

FILED

MAY 19 2021

NOT TO BE PUBLISHED WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS
James J. DeLuca, J.S.C.

<p>ONE NEW ALLIANCE, LLC, PARK AVENUE MEDICAL AND SURGICAL CENTER, INC., and KRIKOR KALFAYAN,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>PAI-CHAUN LIN, GRACE F. LIN, KERRY LIN LIU, KATHLEEN LIN FU, and EMILY FIN,</p> <p>Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: BERGEN COUNTY</p> <p>DOCKET NO. BER-C-144-19</p> <p>DECISION AFTER PLENARY HEARING</p>
---	--

Decided: May 19, 2021

APPEARANCES:

Karl J. Norgaard, Esq.
Norgaard, O'Boyle & Hannon
184 Grand Avenue
Englewood, NJ 07631
Attorneys for Plaintiffs, One New Alliance, LLC, Park Avenue Medical and Surgical Center, Inc. and Krikor Kalfayan

Bertram Siegel, Esq.
Siegel & Siegel, Esqs.
300 Route 4
P.O. Box 414
Teaneck, NJ 07666
Attorneys for Defendants, Pai-Chaun Lin, Grace F. Lin, Kerry Lin Liu, Kathleen Lin Fu and Emily Lin

Introduction

This court conducted a plenary hearing on April 19 and 20, 2021 as to the enforceability of an alleged settlement between and among One New Alliance, LLC (“ONA”), Park Avenue Medical and Surgical Center, Inc. (“Park Medical”) and Krikor Kalfayan (“Kalfayan,” who together with ONA and Park Medical are referred to collectively as “Plaintiffs”) on the one hand, and the defendants, Pai-Chaun Lin (“Pai-Chaun”)¹, Grace F. Lin (“Grace”), Kerry Lin Liu (“Kerry”), Kathee Lin Fu (“Kathee”), and Emily Lin (“Emily,” who together with Pai-Chaun, Grace, Kerry and Kathee are referred to collectively as the “Defendants”) on the other hand. Six (6) witnesses testified at the plenary hearing, namely, Howard Siegel, Esq., Kalfayan, Kathee, Kerry, Emily and Karl J. Norgaard, Esq. (“Norgaard”). In accordance with R. 1:7-4 of the Rules Governing the Courts of the State of New Jersey, this decision constitutes the court’s findings of fact and conclusions of law.

Background

On August 1, 2009, Pai-Chaun and Grace, as sellers, and Kalfayan, as purchaser, entered into an agreement (the “August 1 Agreement”) pursuant to which Kalfayan agreed to purchase the real property commonly known as 120 Park Avenue, Lyndhurst, New Jersey (the “Lyndhurst Property”). Exhibit P-1. The purchase price of \$1,900,000 was payable as follows: \$100,000 within one year of the August 1 Agreement (August 1, 2010) and the balance, \$1,800,000, by August 31, 2011.

¹ Because the Defendants have the same surname, the court refers to each Defendant by their first name. The court intends no disrespect.

According to the August 1 Agreement, Kalfayan was responsible to (i) pay real estate taxes for the Lyndhurst Property on a monthly basis starting on July 1, 2009 and (ii) provide liability and fire insurance on the Lyndhurst property from August 1, 2009 to closing. Further, Kalfayan and Pai-Chaun and Grace agreed to share the rent collected from the Lyndhurst Property through the closing, with Pai-Chaun and Grace keeping 65% of the rent after expenses.

In 2015, Pai-Chaun and Grace, as sellers, and ONA entered into a contract of sale (the "2015 Contract") pursuant to which ONA agreed to purchase the Lyndhurst Property. Exhibit P-2. The 2015 Contract provides that the members of ONA were Amrish Patel and Kalfayan. In particular, ¶33 of the 2015 Contract states:

It is understood and agreed that Krikor Kalfayan is a member of One New Alliance, LLC and has occupied the property for the past 6 years and has full knowledge as to the condition of the building and has been responsible for maintaining the building. The Seller will not turn over the building in a broom clean condition as Krikor Kalfayan has maintained possession of the premises. The Sellers have no knowledge as to compliance with the laws and zoning regulations and Buyer shall do its due diligence in connection therewith.

The 2015 Contract (at ¶4) provides that the purchase price of \$1,700,000 was to be paid as follows: \$170,000 upon execution of the 2015 Contract, \$1,190,000 by way of mortgage and the balance of \$340,000 at closing. The 2015 Contract (at ¶7) provides that ONA had until August 30, 2015 to obtain a mortgage commitment. The estimated closing was set for September 15, 2015. The 2015 Contract (at ¶¶11 and 18) provided that (i) the Lyndhurst Property was being sold "AS-IS" and (ii) any physical inspection of the Lyndhurst Property was to be completed and the results

shared within 15 days after the execution of the 2015 Contract. A closing pursuant to the 2015 Contract did not occur.

On June 3, 2019, Plaintiffs filed this action asserting claims for breach of contract, specific performance, breach of the implied covenant of good faith and fair dealing and related claims. Exhibit P-4. On July 5, 2019, Defendants filed a Landlord-Tenant action against ONA and Kalfayan (Docket No BER-LT-4699-19) (the "Landlord-Tenant Action"). Exhibit P-3. In the Landlord-Tenant Action, Pai-Chaun and Grace, as Co-Trustees of the Living Trust of Kerry Lin Liu, Kathleen Lin Fu and Emily Lin, with each having a 1/3 interest as the owners of the Lyndhurst Property, asserted that ONA and Kalfayan failed to pay \$61,875.86, consisting of claimed rent, late charges, attorneys' fees and unpaid real estate taxes.

After this action and the Landlord-Tenant Action were filed, counsel for the parties negotiated a settlement as to their disputes. In particular, in or about October 2019, parties signed a Stipulation of Settlement (the "First Stipulation")² which acknowledges that the purchase price for the Lyndhurst Property is \$1,700,000. The \$1.7 million purchase price pursuant to the October 2019 Contract provides for a total deposit of \$85,000 within five (5) days of the signing of the contract, a mortgage contingency of \$1,190,000, with the balance of \$435,000 to be paid at closing. ONA had until October 15, 2019 to obtain a mortgage commitment. The October 2019

² A legible copy of the First Stipulation signed by Kalfayan on behalf of all Plaintiffs and Defendants was introduced at trial as Exhibit P-26 and attaches a Contract for Sale of Real Estate dated as of October 1, 2019, signed by all parties (the "October 2019 Contract").

Contract further provides that (i) the Buyer agrees to pay municipal water charges, sewer charges and taxes from April 1, 2019 to the closing (at ¶20) and (ii) ONA will be given possession at the closing and no tenant will have any right to the Lyndhurst Property unless agreed to in the Contract (at ¶21). The First Stipulation (at ¶2) provides that the past due real estate taxes of approximately \$179,000 will be paid by Plaintiffs. The First Stipulation (at ¶4 provides that the closing will take place within four (4) months from the entry of the First Stipulation. The First Stipulation (at ¶ 5) provides that if the closing does not occur within four (4) months from the entry of the First Stipulation, then Plaintiffs shall have relinquished all rights to the Lyndhurst Property to the fullest extent allowed by law. The First Stipulation (at ¶7) further provides that it was made freely, voluntarily and knowingly by the parties with the benefit and advice of independent legal counsel. The First Stipulation was entered by the court on November 6, 2019. **Exhibit P-26.**

By email dated December 9, 2019, Norgaard, as counsel for ONA, provided proof that the property taxes for the Lyndhurst Property were paid for the year 2019. **Exhibit P-23.** The December 6 e-mail acknowledges that March 6, 2020 is the “closing deadline” for the October 2019 Contract. By e-mail dated February 20, 2020 at 2:30 p.m., counsel for Defendants advised counsel for ONA that Defendants intended to transfer the Lyndhurst Property via a 1031 exchange. **Exhibit P-24.** Defendants further advised of certain delinquencies with regard to the real estate taxes.

Kalfayan and Norgaard testified that on or about March 2, 2019, while Kalfayan and Norgaard were meeting, Kalfayan spoke with Pai-Chaun regarding an extension of the March 6, 2019 closing date. According to Kalfayan, he and Pai-Chaun agreed to an extension.³

On or about March 3, 2020, counsel for ONA forwarded to counsel for Defendants a proposed second stipulation of settlement. Exhibit P-26. The transmittal e-mail from Norgaard to Howard Siegel, Esq. dated March 3, 2020 at 2:10 p.m. states, "Attached please find the Second Stipulation extending time that is agreed to by both of our clients. I will call you now to discuss." The proposed second stipulation attached to Norgaard's March 3 e-mail was unacceptable and was thereafter revised by Howard Siegel. By email dated March 4, 2020 at 10:55 a.m. Norgaard wrote to Howard Siegel as follows:

"Howard, the \$200,000 as well as the prior deposit shall be nonrefundable in the event Plaintiff is not able to perform by actually closing on the transaction as set forth herein. See attached revised Stip. I included that the 90 days runs from when the Stip is fully executed so that there is a reason to get it signed with dispatch rather than have it linger." Exhibit P-27.

The revised version of the second stipulation attached to Exhibit P-27 provides that all provisions and deadlines set forth in the First Stipulation are

³ Counsel for Defendants asserted during the plenary hearing that such contact was improper since Pai-Chaun was represented by counsel. The evidence is uncontroverted that counsel for Plaintiffs had no communication with Pai-Chaun. Rather, all such discussions were between Kalfayan and Pai-Chaun. To the extent counsel for Defendants are of the view that Plaintiffs' counsel acted inappropriately, their potential remedy is not with this court.

extended for 90 days. The proposed revision to the second stipulation provides that Plaintiffs are contributing \$200,000 to be applied to the purchase price and that the \$200,000 shall be nonrefundable in the event ONA is unable to close. On March 5, 2020 at 10:32 a.m., Howard Siegel sent an e-mail to Norgaard which attached a revised second stipulation that revised paragraph two and added a new paragraph three. Exhibit P-28. The new paragraph 2 proposed by Howard Siegel reads as follows:

"Plaintiff shall contribute \$200,000.00 to be applied to the purchase price of the Property referred to in the [First Stipulation]. The \$200,000.00 as well as the prior deposit of \$132,000.00 shall be nonrefundable in the event that Plaintiff is not able to perform by actually closing on the transaction as set forth herein. The Buyer agrees that it waives its right to cancel the contract of sale as provided in paragraph 6 of the contract in the event the Buyer does not obtain the mortgage provided therein."

Further, the new paragraph 3, as proposed by Howard Siegel, reads as follows:

"In the event any portion of the \$179,769.00 or other taxes as set forth in the [First Stipulation] are not paid at the time of the closing, the same shall be evidenced by a Promissory Note to be signed by the Buyer."

By email dated March 5, 2020 at 2:31 p.m., Howard Siegel again wrote to Norgaard stating, "I forwarded a revised Stipulation of Dismissal. I would appreciate your responding to the same by tomorrow." Exhibit P-29. On March 9, 2020 at 11:35 a.m., Howard Siegel again e-mailed Norgaard as follows:

"Attached please find an email and check which was deposited into our trust account which will reflect the \$132,000.00 we are holding, please confirm the amount with your client and sign the second stipulation so that the time is not delayed any further." Exhibit P-30.

By e-mail dated March 9, 2020 at 3:25 p.m., Norgaard advised Howard Siegel as follows: "Received and sent to client for execution." Exhibit P-31. On March 10, 2020 at 4:18 p.m., Norgaard forwarded an e-mail to Howard Siegel transmitting the second stipulation signed by Kalfayan on behalf of all Plaintiffs with the note "See attached." Exhibit P-32. On March 11, 2020 at 2:25 p.m., Howard Siegel sent an e-mail to Norgaard which attached a letter dated March 11, 2020, which reads as follows:

"Please be advised that due to your client's failure to close title in accordance with the [First Stipulation] and paragraph 5 of the [October 2019 Contract], we are hereby declaring the contract null and void and I am forwarding the deposit in the sum of \$132,000 to my clients ending our relationship." Exhibit P-33.

On March 11, 2020 at 5:00 p.m., Norgaard forwarded an e-mail to Howard Siegel that reads as follows:

"Mr. Lin agreed and you have our signed Stipulation. It was returned timely and not signed by your clients some of whom received a fraudulent conveyance.

"This is not the end and we will hopefully amicably resolve without the need for court intervention." Exhibit P-34.

Thereafter, on March 13, 2020 at 3:40 p.m., Norgaard wrote to Howard Siegel and stated in part,

"In the afternoon of March 3, 2020, Mr. Kalfayan called Mr. Lin [Pai-Chaun] who agreed to accept \$200,000 in order to extend the closing date for 90 days. Also on March 3rd you were provided with the attached agreement signed by my client that was modified by you (Ostensibly on behalf of your client) and that offer was accepted by way of my client's attached signed agreement with the terms you negotiated. Mr. Kalfayan reasonably relied upon the negotiated agreement and not only

executed same but also provided the extension monies in the amount of \$200,000 that I am holding in trust. These monies will be sent to you in accordance with our client's agreement." Exhibit P-35 (emphasis in original).

On March 16, 2020 at 2:26 p.m., Howard Siegel forwarded a letter to Norgaard by e-mail advising, among other things, that Pai-Chaun has dementia and cannot make this decision by himself. Further, Howard Siegel reiterated that in light of the failure to close pursuant to the First Stipulation, the agreements between the parties were null and void. Exhibit P-36.

All parties have acknowledged that the First Stipulation was enforceable and encompassed all material terms among the parties. However, the parties disagree as to the enforceability of the stipulation signed by Kalfayan and forwarded by Norgaard to Howard Siegel of March 10, 2020 at 4:18 p.m. ("Second Stipulation"). In particular, Defendants assert, among other things, that (i) Pai-Chaun did not have the authority on behalf of the Defendants to agree to the Second Stipulation and (ii) Defendants' counsel (Howard Siegel) did not have the authority to bind Defendants to any resolution without their approval.

Legal Framework

Public policy in this State strongly favors settlement of litigation. Nolan v. Lee Ho, 120 N.J. 465, 472 (1990). Courts should give effect to settlement terms "wherever possible." Dep't of Public Advocate v. N.J. Bd. of Pub. Utils., 206 N.J. Super. 523, 528 (App. Div. 1985). New Jersey courts "strain to give effect to the terms of a settlement wherever possible." Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008) (quoting Dept. of Pub. Advocate v. N.J. Bd. Of Pub. Utils., 206 N.J. Super. 523, 528

(App. Div. 1985)). A settlement agreement need not be in writing to be enforceable. Pascarella v. Bruck, 190 N.J. Super. 118, 124 (App. Div.), certif. denied, 134 N.J. 477 (1993).

"Where the parties agree upon the essential terms of a settlement so that the mechanics can be 'fleshed out' in a writing to be thereafter executed, the settlement will be enforced notwithstanding the fact the writing does not materialize because a party later reneges." Lahue v. Pio Costa, 263 N.J. Super. 575, 596 (App. Div.), certif. denied, 134 N.J. 477 (1993).

An agreement to settle a lawsuit will be honored and enforced in the absence of fraud or other compelling circumstances. Pascarella v. Bruck, *supra*. at 124-125. The party seeking to enforce a settlement agreement bears the burden of demonstrating that one exists in the first place. Amatuzzo v. Kozmiuk, 305 N.J. Super. 469, 475 (App. Div. 1997). In Amatuzzo, *supra* at 475, the Appellate Division stated:

"negotiations of an attorney are not binding on the client unless the client has expressly authorized the settlement or the client's voluntary act has placed the attorney in a situation wherein a person of ordinary prudence would be justified in presuming that the attorney had authority to enter into a settlement, not just negotiations, on behalf of the client."

"[A]n attorney for a private party may settle a lawsuit based on actual or apparent authority to do so." Seacoast Realty Co. v. W. Long Branch Borough, 14 N.J. Tax 197, 202-03 (Tax 1994). Actual authority may be express or implied. Newark Branch, N.A.A.C.P. v. W. Orange Twp., 786 F. Supp. 408, 423 (D.N.J. 1992). Implied authority exists when "an agent is authorized to do what he [or she] may reasonably infer the principal desires him [or her] to do in light of the principal's

manifestations and facts as he [or she] knows or should know them when he [or she] acts." Lampley v. Davis Mach. Corp., 219 N.J. Super. 540, 548-49 (App. Div. 1987). "The focus is on the agent's reasonable perception of the principal's manifestations toward him" or her. Newark Branch, N.A.A.C.P., 786 F. Supp. at 424.

Apparent authority arises when "the client's voluntary act has placed the attorney in a situation wherein a person of ordinary prudence would be justified in presuming that the attorney has authority to enter a settlement, not just negotiations, on behalf of the client." Amatuzzo, 305 N.J. Super. at 475; see also LoBiondo v. O'Callaghan, 357 N.J. Super. 488, 497 (App. Div. 2003) (stating that creation of apparent authority is based on "the actions of the principal, not the alleged agent"). Thus, actual authority depends on the agent's reasonable perceptions of the principal's actions; apparent authority depends on a third-party's perceptions. An attorney is presumed to possess the authority to act on behalf of a client, a presumption which the client has a heavy burden of overcoming. Jennings v. Reed, 381 N.J. Super. 217, 231 (App. Div. 2005).

Under the concept of "apparent authority," the principal is bound by the act of his agent within his apparent authority, which he knowingly permits an agent to assume or which he holds the agent out as possessing. Reynolds Offset Co. v. Summer, 58 N.J. Super. 542, 558 (App. Div. 1959), certif. denied, 31 N.J. 554 (1960). Such authority exists "when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations. AMB Property, LP v. Penn Am. Ins. Co., 418 N.J. Super. 441 (App. Div. 2011). The attorney's words or actions alone are not sufficient to give rise to

such apparent authority, Amatuzzo, supra at 476. However, an attorney is presumed to possess the authority to act on behalf of a client, a presumption which the client has a “heavy burden” of overcoming. Jennings v. Reid, 381 N.J. Super. 217, 231 (App. Div. 2005) (quoting Sun Ins. Co. of Cal. v. Williams, 729 F.2d 581, 583 (8th Cir. 1984).

Plaintiffs have the burden of proving that despite the unsigned nature of the Second Stipulation, a settlement had been, in fact, achieved (see, Amatuzzo, supra at 475). Further, Defendants have the “heavy burden” of demonstrating that Howard Siegel lacked the actual or apparent authority to bind them (see, Jennings v. Reid, supra) or establishing some other compelling reason to vacate the settlement. See, Nolan v. Lee, supra at 472.

Analysis

If the court determines that Howard Siegel possessed either (i) the actual authority or (ii) the apparent authority to agree to the terms of the Second Stipulation, then this court will enforce the Second Stipulation. In considering whether Howard Siegel had actual authority (express or implied) to agree to the Second Stipulation, the focus is on Howard Siegel’s understanding of what, if anything, he was authorized to do either expressly or implicitly by the Defendants. Lampley v. Davis Mach. Corp., supra. However, as to apparent authority, the focus is on the understanding of Plaintiffs’ counsel regarding the authority of Defendants’ agent (Howard Siegel) to consummate a settlement. Reynolds Offset Co. v. Summer, supra; AMB Property, LP v. Penn Am. Ins.Co., supra.

The parties to this matter approached whether Howard Siegel had the requisite authority from very different perspectives. Plaintiffs focused primarily on Howard Siegel's apparent authority, while Defendants focused primarily on Howard Siegel's actual authority.

There is no dispute that the Defendants gave Howard Siegel the authority to engage in settlement discussions on their behalf with Plaintiffs' counsel. The individual Defendants acknowledged that Howard Siegel and his firm were representing them in their dispute with Plaintiffs. At no time during the relevant time period did the Defendants advise Howard Siegel or his firm to cease such discussions. Accordingly, the court finds that Defendants understood that Howard Siegel was proceeding with settlement discussions with Plaintiffs' counsel and authorized him to do so.

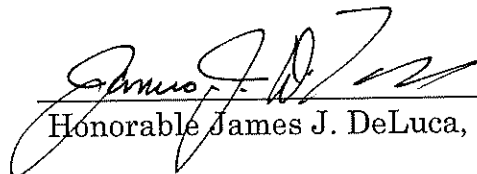
On March 5, 2020 at 10:32 a.m., Howard Siegel forwarded to Plaintiffs' counsel a proposed form of second stipulation. The transmittal e-mail [Exhibit P-28] did not advise it was subject to approval or review by any of the Defendants. The revised stipulation attached to Howard Siegel's e-mail contained new provisions. On March 5, 2020 at 2:31 p.m., Howard Siegel wrote to Norgaard following up on the status of the signed Second Stipulation. Exhibit P-29. The March 5 e-mail did not indicate that the Second Stipulation was subject to further review or approval by Defendants.

Defendants' s voluntary actions placed Howard Siegel in a situation where a person of ordinary prudence, namely, Plaintiffs' counsel, would be justified in presuming that Howard Siegel had the authority to enter into a settlement and not just negotiations on behalf of the client. See, Amatuzzo, supra at 475. The

negotiations between Howard Siegel and Plaintiffs' counsel regarding the Second Stipulation focused on the non-refundability of the deposit. On March 10, 2020, Plaintiffs accepted the Second Stipulation as revised by Howard Siegel (Exhibit P-32) and the revisions to the First Stipulation and October 2019 Contract became effective.

In summary, the court finds that Howard Siegel, on behalf of Defendants, made a settlement offer on March 5, 2020. Howard Siegel had the apparent authority to make that offer. The offer on behalf of Defendants was never revoked. On March 10, 2020 at 4:18 p.m., Plaintiffs accepted the Second Stipulation when it transmitted the signed stipulation to Howard Siegel and advised that the additional funds were being held in escrow. As such, the court finds that the Second Stipulation should be enforced.⁴ In light of Defendants' refusal to allow Plaintiffs to comply with the terms of the Second Stipulation, the 90-day time frame for closing shall run from the date of the Decision. Closing on the matter shall take place no later than August 17, 2021. An order accompanies this Decision.

Dated: May 19, 2021


Honorable James J. DeLuca, J.S.C.

⁴ In light of the court's determination on the issue of apparent authority, the court need not reach the issue of whether Howard Siegel had actual authority to agree to the terms of the Second Stipulation.