

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MARK KREISHER and JOANNA KREISHER, Husband and Wife, Plaintiffs,	: NO. 19-1586
vs.	:
	:
	: CIVIL ACTION
	:
GARDNER HOMES, INC., Defendant.	: <i>Motion to Enforce</i> : <i>Settlement Agreement</i>

ORDER

AND NOW, following argument held January 20, 2021 on Plaintiffs' Motion to Enforce Settlement Agreement, the Court hereby issues the following ORDER.

Plaintiffs Mark Kreisher and Joanna Kreisher ("Plaintiffs") initiated this action on September 19, 2019 by the filing of a Complaint. Within the Complaint, Plaintiffs allege that Defendant Gardner Homes, Inc. ("Defendant") had deficiently and incompletely performed construction work on the Plaintiffs' home. The Complaint raised counts of Breach of Contract, Breach of Warranty (Express and Implied), Negligence, Unjust Enrichment (Alternative Theory of Relief), and Violation of Pennsylvania's Unfair Trade Practices Consumer Protection Law. On October 18, 2019, Defendant filed an Answer, New Matter, and Counterclaim. The Counterclaim raised a count of Unjust Enrichment for Plaintiffs' purported failure to pay the full amount due for Defendant's labor and materials. On December 18, 2020, Plaintiffs filed a Motion to Enforce Settlement Agreement. Defendant filed a Response to this Motion on December 23, 2020.

The relevant facts are as follows. During the course of discovery, counsel for the parties engaged in a series of phone calls aimed at negotiating a settlement. Ultimately, counsel agreed that this settlement would require both parties to relinquish their claims without monetary consideration. On August 20, 2020, Defendants' counsel, William P. Carlucci, Esquire ("Attorney Carlucci"), emailed

Plaintiffs' counsel, J. Michael Wiley, Esquire ("Attorney Wiley"), an initial draft of a Settlement Agreement. Having received no substantive response from Attorney Wiley, on September 18, 2020, and again on October 9, 2020, Attorney Carlucci resent copies of this initial draft.¹ The initial draft Settlement Agreement explicitly provided that each party agreed to release the other party from "any claims of any nature whatsoever, other than faithful performance of th[e] Agreement."² However, the initial draft Settlement Agreement also clarified that Plaintiffs would not be waiving any manufacturer warranties as to materials, fixtures, or equipment provided by Defendant.³

Attorney Wiley thereafter returned a revised version of the Settlement Agreement to Attorney Carlucci. In the email conveying the revised Settlement Agreement, Attorney Wiley explained that he had added language addressing the resolution of a related action proceeding in Columbia County, and had also added language expressly reserving for Plaintiffs the right to bring unknown claims not part of the foregoing litigation.⁴ In consecutive responsive emails, Attorney Carlucci indicated that while he agreed that a release would not affect any manufacturer's warranties, he would not otherwise agree to the provision allowing Plaintiffs to reserve future claims.⁵

Within the Motion to Enforce Settlement Agreement, Plaintiffs seek enforcement of the revised Settlement Agreement drafted by Attorney Wiley, asserting that it properly memorializes the parties' agreement in the case; that is, that both parties would walk away from their claims.⁶ Plaintiffs assert that this

¹ A copy of this initial draft is attached as Exhibit A to the Motion to Enforce Settlement Agreement. Copies of Attorney Carlucci's emails are attached as Exhibits A through C to Defendant's Response to Motion to Enforce Settlement.

² Motion to Enforce Settlement Agreement (Ex. A – Settlement Agreement ¶ 1) (Dec. 18, 2020).

³ Motion to Enforce Settlement Agreement (Ex. A – Settlement Agreement ¶ 2).

⁴ A copy of this revised draft is attached as Exhibit B to the Motion to Enforce Settlement Agreement. The associated email is reproduced in ¶ 14 of the Motion to Enforce Settlement Agreement.

⁵ Attorney Carlucci's responsive emails are reproduced in ¶ 15 of the Motion to Enforce Settlement Agreement.

⁶ See Motion to Enforce Settlement Agreement ¶ 16.

Agreement is binding because the parties came to a meeting of the minds as to all essential terms, contending that a release clause is not a *per se* essential term of a settlement agreement.⁷ Plaintiffs clarify that while the doctrine of *res judicata* would preclude them from subsequently litigating any claim that had been or could have been brought in the present action, *res judicata* would not preclude Plaintiffs from bringing claims relating to latent defects that were unknown at the time of the settlement, and therefore such claims may be reserved.⁸

In its Response, Defendant denies that there was ever any discussion about the parties “simply walking away from their claims[,]” instead asserting that all discussions involving settlement were always conditioned on the exchange of a mutual release.⁹ Attorney Carlucci elaborated at argument on the Motion to Enforce Settlement Agreement that settlement negotiations between the parties consisted of a half dozen phone calls and the excerpted email exchanges, and maintained that at no time during these discussions did he use the term “walk away from claims.”

“The elemental aspects necessary to give rise to an enforceable contract are ‘offer’, ‘acceptance’, ‘consideration’ or ‘mutual meeting of the minds.’”¹⁰ “[A]n offer to contract must be intentional and sufficiently definite in its terms, and no offer will be found to exist where its essential terms are unclear.”¹¹ “An offeree’s power to accept is terminated by (1) a counter-offer by the offeree; (2) a lapse of time; (3) a revocation by the offeror; or (4) death or incapacity of either party.”¹² “However, ‘[o]nce the offeree has exercised his power to create a contract by accepting the

⁷ See Motion to Enforce Settlement Agreement ¶¶ 24-28.

⁸ See Motion to Enforce Settlement Agreement ¶ 20.

⁹ See Defendants Response to Motion to Enforce Settlement Agreement ¶ 10 (Dec. 23 2020).

¹⁰ *Schreiber v. Olan Mills*, 627 A.2d 806, 808 (Pa. Super. 1993) (citing *Stelmack v. Glen Alden Coal Co.*, 14 A.2d 127, 128 (Pa. 1940)).

¹¹ *Bair v. Manor Care of Elizabethtown, PA, LLC*, 108 A.3d 94, 98 (Pa. Super. 2015) (quoting *Lackner v. Glosser*, 892 A.2d 21, 30 (Pa. Super. 2006)).

¹² *Mastroni-Mucker v. Allstate Ins. Co.*, 976 A.2d 510, 518 (Pa. Super. 2009) (citing *First Home Savings Bank, FSB v. Nernberg*, 648 A.2d 9, 15 (Pa. Super. 1994), appeal denied, 657 A.2d 491 (Pa. 1995)).

offer, a purported revocation is ineffective as such.”¹³

“An agreement is an enforceable contract wherein the parties intended to conclude a binding agreement and the essential terms of that agreement are certain enough to provide the basis for providing an appropriate remedy.”¹⁴ A release clause is not *per se* an essential term of a settlement agreement.¹⁵ “Where a settlement agreement contains all of the requisites for a valid contract, a court must enforce the terms of the agreement.”¹⁶ “This is true even if the terms of the agreement are not yet formalized in writing.”¹⁷ However, while “[m]anifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof. . .the circumstances may show that the agreements are preliminary negotiations.”¹⁸

In consideration of the foregoing, the Court first finds that it is clear that the telephone discussions between Plaintiff’s counsel and Defendant’s counsel did not precipitate the formation of a valid and enforceable verbal contract. The Court credits Attorney Carlucci’s representations that he did not understand these informal discussions to be anything more than negotiations intended to precipitate the execution of a mutual release. Consequently, there could be no meeting of the minds necessary to form a valid contract.

Further, the Court finds that although the initial Settlement Agreement drafted by Attorney Carlucci on behalf of Plaintiff was a valid offer that would have become enforceable by Defendant’s acceptance, Attorney Wiley declined to accept this offer, instead returning a counteroffer in the form of the revised Settlement Agreement.

¹³ *Id.* (quoting Restatement (Second) of Contracts § 42, Comment c. (1981)).

¹⁴ *Linnet v. Hitchcock*, 471 A.2d 537, 540 (Pa. Super. 1984) (citations omitted).

¹⁵ *Mastroni-Mucker*, 976 A.2d at 522 n.5.

¹⁶ *Id.* at 518 (citing *McDonnell v. Ford Motor Co.*, 643 A.2d 1102, 1105 (Pa. Super. 1994), appeal denied, 652 A.2d 1324 (Pa. 1994)).

¹⁷ *Id.* (citing *Mazzella v. Koken*, 739 A.2d 531 536 (Pa. 1999)).

¹⁸ *Kazanjian v. New England Petroleum Corp.*, 480 A.2d 1153, 1157 (Pa. Super. 1984) (quoting Restatement (Second) of Contracts § 27 (1981)).

Attorney Carlucci provided that his client would not accept this counteroffer. At no point, therefore, was there an acceptance that would form a valid contract.

Plaintiff's position is that the revised Settlement Agreement was not a counteroffer, but in fact a valid acceptance, because it did not contain material varying terms.¹⁹ However, the Court is of the opinion that the scope of the release clause was a material term in this case, even if it may not qualify as a material term under other circumstances. The initial Settlement Agreement drafted by Attorney Carlucci was explicit in providing that each party agreed to release the other party from "any claims of any nature whatsoever, other than faithful performance of th[e] Agreement."²⁰ The Settlement Agreement also expressly stated that Plaintiffs would not be waiving any manufacturer warranties as to materials, fixtures, or equipment provided by Defendant.²¹ These provisions comprised the majority of the two-page initial draft Settlement Agreement. While the scope of a release may in some instances be collateral to a settlement agreement, in this instance the Settlement Agreement functionally was the release, and so the scope of that release was clearly material to the terms of the settlement. Pursuant to the foregoing, Plaintiff's Motion to Enforce Settlement Agreement is DENIED.

IT IS SO ORDERED this 4th day of March 2021.

BY THE COURT,

Eric R. Linhardt, Judge

ERL/cp

cc: William P. Carlucci, Esq.
J. Michael Wiley, Esq.
Gary Weber, Esq. / Lycoming Reporter

¹⁹ See *Thomas A. Armbruster, Inc. v. Barron*, 491 A.2d 882, 887 (Pa. Super. 1985) ("An alleged acceptance is not unconditional, and is thus not an acceptance, if it alters the terms of the offer in any material respect[.]") (emphasis added) (quotations and citation omitted).

²⁰ Motion to Enforce Settlement Agreement (Ex. A – Settlement Agreement ¶ 1).

²¹ Motion to Enforce Settlement Agreement (Ex. A – Settlement Agreement ¶ 2).