

NJ SUPREME COURT RULES DECISIVELY ON MEDIATION

Mediators who don't keep up with important legal developments risk doing disservice to their clients. On August 15, 2013, the NJ Supreme Court published an opinion that provides important guidance for both lawyers who provide mediation services and clients who select mediation for dispute resolution.

The case, Willingboro Mall LTD v. 240/242 Franklin Ave LLC, (Docket No. A-3582-10T1, approved for publication August 8, 2013), ended a lengthy dispute that began in 2005. The dispute arose from the sale of the Willingboro Mall (plaintiff) to buyer Franklin (defendant) where, as part of the sale, Franklin agreed to pay certain existing fines and penalties associated with the mall property. When Franklin failed to meet these obligations, Willingboro brought a foreclosure action against Franklin, and the hearing court ordered the dispute to mediation. After several days, the parties reached agreement on key terms and the mediator reviewed the terms with the parties, but the agreement

was not memorialized in a writing signed by the parties. Within days, the parties each then took some action toward implementation of the mediator's findings: Franklin sent a confirming letter describing its understandings to Willingboro, and Willingboro, as agreed, placed funds in escrow and agreed to release the funds once the fines and penalties were satisfied. Three weeks later, Willingboro apparently had a change of heart and notified Franklin through its attorneys that they rejected the settlement.

Defendant Franklin asserted that there was indeed a final mediated agreement, filed a motion to enforce, and in support, offered certifications from individuals who had attended the mediation sessions to describe discussions during the mediation. Plaintiff Willingboro responded by requesting an evidentiary hearing, and in support, filed a certification from one of its employees who attended the mediation who stated he did not believe the confirming letter was intended to be legally binding.

Following a plenary hearing, the trial judge found that the facts and testimony from the witnesses established that the parties had reached a legally binding settlement, even though the terms of the settlement were not reduced to a writing signed by the parties.

The NJ Appellate Court in a 2011 decision (A-62 September term 2011 069082), affirmed the trial court and found that in order to have a binding enforceable agreement in a mediation, a single signed settlement agreement is not required; it is sufficient to have more than one document (e-mails, tape recordings, for example) which when taken together reveal the intent of the parties. So, where the key elements of a mediated settlement are identified and confirmed by each of the parties but not memorialized in a signed agreement at the moment the mediation is completed, this will not affect the finality and enforceability of the agreement. The Appellate Court's reasoning is based on two important principles: First, settlement of disputes in a non-judicial setting (e.g. mediation) is an important element in the efficient operation of the judicial system and therefore to be encouraged.

Using judicial resources to re-hear matters that have already been decided in mediation is wasteful and inconsistent with the broader goal. (Note that the case in hand started with a mediation in 2005 and was finally resolved by the NJ Supreme Court in 2013.). So, broadening the definition of a "binding agreement" in this mediation case is consistent with this goal. Second, the Appellate Court soundly rejected plaintiff's argument that oral agreements arising from mediation are *ipso facto* not enforceable if the party or parties did not specifically waive the confidentiality privilege that attaches to the content of a mediation. Generally, an oral agreement will not be enforceable before a final settlement is reached, and all prior communications are protected by mediation settlement confidentiality unless specifically waived, in this case, neither party waived confidentiality as to the other party's revelations, but each of the parties breached the confidentiality of the proceeding by themselves revealing the content of participants' discussions during the mediation. The Supreme Court decision, *supra*, affirmed the enforceability of the oral

agreement. Further, they also held that "going forward" if a mediation settlement is not reduced to a signed writing, it will not be enforceable. The opinion was critical of the disclosure of the content of mediation discussions, both by plaintiff and also by the mediator (even though mediator had been ordered by a lower court to testify about the content of the mediation discussions) and stressed the criticality of confidentiality to the parties' being willing to engage in candid and unrestrained discussions in pursuit of settlement, or, put another way, the mediation communications privilege is intended to provide comfort for each of the parties that their words uttered within the sanctity of a mediation session cannot later be used against them. The New Jersey courts have consistently expressed strong support for the important role played by mediation, and most certainly want to encourage the finality of mediated agreements, and this case certainly sends a clear message that the way to get finality for a mediated agreement is NOT to initiate litigation, which is what mediation is intended to avoid, and that even though mediation

may not always be successful, it should most certainly not spawn more litigation.

Practice Pointer

An experienced mediator will always spend time at the outset establishing clients' expectations and explaining to parties for whom mediation is being conducted, that aside from the practical reasons to fully resolve all issues during a mediation, once the mediation is "over", it will be difficult to obtain court review to decide any open questions that may not be identified until after the mediation is completed. Unlike arbitration, in mediation, the NJ Supreme Court has made it clear that the courts are not intended as a forum for further clarification or modification of a mediation result, once that mediation has been completed. Clearly, this decision places greater responsibility on the mediator, but it also creates strong incentives for the parties to be comfortable with candor and openness, knowing that their trust will not be betrayed, to reach an agreement on all open issues, an

outcome that is certainly more efficient, less time consuming, and less expensive for the participants.