

BOBBIE J. MYERS,	:	IN THE COURT OF COMMON PLEAS OF
Plaintiff	:	LYCOMING COUNTY, PENNSYLVANIA
vs.	:	NO. 00-01,582
DOUGLAS ROBERT CAMPBELL	:	PETITION TO COMPEL SETTLEMENT
JEAN M. WOMMER,	:	
Defendants	:	

Date: May 4, 2004

MEMORANDUM OPINION and ORDER

Before the Court is Plaintiff's Petition to Compel Settlement Funds filed March 29, 2004. The Plaintiff seeks to compel Defendants Shamrock Grill RFG Co. (Shamrock) and Kelly's Bar and Grill, Inc. (Kelly's) to each pay \$5,000 as their share of a global settlement of Plaintiff's claims.

On April 16, 2004, at the time set for a hearing and argument, on-the-record statements of counsel were received. Counsel agreed to present evidence through their statements as opposed to testimony under oath.

Through its counsel, Richard J. Callahan, Esquire, Shamrock acknowledged that it had reached a settlement with the Plaintiff, but that it had also failed to tender its \$5,000 portion of the global settlement. At the argument, this Court ascertained that Shamrock was willing to tender the \$5,000 to Plaintiff in exchange for an appropriate settlement discontinuance of the claim against Shamrock. At that time, this Court directed that the parties should proceed to complete settlement with the tender of the \$5,000 in exchange for documents terminating the action as to Shamrock.

With regard to Kelly's, counsel requested and were given the opportunity to submit documents in support of their respective positions. Those documents have been received and reviewed by the Court. They will be filed to perfect the record on this issue. Specifically, the documents are a letter and attachments from Plaintiff's counsel, Jeff B. Feinman, Esquire, dated April 20, 2004 and received by this Court on April 27, 2004. A letter and attachments from counsel for Kelly's, Scott T. Williams, dated April 19, 2004 and received April 21, 2004.

The Court concludes that no settlement agreement was reached between the Plaintiff and Kelly's. For there to be an enforceable settlement agreement there must have been a meeting of the minds between the Plaintiff and Kelly's. Plaintiff must prove this meeting of the minds by a preponderance of the evidence. Based on the statements of record and the documents submitted, there was no meeting of the minds between counsel for Plaintiff and counsel for Kelly's as would pertain to settlement.

Plaintiff contends that an agreement was reached with Kelly's on April 19, 2002 at the depositions of Defendants Douglas Campbell and Jean Wommer. The evidence submitted indicates that at these depositions, the Defendants made an "informal offer" whereby the bar defendants (Kelly's, Shamrock, and 341 Partners, Inc.) would each pay \$5,000 towards a global settlement. The evidence is not clear as to what point in the depositions the settlement discussions occurred or who said exactly what. However, it does appear to be conceded that the essence of the parties' settlement discussions was that each bar defendant would pay \$5,000.

Based upon representations made on the record at the April 16th hearing and the documents supplied to the Court by the respective attorneys, it is clear that on April 25, 2002 Attorney Feinman for Plaintiff rejected that informal offer. In a letter to all counsel dated April 25, 2002, Attorney Feinman referenced the informal offer by stating:

My understanding is there is an informal offer proposed to your clients by yourselves in the amount of \$5,000 per party, total bar defendants \$15,000. We current (sic) wait your formal tender of this offer. To expeditiously move this matter along, I believe your \$15,000 offer has ripened into a formal one and I have so advised my client of such.

Letter of April 25, 2002 from Attorney Feinman to all Counsel, attached to the document submissions of both Plaintiff and Defendant Kelly's. Then, in the same letter, on behalf of Plaintiff, Attorney Feinman rejected that offer by stating:

... my client is willing to 'split the difference' between the evaluation of the market value of your clients' liquor licenses of \$25,000 per defendant (\$75,000 total) and the \$15,000 informal offer or \$45,000 total.

This was a counter offer. Attorney Feinman, on behalf of Plaintiff, certainly recognized this was a counter offer because he then said, "Kindly respond to this new demand as soon as possible...." The counter offer acted as a rejection of the informal offer and extinguished it.

There was no subsequent agreement between Plaintiff and Kelly's as to a settlement. In a letter to all counsel dated May 8, 2002, Attorney Feinman stated that, "This letter will confirm that we have settled the above referenced for the sum of \$5,000.00 for each bar defendant and \$15,000.00 for Defendants Campbell and Wommer." However, in the timeframe between Attorney Feinman's April 25, 2002 counter-offer letter and his May 8, 2002 letter there is no evidence to support a finding that Attorney Williams, on behalf of Kelly's,

reached an agreement with Plaintiff as to settlement. Indeed, the evidence supports that the subsequent May 8, 2002 letter was a unilateral act by Attorney Feinman just as was his April 25th letter which re-characterized informal discussions into a formal settlement offer. In response to the May 8, 2002 letter it appears the other defendants did do as the letter suggested should be done to consummate settlement – that is, the other defendants prepared and sent releases to Attorney Feinman for his client to execute. Attorney Williams, however, did not prepare nor send a release on behalf of Kelly's.

This Court has asked Plaintiff's counsel to specify the date, time and place where such an ascension on behalf of Attorney Williams occurred. No such evidence has been forthcoming. The closest the evidence comes to it is Attorney Feinman's assertion in paragraph six on page two of the April 20, 2004 letter to this Court which states:

Sometime after April 25, 2002 (specific date unknown) Plaintiff's counsel spoke with all counsel and confirmed settlement thereby, prompted Plaintiff's counsel's May 8, 2002 final settlement confirmation.

In support thereof Attorney Feinman argues that this is supported by the circumstance that no one ordered transcripts of the deposition testimony.

In contrast, Attorney Williams has represented to the Court on the record that he never extended a \$5,000 offer on behalf of Kelly's to Plaintiff's counsel and never had a discussion where he responded in any way to the counter demand made by Attorney Feinman in Attorney Feinman's letter of April 25, 2002. In support thereof, he has submitted copies of multiple letters that he sent to his client requesting a response as to how Kelly's wished to proceed with the case. In these letters, the first dated April 29, 2002, Attorney Williams informed Kelly's of Plaintiff's demand for payment of \$5,000 for settlement of the case.

Attorney Williams did not receive a response from Kelly's. Again, on May 29th, after Attorney Feinman's letter of May 9th would have been received, Attorney Williams wrote to Sandra Cillo, owner of Kelly's to state Plaintiff had confirmed a willingness to settle for \$5,000 and requested that his client contact him to discuss the matter. Notably to this Court this letter did not request that his client foreword the agreed-upon settlement funds as might be expected if a settlement agreement had been finalized. All of Mr. Williams' letters to Kelly's (July 18, 2002, February 26, 2003, April 16, 2003, May 13, 2003, June 10, 2003 and February 9, 2004) are to the same effect. Kelly's owner made no response to any of these letters.

These letters, clearly support that Attorney Williams did not have authority from Kelly's to enter into a settlement agreement with the Plaintiff, that Kellys did not accept an offer to pay \$5,000 in settlement of the case, and that Attorney Williams was not going to enter into a settlement without Kelly's consent.

The Court is convinced that no meeting of the minds occurred between Attorney Williams and Attorney Feinman, which would be necessary in order to conclude that settlement had been reached. Therefore, Plaintiff's Petition to Compel Settlement Funds against Kelly's Bar and Grill, Inc. must be denied.

ORDER

It is hereby ORDERED and DIRECTED that Plaintiff's Petition to Compel Kelly's Bar and Grill, Inc. to tender settlement payment of \$5,000 is DENIED.

It is further ORDERED and DIRECTED that Plaintiff and Defendant Shamrock Grill RFG Co. shall complete the agreed upon payment and exchange of releases within thirty (30) days of this date. Plaintiff shall then mark the record accordingly.

This case is hereby listed for trial in this Court's September 2004 Trial Term. The trial dates will be between September 13-October 1, 2004. Pretrial conference will be held between the dates of August 10-16, 2004. Specific dates will be noticed to the parties at a later date. Jury selection will be August 23-24, 2004 and a settlement conference, if necessary, will be held August 19, 2004. Counsel are attached for the foregoing dates. Counsel shall immediately notify all parties and necessary witnesses of their need to be available on the dates stated above.

All discovery shall be completed not later than June 25, 2004. Any expert reports yet to be filed by the proposing party shall be filed not later than June 1, 2004. Responsive expert reports shall be filed not later than June 25, 2004. All dispositive motions, including motions to exclude expert testimony under Pa. R.C.P. 207.1 shall be filed not later than July 2, 2004.

BY THE COURT:

William S. Kieser, Judge

cc: Scott T. Williams, Esquire
Jeff B. Feinman, Esquire
Judges
Christian J. Kalas, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)