IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

TURNKEY CONSTRUCTION INC., Claimant,	:	NO. 20 - 90045
vs.	:	CIVIL ACTION - LAW
MARK P. LUNDBERG, Owner.	:	*Motion to Compel Settlement*

OPINION & ORDER

AND NOW, after having reviewed Claimant Turnkey Construction Inc.'s Motion to Compel Settlement, the Court hereby issues the following ORDER.

Background

The foregoing involves a Mechanics' Lien Claim filed by Claimant Turnkey Construction Inc. ("Claimant") on February 12, 2020, against property owned by Mark P. Lundberg ("Owner"), located at 1783 Route 220 Highway, Muncy, Lycoming County, Pennsylvania 17756 ("Property"). Claimant's Complaint, filed April 9, 2020, sought $35,400.00, plus interest and costs, allegedly outstanding on the parties' contract for construction, remodeling, and repair work performed at the Property. Owner filed an Answer, New Matter, and Setoff New Matter on May 4, 2020, asserting under New Matter that only $18,474.12 remained pending under the parties' contract, and that such would be paid upon satisfactory completion of the work under the contract. Under the Setoff New Matter, Owner alleged that Claimant breached the contract by failing to perform all of the repair and remodeling work provided for in the contract.

Before the Court is Claimant's Motion to Compel Settlement ("Motion"), filed on June 25, 2020. Claimant filed a Brief in Support of this Motion on October 23, 2020. Owner filed a Brief in Opposition to the Motion on November 11, 2020. The parties have requested that the Court rule on the briefs.[1]

Claimant's Motion alleges that Owner has refused to execute and abide by a Settlement Agreement drafted by Owner's counsel, William Carlucci, Esquire, and

[1] A more detailed summary of the procedural history in this case is provided in this Court's Order dated October 5, 2020.

containing terms to which both parties had agreed, including payment by Owner to Claimant in the amount of $25,850.00, and a waiver by Owner of all future claims against Claimant regarding the Property. Claimant's counsel, Joe Musto, Esquire, received a copy of this Settlement Agreement from Attorney Carlucci via email on June 4, 2020, and returned to Attorney Carlucci that same copy executed by his client on the same date. Owner thereafter failed to execute and return the Settlement Agreement. Claimant seeks a Court Order holding that Owner is bound by the terms and conditions of the Settlement Agreement.

The parties have stipulated to certain issues. Owner, through a proffered Verification, has conceded that Attorney Carlucci was authorized to negotiate a settlement on his behalf as to all relevant terms.[2] Owner has also conceded that any argument that he failed to fully comprehend that the Settlement Agreement waived future warranty claims constituted a unilateral mistake on his part that would not vitiate the Agreement.[3] The only issue left for the Court's determination then, is whether the Settlement Agreement drafted by Attorney Carlucci and sent via email to Attorney Musto constituted an offer of settlement that could be accepted by Claimant to form a binding contract.

Attached as Exhibit A to Claimant's Motion, Claimant has provided evidence of the parties' negotiations in an email communication chain with the subject line "Turnkey v. Lundberg."[4] At the beginning of this chain is an email sent by Attorney Musto to Attorney Carlucci on May 15, 2020, at 3:44 p.m., by which Attorney Musto sent scanned copies of certain discovery requests as well as Claimant's reply to Owner's New Matter. Within this email, Attorney Musto summarized prior settlement discussions, noting that Owner had offered to pay only $18,000.00 of Claimant's initial $35,400.00 claim. After Claimant had made an offer to reduce his claim to $31,000.00, Owner had authorized a counter-offer of $23,000.00. Attorney Musto proposed a mid-point settlement figure of

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[2] *See* Objection to Subpoena Pursuant to Rule 4009.21 and Request for Imposition of Sanction Pursuant to Rule 4019(h) (Ex. A – Verification of Mark P. Lundberg in Opposition to Claimant's Motion to Enforce Settlement Agreement) (Aug. 5, 2020).

[3] *See Farner v. W.C.A.B. (Rockwell Int'l)*, 869 A.2d 1075, 1079 n.5 (Pa. Commw. 2005) (citing *Welsh v. State Employees' Retirement Bd.*, 808 A.2d 261 (Pa. Commw. 2002)) ("Generally, a unilateral mistake which is not caused by the fault of the opposing party affords no basis for relief.").

[4] A more complete version of this email chain is attached as Exhibit A to Owner's Brief in Opposition.

$26,700.00, on the condition that the parties would execute a release of all claims related to the work performed by Claimant at the Property. After some back-and-forth, Owner made a counteroffer of $25,000.00.[5]

By email sent on June 2, 2020 at 4:59 p.m., Attorney Musto indicated that his client had granted him authorization to split the difference between Owner's offered $25,000.00 and Claimant's prior offer of $26,700.00, to settle the case for $25,850.00. By response sent on June 2, 2020 at 5:19 p.m., Attorney Carlucci provided that he did not have authority to go above $25,000.00, but indicated that he would try speaking with his client. By follow-up email sent on June 3, 2020 at 2:58 p.m., Attorney Carlucci attached a document titled "Settlement Agreement" that was identified in the email as a "[f]irst draft for your review and comment."[6]

Paragraph 1 of this draft Settlement Agreement, titled Payment, required payment of $25,850.00 by Owner to Claimant within fifteen (15) days of the parties' mutual execution of the Agreement, which Claimant would accept as payment in full for all labor and material provided by Claimant at the Property. Under Paragraph 2, Withdrawal of Claim, Owner agreed to waive all claims against Claimant regarding labor and materials, although the provision specified it would not function as a waiver of any manufacturer warranties applicable to materials, fixtures, or equipment provided by Claimant. Paragraph 3, Withdrawal of Claim, required Claimant to mark the foregoing action as settled, with prejudice, within ten (10) days of receiving full payment under the Agreement. Paragraph 4, Release, required that the parties release each other from all claims, other than faithful performance of the Agreement, although again specifying that Owner had not waived any manufacturer warranty claims. Paragraph 5, Entire Agreement, specified that the terms within the Settlement Agreement constituted the entire agreement of the parties, not to be contravened by any inconsistent oral representations. Paragraph 6, Modification, provided that no modification of the terms of the Agreement would be effective unless in writing and signed by the party against whom enforcement was sought. Paragraph 7, Waiver of Jury Trial, provided that if any

[5] This counteroffer is referenced in the email chain, but was not communicated by email.
[6] A copy of this draft Settlement Agreement is attached as Exhibit B to the Motion to Compel Settlement.

dispute were to arise regarding the terms of the Agreement, the issue would be resolved by bench trial in the Lycoming County Court of Common Pleas.

In a response sent on June 4, 2020 at 9:45 a.m., Attorney Musto thanked Attorney Carlucci for taking the initiative in drafting a Settlement Agreement, but requested that Attorney Carlucci include certain substitute language. He specifically requested that that the opening provisions of Paragraph 1 be amended to read: "Within fifteen (15) days of delivery of this Agreement bearing signature on behalf of Turnkey Construction, Inc. (hereinafter "Turnkey") to William P. Carlucci, Esquire, Mark P. Lundberg (hereinafter "Lundberg") shall pay Turnkey the net sum of…" He further asked that Paragraph 2 be retitled Waiver of Claims, and the opening provisions of Paragraph 2 be amended to read: "Lundberg hereby waives all claims against Turnkey in connection with labor and materials provided by Turnkey to Lundberg at 1783 Route 220 Highway, Muncy, Lycoming County, Pennsylvania 17756, including any and all warranties by Turnkey."

On June 4, 2020, at 10:15 a.m., Attorney Carlucci sent a response email attaching a document titled "Settlement Agreement.docx." Attorney Carlucci did not include any language in the body of the email, save for his automated signature. This Settlement Agreement document was identical to the prior Agreement identified as a first draft, except that Attorney Carlucci had made certain alterations to Paragraph 1 and Paragraph 2 of the Agreement accordant with Attorney Musto's requests. Paragraph 1 now started with the language: "Within fifteen (15) days of the execution and delivery of this Agreement by Turnkey, Mark P. Lundberg (hereinafter "Lundberg") agrees to pay Turnkey Construction, Inc. (hereinafter "Turnkey") the net sum of…" Paragraph 2 was retitled Waiver of Claims, and the opening language was amended to read: "Lundberg hereby waives all claims against Turnkey, of any nature whatsoever, in connection with labor and materials provided by Turnkey to Lundberg at 1783 Route 220 Highway, Muncy, Lycoming County, Pennsylvania 17756."

Attorney Musto sent a responsive email on June 4, 2020 at 11:44 a.m., attaching this second Settlement Agreement signed by his client. He asked that the document be executed by Attorney Carlucci's client and that an original then be returned to him. Attorney Carlucci provided no response.

Eleven (11) days later, on June 25, 2020 at 9:10 a.m., Attorney Musto sent Attorney Carlucci a follow-up email emphasizing that per the terms of the Settlement Agreement, Owner had only fifteen (15) days from June 4, 2020, to make full payment of the $25,850.00, and further reminding Attorney Carlucci to return an original of the Agreement executed by Owner. Attorney Musto warned that Owner's failure to timely comply with the payment provisions of the Agreement would prompt him to file a Motion to Compel Settlement. Attorney Carlucci replied by email on June 25, 2020 at 9:18 a.m., stating only that he would be filing a motion to Amend Owner's Setoff claim.

After some back-and-forth, in which Attorney Musto expressed some puzzlement as to the deterioration of the parties' accord, Attorney Carlucci sent an email on June 25, 2020 at 8:32 p.m. explaining that his client had a water problem at the Property due to a defect in construction, and that Claimant had been unwilling to address this problem when called for help. By email sent June 26, 2020 at 8:35 a.m., Attorney Musto attached a copy of the Motion to Compel Settlement, and indicated that the matter would have to be resolved through litigation.

Within his Brief in Support of the Motion to Compel Settlement, Claimant argues that the first draft Settlement Agreement sent by Attorney Carlucci to Attorney Musto on June 3, 2020, constituted a written offer to contract. Attorney Musto's response on June 4, 2020 constituted a rejection of the initial offer and the communication of a counteroffer containing alternate terms. Owner then accepted this counteroffer when Attorney Carlucci revised the initial draft Settlement Agreement by making amendments in line with those requested by Attorney Musto on behalf of Claimant.[7] Alternately, Claimant contends that if the first draft did not constitute an offer, then Attorney Carlucci's email on June 4, 2020 containing the revised Settlement Agreement constituted an offer, which was accepted by Claimant's return of the partially executed Settlement Agreement on the same date.[8]

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[7] *See* Second Brief of Claimant in Support of Motion to Compel Settlement at 6 (Oct. 23, 2020) ("Brief in Support").

[8] *See* Brief in Support at 6-7. Claimant also raises issues regarding unilateral mistake, but as noted *supra*, Owner has agreed to waive any argument that the Settlement Agreement is invalid based on his misapprehension as to the scope of certain terms. Further, Claimant raises issues regarding the parol evidence rule. However, the Court at this juncture addresses only whether the parties have agreed to contract, and will not address a dispute as to the interpretation of language within the Agreement itself.

Within his Brief in Opposition, Owner propounds various arguments, first asserting that in situations where parties to an agreement, "themselves contemplate that their agreement cannot be complete until it is reduced to writing, no contract exists until execution of the writing."[9] Owner also emphasizes that there must be a meeting of the minds as to all terms between the parties before a valid contract may be enforced.[10] Owner further argues that there was no negotiating session between the parties, and that the back-and-forth email between parties lacked essential contractual terms, only discussing the money amount of settlement. Owner contends that there were no negotiations as to many essential terms, but merely "cover" emails with attached drafts of proposed Settlement Agreements. Owner finally asserts that Claimant cannot enforce a partially executed Settlement Agreement when Owner has refused to sign the Agreement due to a potential waiver of prospective warranties.[11]

Analysis

The Court first notes that within Pennsylvania, "[t]here is a strong judicial policy in favor of voluntarily settling lawsuits because it reduces the burden on the courts and expedites the transfer of money into the hands of a complainant."[12] Settlement agreements are enforced under the principals of contract law.[13] "There [must be] an offer (the settlement figure), acceptance, and consideration (in exchange for the plaintiff terminating his lawsuit, the defendant will pay the plaintiff the agreed upon sum)."[14] Further, to create an enforceable contract to settle, the agreement must "be sufficiently

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[9] Owner's Brief in Opposition to Claimant's Motion to Compel Settlement at 4 (Nov. 4, 2020) ("Brief in Opposition") (quoting *Essner v. Shoemaker*, 143 A.2d 364, 366 (Pa. 1958)).
[10] Brief in Opposition at 4 (quoting *In re Whatever, LLC*, 478 B.R. 700, 705 (Bankr. W.D. Pa. 2012)) ("[I]t is essential to the enforceability of settlement agreement that the minds of the parties shall meet upon all the terms, as well as the subject matter, of the agreement."). Owner also cites *In re Whatever, LLC*, for the proposition that an attorney must have express authority to bind his or her client; however, as mentioned *supra*, Owner has already stipulated that Attorney Carlucci was negotiating with authority in this matter.
[11] *See* Brief in Opposition at 6.
[12] *Mastroni-Mucker v. Allstate Ins. Co.*, 976 A.2d 510, 518 (Pa. Super. 2009*)* (citing *Felix v. Giuseppe Kitchens & Baths, Inc.*, 848 A.2d 943, 946 (Pa. Super. 2004)).
[13] *Id.* (citing *Pulcinello v. Consolidated Rail Corp.*, 784 A.2d 122, 124 (Pa. Super. 2001), appeal denied, 796 A.2d 984 (Pa. 2002)).
[14] *Id.* (quoting *Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick*, 587 A.2d 1346, 1349 (Pa. 1991), cert. denied, 502 U.S. 867, (1991)).

definite to enable a court to give it an exact meaning,"[15] although, "not every term of a contract must always be stated in complete detail."[16] "Where an essential term is missing or not clearly expressed, the court may infer the parties' intent from other evidence and impose a term consistent with it."[17]

Key in this case is whether there was ever an offer that could be accepted. An offer is "a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."[18] "It is basic contract law that one cannot suppose, believe, suspect, imagine or hope that an offer has been made. An offer must be intentional, definite, in its terms and communicated; otherwise, no meeting of the minds can occur."[19] However, "[in] ascertaining the intent of the parties to a contract, it is their outward and objective manifestations of assent, as opposed to their undisclosed and subjective intentions, that matter."[20] Factors to consider when determining whether matters have preceded beyond preliminary negotiations and an offer has been made, "include the terms of any previous inquiry, the completeness of the terms of the suggested bargain, and the number of persons to whom a communication is addressed."[21]

Conclusion

Having reviewed the facts of the case, and the applicable law, the Court finds that the first draft version of the Settlement Agreement sent by Attorney Carlucci to Attorney Musto on June 3, 2020, was not an offer of settlement, but rather a component of the parties' preliminary negotiations. By qualifying this Settlement Agreement as a "[f]irst draft for your review and comment[,]" Attorney Carlucci was specific in identifying the document as a proposal intended to spur further discussion. Having determined

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[15] Nicholas v. Hofmann, 158 A.3d 675, 694 (Pa. Super. 2017) (citing In re Friese's Estate, 9 A.2d 401, 403 (Pa. 1939)).
[16] *Id.* (quoting *Helpin v. Trustees of Univ. of Pennsylvania*, 969 A.2d 601, 610–11 (Pa. Super. 2009), aff'd, 10 A.3d 267 (Pa. 2010)).
[17] *Id.* (quotations and citations omitted).
[18] *Kingsbury, Inc. v. GE Power Conversion UK, Ltd.*, 78 F. Supp. 3d 611, 619 (E.D. Pa. 2014) (quoting *Cobaugh v. Klick–Lewis, Inc.*, 561 A.2d 1248, 1249 (Pa. Super. 1989)).
[19] *Id.* (quoting *Stumpp v. Stroudsburg Mun. Auth.*, 658 A.2d 333, 335 (Pa. 1995)).
[20] *Ingrassia Const. Co. v. Walsh*, 486 A.2d 478, 483 (Pa. Super. 1984) (citation omitted).
[21] *Id.* (quoting *Beaver Valley Alloy Foundry, Co. v. Therma–Fab, Inc.*, 814 A.2d 217, 222 (Pa. Super. 2002); Restatement (Second) of Contracts, § 26 comment c)).

that the initial draft Settlement Agreement did not constitute an offer, the Court consequently holds Attorney Musto's reply email sent on June 4, 2020, suggesting amendment of certain provisions to this Agreement, did not constitute a counter-offer but merely further negotiations as to terms.

However, the Court holds that the revised Settlement Agreement sent by Attorney Carlucci to Attorney Musto on June 4, 2020 did in fact constitute an offer inviting acceptance. Unlike the initial Settlement Agreement, this revised Settlement Agreement was not identified as a draft in the email body itself, and was not referred to as a draft in the document title or file name. The Settlement Agreement provided all essential terms, including the settlement amount and the timeline for performance. There was appropriate consideration, as under the Agreement Claimant agreed to discontinue the foregoing action after receiving the settlement amount in full. All objective indications suggest that the parties had mutually agreed to the language of the revised Settlement Agreement, as Owner's counsel, acting with authorization, drafted the Agreement and Claimant executed the Agreement. Further, the revised Settlement Agreement, by its own terms, became effective upon its execution by Claimant and its return to Owner.

The fact that the parties reached a settlement through email exchange rather than in-person at a settlement conference is of no import, as there is no limitation to settlements reached through remote communications so long as the remote exchanges manifest the parties' mutual assent and intention to be bound by material terms of the agreement.[22] Further, the fact that certain terms of the settlement were not discussed in the body of the email exchanges does not indicate a lack of assent to those terms.

The cases cited by Owner within his Brief in Opposition to support his claim that no offer had been made, are clearly distinguishable and in effect weigh against Owner to the extent they highlight factors not present in this case. For example, Owner *cites In re Whatever, LLC*, for the proposition that there must be a meeting of the minds before there can be a valid enforceable settlement. However, in that case the Court found that

[22] *See e.g.*, *California Sun Tanning USA, Inc. v. Elec. Beach, Inc.*, 369 F. App'x 340, 346 (3d Cir. 2010) (applying Pennsylvania law and holding that parties could be bound through an agreement reached through a series of email exchanges).

an offer of settlement made by email only constituted a "conditional offer" because the email expressly stipulated that the offer, "was [s]ubject to final approval by committee[,]" among other limitations.[23] No similar limitation was provided in this case. Additionally, *Mazella v. Koken*, cited also for the proposition that there must be a meeting of the minds to form a valid contract, is also inapposite because in that case, the written offer was returned signed but also included several revisions. The Pennsylvania Supreme Court held that these revisions were "material changes" from the terms proposed by the offeror, and so the returned document was not an acceptance, but a counter-offer.[24] In this case, Claimant accepted the terms of the revised Settlement Agreement without objection or alteration.

ORDER

Pursuant to the foregoing, Claimant's Motion to Compel Settlement is hereby GRANTED. Owner shall execute and return the partially executed Settlement Agreement to Claimant within seven (7) days of the date of this Order. Further, Owner shall pay the agreed upon 25,850.00 within seven (7) days of the date of this Order. Owner's failure to timely comply with this Order may result in the imposition of sanctions.

IT IS SO ORDERED this 14th day of December 2020.

BY THE COURT,

Eric R. Linhardt, Judge

ERL/cp
cc: William Carlucci, Esq.
Joseph R. Musto, Esq.
Gary Weber, Esq. / Lycoming Reporter

[23] *In re Whatever, LLC*, 478 B.R. 700, 707 (Bankr. W.D. Pa. 2012).
[24] *Mazzella v. Koken*, 739 A.2d 531, 538 (Pa. 1999).