis," favored SMT. Judge Hurley did note, however, that the "clearest indication" for this factor "is the alleged agreement's complexity: the more complex, the more likely an agreement is typically committed to writing." Id. at *5.

Rule 408 Did Not Preclude a Claim Based on Settlement Discussions

SMT's second argument was that the claim based on the December settlement discussions should be stricken under FRE 408 because the facts underlying the claim occurred during settlement discussions. Judge Hurley had little trouble rejecting this argument. He noted, first, that Rule 408 is a rule of evidence, which "precedent instructs against applying … at the pleadings stage." Id. at *6.

He then noted that, even if Rule 408 applied, it bars evidence of settlement negotiations "'to prove or disprove the validity or amount of a disputed claim.'" Id. (quoting FRE 408(a)). Rule 408 does *not* preclude admissibility of settlement negotiations where they form a claim *different* from the one that was the subject of the settlement discussions. Id.

For example, if the December 2019 settlement negotiations had been cited to prove the amount or validity of the *original* agreement, Rule 408 might have precluded them (at least later in the proceedings). But, here, the December 2019 settlement negotiations were cited to show a *new* agreement had been entered into, and separately breached. See id. at *7.

Conclusions

This case poses some interesting lessons and warnings for practitioners. *First*, if either clients or their lawyers reach an agreement in principle but do not want to be bound by that agreement until there is a written settlement document, the parties must say so clearly and explicitly. Apparently, it is insufficient to say details must be confirmed or that the deal must "still be papered." Rather, parties should take care to state that, although they have a deal in principle, they will not proceed with it until it is in a signed writing.

Second, and a thornier question for practitioners, is what value such a writing has in the context of a motion to dismiss. As Judge Hurley noted, if a complaint adequately alleges an oral agreement without reference to any documents, it may not matter at the motion to dismiss phase if the counterparty stated orally or in writing that there was no deal absent a writing. This is also a lesson to a party seeking to *enforce* an oral agreement: If one cites emails and other writings in one's complaint, a court will be permitted to consider them on a motion to dismiss.

Third, practitioners who do not wish for their clients to be bound without a written agreement should discourage their clients from performing until that writing is in place. This factor proved important here.

Because the parties reached an agreement in principle and then acted at least partially in accordance with the terms of that agreement, it was more difficult to dispute, at least at the pleadings stage, that there was an enforceable agreement.

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