

COUNSELORS AT LAW

WILLINGBORO MALL, LTD. v. 240/242 FRANKLIN AVENUE LLC (A-62-11) (069082) Decided 8/15/13

The New Jersey Supreme Court has held that "if the parties to <u>mediation</u> reach an agreement to resolve their dispute, the terms of that settlement must be reduced to <u>writing</u> and signed by the parties before the mediation comes to a close."

This case involves Willingboro Mall, Ltd. (Willingboro), the owner of the Willingboro Mall, selling its property to 240/242 Franklin Avenue LLC (Franklin) in February 2005. To secure part of Franklin's obligations, the parties executed a promissory note and mortgage on the property. Willingboro subsequently filed a mortgage foreclosure action. Franklin denied that it defaulted on the note. The court subsequently referred this matter to nonbinding mediation.

On November 6, 2007, a retired Superior Court Judge conducted the mediation. Willingboro's manager, Scott Plapinger, and attorney, Michael Zindler, appeared on behalf of the Willingboro. The mediation was held at the offices of Franklin's attorney, Joseph Grimes. The mediator met privately with each side. At some point, Franklin offered \$100,000 to Willingboro in exchange for settlement of all claims and for a discharge of the mortgage. On behalf of Willingboro, Plapinger orally accepted the offer in the presence of the mediator who presented the terms of the proposed settlement. Plapinger also affirmed that he gave his attorney authority to enter into the settlement. The terms of the settlement were <u>not</u> reduced to writing before the conclusion of the mediation.

On November 9th, Franklin forwarded to the court and Willingboro a letter announcing that the case had been "successfully settled." The letter also set forth the terms of the settlement. On November 20th, Franklin's attorney sent a separate letter to Willingboro stating he held the \$100,000 in his attorney trust account to fund the settlement. On November 30th, Willingboro's attorney told Franklin's attorney that Willingboro rejected the settlement terms.

In December, Franklin filed a motion to enforce the settlement agreement. Franklin attached certifications from its attorney and the mediator that revealed communications made between the parties during the mediation. The mediator averred in his Certification that the parties voluntarily entered into a binding settlement agreement and that the settlement terms were accurately memorialized in Franklin's letter to the court.

Willingboro did not give its consent to the filing of either Certification; however, Willingboro did not move to dismiss the motion based on violations of the mediation communication privilege. Instead, in opposition to the motion, Willingboro requested an evidentiary hearing and the taking of discovery and filed a Certification of its manager, Scott Plapinger. Plapinger averred that he reluctantly agreed to take part in the mediation and that he was told it was "nonbinding."

During discovery taken in connection with the motion to enforce, five witnesses were deposed including the mediator, Willingboro's manager and Willingboro's attorney. After the close of discovery, the Honorable Michael J. Hogan conducted a four day evidentiary hearing. Judge Hogan found that a binding settlement agreement was reached as a result of the court directed mediation. The Appellate Division affirmed the trial court's enforcement of the settlement agreement.

The New Jersey Supreme Court granted Willingboro's petition for certification. Willingboro raised two issues: 1) Whether \underline{R} .1:40-4 (i) requires a settlement agreement reached at mediation to be reduced to writing and signed at the time of mediation and 2) whether Willingboro waived the mediation communication privilege.

 $\underline{\mathbf{R}}$. 1:40-4(i) states "a settlement reached at mediation is not enforceable unless it is reduced to writing at the time of the mediation signed by the parties." In this case, the writing memorializing the terms of the settlement was forwarded by Franklin after the mediation and never signed by Willingboro. Accordingly, Willingboro argued that the purported settlement should not be enforced. Franklin countered by noting that nothing in $\underline{\mathbf{R}}$. 1:40-4(i) requires the written settlement agreement resulting from the mediation be created or tendered on the actual day of the mediation. Willingboro also argued that it did not waive the mediation communication privilege by presenting evidence in opposition to the motion to enforce the oral agreement. Willingboro noted that the mediation communication privilege had "already been destroyed by Franklin's disclosures to the court through the mediator certification." Thus, Willingboro's response was simply a defensive measure and should not have been taken as a waiver.

The Supreme Court noted that \underline{R} . 1:40-4(d) provides: "Unless the participants in a mediation agree otherwise or to the extent disclosure is permitted by this rule, no party, mediator or other participant in the mediation may disclose any mediation communication to anyone who is not a participant in the mediation." The purpose of the rule is that without assurance of confidentiality, participants will be unwilling to enter into candid and unrestrained communication. In addition, the New Jersey Mediation Act (N.J.S.A. 2A:23C-1 et. seq.) and the Rules of Evidence (N.J.R.E. 519) confer a privilege on mediation communications.

The Court noted that there are limited exceptions to the privilege which include a signed writing exception which allows a settlement agreement reduced to writing and adopted by the parties to be admitted into evidence to prove the validity of the agreement. \underline{R} .1:40-4(i) provides that "if there is an agreement, it shall be reduced to writing and a copy thereof furnished to each party."

The Court noted that the second exception to the mediation communication privilege is waiver. Pursuant to statute and case law, the waiver must be express. The Court concluded that the Certifications filed by Franklin's attorney and the mediator in support of Franklin's motion to enforce the oral agreement disclosed privilege mediation communications. Despite the fact that Franklin violated the mediation communication privilege, Willingboro did not timely move to strike or suppress the disclosure of the mediation communications. Instead, Willingboro proceeded to litigate whether it had in fact entered into a binding oral settlement agreement.

Willingboro breached the mediation communication privilege by appending to its opposition papers Scott Plapinger's Certification. Thus, Willingboro expressly waived the mediation communication privilege in responding to the motion.

In order to avoid these issues, the Court concluded: "If the parties to mediation reach an agreement to resolve their dispute, the terms of that settlement must be reduced to writing and signed by the parties before the mediation comes to a close."