NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2961-12T1

DIEGO VILLAQUIRAN,

Plaintiff-Appellant,

v.

ALL-STATE INTERNATIOINAL, INC.
d/b/a ALL-STATE LEGAL,

Defendant-Respondent.

Argued December 18, 2013 – Decided July 8, 2014

Before Judges Sapp-Peterson and Maven.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-1428-12.

Danielle Y. Alvarez argued the cause for appellant (Lite DePalma Greenberg, LLC, attorneys; Bruce D. Greenberg, of counsel; Ms. Alvarez, on the briefs).

Francine Esposito argued the cause for respondent (Day Pitney, LLP, attorneys; Ms. Esposito and Jessica M. Burstein, on the brief).

PER CURIAM

Plaintiff Diego Villaquiran appeals from the trial court order enforcing a settlement agreement (Agreement) the court found he entered with his former employer, defendant All-State

International, Incorporated. The trial court determined the parties had reached a meeting of the minds as to the material terms of the Agreement and that plaintiff's refusal to execute the Agreement was buyer's remorse rather than a genuine disagreement over its material terms. Because we conclude there are genuine disputes as to what constituted the material terms of the Agreement and, also, as to whether the parties mutually agreed to those terms, we reverse and remand for a plenary hearing. However, in the event, upon remand, the court determines the parties entered into a valid, enforceable agreement, we affirm the February 6, 2012 order excising the revocation clause.

Plaintiff commenced his employment with defendant as an engraving press operator in 1984. In May 2010, he injured his upper back and right arm while at work. Defendant failed to notify its worker's compensation insurance carrier of the incident. Plaintiff, however, reported his injuries to the carrier, and a claim for benefits was filed on his behalf. In April 2012, plaintiff filed a five-count complaint against defendant alleging discrimination, unlawful termination, hostile work environment and retaliation under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. According to plaintiff, it was only after he filed a worker's compensation

claim that he began receiving disciplinary charges. He further alleges that his subsequent termination was in retaliation for seeking worker's compensation benefits.

Both prior to and after plaintiff filed his complaint, the parties commenced settlement negotiations. On September 16, 2012, plaintiff's counsel emailed defense counsel representing that he had plaintiff "at $78K, and [plaintiff] will not go any lower. . . . If [defense counsel] can come back to [him] at $78K, then we are good to go. If not, then we will proceed with litigation." Defendant agreed to the $78,000 monetary figure and drafted the proposed settlement agreement. In a September 25, 2012 communication to defense counsel, plaintiff's counsel stated: "I have no general issues with the agreement/release you sent me, although there are a few proposed revisions, none of which I think would stand in the way of resolving it." The parties continued negotiations on the remaining terms of the written settlement agreement.

Plaintiff's counsel submitted revisions of the Agreement to defense counsel. The proposed changes stated:

> 2. Villaquiran agrees that, **upon receipt of the settlement amount in accordance with Paragraph 4**, the lawsuit shall be dismissed in its entirety with prejudice . . . .[1]

[1] The bolded, underlined text represents plaintiff's revisions.

. . . .

3.(j) The claims released in this Paragraph shall not apply to any claim for workers' compensation with All-State's workers' compensation insurance carrier.

. . . .

4.(a) Within **twenty (20)** calendar days of All-State's counsel's receipt of: (i) this original Agreement signed by Villaquiran; (ii) an original Stipulation of Dismissal with Prejudice, signed by Villaquiran's attorney, in a form attached hereto as Exhibit A, **to be filed by All State's counsel upon Plaintiff's receipt of the settlement amount** . . . . and (vi) the expiration of the revocation period set forth in Paragraph 16 below, All-State will make a payment to Villaquiran of **$78,000.00 (SEVENTY-EIGHT THOUSAND DOLLARS AND ZERO CENTS).** . . .

> (i) The amount of **$20,000.00** (TWENTY-THOUSAND DOLLARS AND ZERO CENTS) to be paid to Villaquiran in full satisfaction of any and all claims he may have or claim to have against the Released Parties for compensatory damages, including but not limited to, any mental anguish, emotional distress, pain and suffering, embarrassment and humiliation . . . .
>
> (ii) The gross amount of $52,375.00 (FIFTY-TWO THOUSAND THREE HUNDRED AND SEVENTY-FIVE DOLLARS AND ZERO CENTS) to be paid to Villaquiran in full satisfaction of any and all claims he may have or claim to have against the Released Parties for any form of lost compensation or

benefits arising out of the Lawsuit. . . .

(iii) The amount of **$5,625.00 (FIVE-THOUSAND SIX HUNDRED AND TWENTY-FIVE DOLLARS AND ZERO CENTS)** for any and all claims Villaquiran may have or claim to have for the payment of costs and attorneys' fees. . . .

8. . . . All-State agrees that its management and supervisory employees will not disparage, demean, criticize, reflect negatively, or denigrate the name or reputation of Villaquiran. In addition, All-State agrees that it will not issue any challenge to any of Villaquiran's continued claims for unemployment benefits arising from his termination of employment with All-State.

(a) The parties agree that, in the event either party breaches, or causes the breach of, the non-disparagement provisions set forth above, the breaching party shall be liable to the non-breaching party for its (or their) actual damages and attorneys' fees for each violation. Notwithstanding any such relief, all of the other terms of this Agreement shall remain in full force and effect, and the remedies provided for herein shall not bar any other claims for damages or other relief, either at law or equity.

. . . .

9. . . . However, All-State understands and agrees that if, in the future, **Villaquiran** is employed by an entity that is acquired by any All-State entity, he shall **not** be required to resign his employment.

. . . .

> **12. . . . <u>All-State agrees that it shall reimburse Villaquiran for any reasonable out-of-pocket expenses and costs incurred by him in complying with this Paragraph.</u>**

Defense counsel returned the revised agreement to plaintiff's counsel, but the proposed changes in Paragraphs Eight, Nine and Twelve of the Agreement did not appear in the final draft. On October 15, 2012, plaintiff sent an email to defense counsel advising that there "were far too many non-monetary provisions in the settlement agreement to which [the client] will not agree," and expressed they should proceed with litigation. Plaintiff's counsel stated that "[t]his was somewhat unexpected, but the client felt the agreement was too restrictive and one-sided."

The record reflects no further communications between the parties thereafter, except that the parties were noticed to attend court-ordered mediation on November 30, 2012. On that date, plaintiff's counsel demanded more money. Defense counsel offered an additional $1000 and also expressed a willingness to assume all of the mediator's fees. Plaintiff rejected this offer, but defense counsel represented the offer would remain open for a number of days.

On December 24, 2012, defendant filed a motion to enforce the settlement. The court conducted oral argument the following month and, at its conclusion, rendered an oral opinion granting

the relief sought by defendant. The court found the parties, by their conduct, "prior to and including the drafting of a written settlement agreement and the September 21[], 2012 e-mail constituted a binding settlement offer and acceptance of non-monetary terms as memorialized in the final writing submitted to the [c]ourt." As for the purported counter-offer of an additional $1000 plus payment of the mediator fees, the court found "defense counsel's agreement to pay mediation and attorney's fees . . . is not a counteroffer since defendant['s] counsel certifies that she did not change the underlying gross settlement figure of $78,000." The court found this counter-offer represented a nominal alteration of the settlement and defendant's agreement "to pay a mediator's fees and $1000 towards attorney's fees incurred at mediation, not the gross number of two years pay which was the fundamental figure agreed upon by both of the parties."

The court noted that in both "plaintiff's submission and at oral argument, counsel for the plaintiff does not cite a single material term of settlement to which the parties did not agree, aside from plaintiff's second thoughts about the $78,000 figure." The court concluded plaintiff's refusal to sign the Agreement had nothing to do with the $78,000 settlement figure, but rather, plaintiff's "buyer's remorse."

Following the entry of the court's order enforcing the settlement, plaintiff's counsel advised defense counsel of plaintiff's intent to invoke the revocation clause contained in the settlement agreement. Defense counsel reached out to the court for clarification and the court held an additional hearing on February 6, 2013 to address this issue.

At the February 6, 2013 hearing, the court acknowledged that although this issue had been raised in footnotes by both parties' briefs, in connection with the enforcement motion, and argued at that hearing, the court failed to expressly address the issue. The court suggested that its decision implicitly resolved the issue. Nonetheless, the court found that:

> I recall that the defendant indicated that they in fact probably would have excised that portion. They did not; they recognize the error and that it could have caused confusion. But in essence[,] in reviewing the particular case law on this particular point, [t]he [c]ourt does find that that provision does not apply to the case at bar, should be excised, and does not permit the plaintiff to revoke their signature; which is why [t]he [c]ourt entered the order as [it] did on the 18th of January which enforced the entire settlement and also required a stipulation of dismissal to be filed.

Based upon this finding, the court excised the revocation provision.

On appeal, plaintiff contends there was no meeting of the minds on all material terms of the Agreement and the court erred by rewriting the clear and unambiguous terms of the settlement agreement when it excised the revocation clause. We conclude the record was not so one-sided for the court to have concluded that plaintiff's failure to execute the agreement was buyer's remorse.

New Jersey public policy favors the settlement of litigation, and a settlement agreement is a contract that should be enforced by the courts like other types of contracts. Pascarella v. Bruck, 190 N.J. Super. 118, 124-25 (App. Div.), certif. denied, 94 N.J. 600 (1983). A settlement agreement becomes an enforceable settlement contract when the parties agree upon and manifest their intent to be bound by all of the essential terms of the proposed contract. See Hagrish v. Olson, 254 N.J. Super. 133 (App. Div. 1992). Here the court, in finding that there had been a meeting of the minds, essentially credited the certification of defense counsel, notwithstanding that plaintiff's counsel's certification stated otherwise.

In defense counsel's certification in support of the motion to enforce the settlement, she stated that based upon her discussions with plaintiff's counsel, plaintiff "is refusing to sign the Settlement Agreement because . . . he has now decided

that he wants more to settle the matter." On the other hand, in his certification submitted in opposition to the motion, plaintiff's counsel stated that it had "always been conveyed to [defense counsel] that the finalization of any settlement would be contingent upon my client's acceptance of the written settlement agreement, including the non-monetary terms and provisions." He denied ever representing to defense counsel that his client had agreed to all of the non-monetary terms. He certified further that after meeting with plaintiff and going over the proposed agreement, at length, plaintiff conveyed that he would not accept the settlement in the form presented. During oral argument, defense counsel represented to the court that whatever plaintiff raised in terms of non-monetary terms, defendant conceded to them. This representation, however, is not supported by the record. Defendant failed to adopt the proposed changes embodied in Paragraphs Eight, Nine and Twelve of the Agreement.

In Paragraph Eight, plaintiff's counsel inserted the word "will not" in place of "should not" in relation to defendant disparaging plaintiff, which, if defendant had accepted this verbiage, would have been consistent with the verbiage in the Agreement as it applied to plaintiff disparaging defendant. Additionally, in this paragraph, plaintiff's counsel sought an

agreement from defendant that it would not challenge plaintiff's claims for unemployment benefits "arising from his termination of employment with All-State." In Paragraph Nine, defendant failed to include, in the final draft, its agreement that if plaintiff "is employed by an entity that is acquired by any All-State entity, he shall not be required to resign employment."

The trial court, in its decision, stated that plaintiff's counsel, at no time, cited a single material term of the settlement agreement to which the parties did not agree. Plaintiff's counsel, however, repeatedly advanced that the non-monetary terms were unacceptable to plaintiff. Nonetheless, the court accepted defense counsel's representation that defendant had acceded to those demands, notwithstanding defendant's failure to adopt all of the proposed changes.

We are persuaded that plaintiff presented disputed issues as to whether there had been a meeting of the minds sufficient to establish an enforceable agreement and that the court should have conducted a plenary hearing to resolve the disputed issues rather than essentially make credibility determinations based upon one attorney's certification and representations during oral argument without explaining why one certification was credited over another certification and oral representation. While the court's characterization of plaintiff's attempt to

walk away from the Agreement was "buyer's remorse," the court did not consider defendant's conduct in the context of the proposed non-monetary terms he would forfeit, if he executed the Agreement.

Notwithstanding our State's strong public policy favoring settlement of litigation, Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008), we are equally mindful that, in general, a client's consent to settle a case is necessary for the settlement to bind that client. See RPC 1.2(a) (mandating that "[a] lawyer shall abide by a client's decision whether to settle a matter"). Despite efforts to assure that settlements are not enforced without the parties' mutual assent or without the apparent authority to settle reposed in the lawyers who represent the parties, at times a client may allege, as here, that he never consented to a settlement. In such circumstances where a colorable claim of non-assent is raised, the preferred practice is for the trial court to conduct a plenary hearing. At such a plenary hearing, the veracity of the client's representations can be explored through an adversarial process, and the court will have the opportunity to observe the witnesses first-hand and to make appropriate credibility determinations. See, e.g., Amatuzzo v. Kozmiuk, 305 N.J. Super. 469, 475-76 (App. Div. 1997)(remanding for a plenary hearing to consider

whether the client authorized a settlement); Harrington v. Harrington, 281 N.J. Super. 39, 46-47 (App. Div.) (ordering such a plenary hearing in the context of a disputed matrimonial settlement), certif. denied 142 N.J. 455 (1995); see also Lahue v. Pio Costa, 263 N.J. Super. 575, 589-91 (App. Div.) (noting the judge's role in ascertaining the credibility of a party who claimed that his consent to settle had been contingent), certif. denied, 134 N.J. 477 (1993). A remand for such a plenary hearing is warranted in this case.

Finally, in the event, upon conclusion of the plenary hearing, the court determines there was a meeting of the minds, and, therefore, an enforceable agreement, we affirm the court's February 6, 2013 order excising the revocation clause. The court found its inclusion was inadvertent and plaintiff's counsel did not dispute this fact. That finding is entitled to our deference. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974).

Reversed in part and affirmed in part. We do not retain jurisdiction.