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New, From Willingboro Mall: Mediated Settlements Must Be in Writing

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In *Willingboro Mall v. 240/242 Franklin Avenue*, 215 N.J. 242 (2013), a commercial dispute, our Supreme Court vastly changed the enforcement landscape of mediated settlement agreements under New Jersey's Uniform Mediation Act (UMA-NJ), N.J.S.A. 2A: 23C-1, et seq., Evidence Rule 519, and Rule 1:40-4(i). See *Minkowitz v. Israeli*, No. A-2335-11T2, 2013 N.J.Super. LEXIS 144 *37, 38, 46 (App. Div. Sept. 25, 2013) (*Willingboro Mall* cited in Family Part opinion dealing with enforceability of mediated settlement agreements).

Factual and Procedural History

In 2005, Willingboro Mall agreed to sell property to 240/242 Franklin Avenue. In a separate indemnification agreement, Franklin Avenue agreed to pay certain township penalties and fines on the property. Six months after the parties signed the contract, Willingboro Mall filed a foreclosure complaint alleging that Franklin Avenue had defaulted on its obligations, a claim that Franklin Avenue denied.

In 2007, the trial court referred the parties to mediation, which, according to Franklin Avenue, produced an oral settlement agreement after a single meeting. Shortly after the mediation session, Franklin Avenue's attorney sent a letter to the court and to Willingboro Mall's counsel, memorializing the asserted terms of settlement. Franklin Avenue's lawyer sent a second letter to the court and Willingboro, informing them that he had placed $100,000 in escrow, to be disbursed to Willingboro Mall upon stated conditions precedent.

Willingboro Mall refused to sign a release or fulfill the conditions precedent. Franklin Avenue filed a motion to enforce the settlement agreement and attached certifications from its attorney and the mediator, which revealed privileged mediation communications. Willingboro Mall did not move to dismiss Franklin Avenue's motion or to strike the certifications based on asserted violations of mediation privilege. Instead, Willingboro Mall requested an evidentiary hearing and discovery, and filed an opposing certification from its own manager, which also disclosed privileged mediation communications.

The trial court ordered the taking of discovery and scheduled a hearing to determine whether an enforceable oral agreement had been reached in mediation. In discovery, Willingboro Mall did not object to the mediator's disclosure of privileged communications. At the plenary hearing, Willingboro Mall consented to the trial judge's direction to the mediator to testify to privileged mediation communications. After the plenary hearing, the trial court found that the parties had reached an enforceable oral settlement agreement at mediation and made credibility findings.

On appeal, the Appellate Division rejected Willingboro Mall's argument, per R. 1:40-4(i), that a mediated settlement invariably requires a signed agreement at the end of mediation. It found substantial credible record evidence to support the trial court's determination that the parties had reached a binding oral agreement at mediation.

The Supreme Court's Rulings

The Supreme Court accepted Willingboro Mall's petition for certification, and considered the following issues de novo: (1) whether UMA-NJ, Evidence Rule 519 and Rule 1:40-4(i) condition an agreement's enforceability on the existence of a record signed by the parties to be bound; and (2) whether Willingboro Mall expressly waived the privilege that ordinarily protects against discovery or admission of mediation communications.

The court recognized that exclusion of mediation communications from discovery and trial enhances the quality and efficacy of the process. As stated in Rule

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1:40-4(d), "[u]nless the participants in a mediation agree otherwise or to the extent disclosure is permitted by this rule, no party, mediator, or other participant in a mediation may disclose any mediation communication to anyone who is not a participant in the mediation."

The court identified two exceptions to confidentiality: a signed writing and waiver. UMA-NJ and Evidence Rule 519 both allow admission of a written and signed settlement agreement to prove the agreement. The court cited the UMA drafters regarding the definition of an "agreement evidenced by a record" and the meaning of "signed" to determine that it applies not only to "written and executed agreements" but also to videotape and audiotape proofs.

The court found that the signed writing exception had no application here, because the parties' asserted agreement was oral. However, the court concluded that Willingboro Mall's failure to seek timely exclusion of privileged mediation communications permitted their admission, and that the trial court had relied upon substantial credible evidence to find that the parties had settled their case on the terms decided. The court held that the certifications filed by Franklin Avenue's attorney and the mediator breached mediation privilege. While Willingboro Mall did not consent to such disclosures, said the court, it also failed to timely object to their admission and consideration.

The court concluded that Willingboro Mall expressly waived the mediation privilege by engaging in "unrestricted litigation … which involved wholesale disclosures of mediation communications." Willingboro Mall also "waive[d] any issues of [mediation] confidentiality" at the mediator's deposition and by consenting to the trial judge's direction to the mediator to testify at a plenary hearing.

The court unanimously affirmed the Appellate Division's ruling that both parties had expressly waived statutory and court-rule confidentiality, and upheld as binding the parties' oral settlement agreement reached at mediation. *However*, to avoid repeated problems of enforcement, the court mandated that, "going forward," mediating parties must ordinarily enter into a written and signed settlement agreement, or settlement will be unenforceable:

> The rule requiring a signed, written agreement is intended to ensure, to the extent humanly possible, that the parties have voluntarily and knowingly entered into the settlement and to protect the settlement against a later collateral attack. A settlement in mediation should not be the prelude to a new round of litigation over whether the parties reached a settlement. The signed, written agreement requirement—we expect—will greatly minimize the potential for litigation.

In complex cases involving delayed settlement, said the court, the mediation session may be continued for a "brief but reasonable period of time to allow for the signing of the settlement."

Analysis of the Opinion

In reaching its decision, the Supreme Court either ignored or willfully bypassed the UMA-NJ's provisions expressly permitting enforcement of oral settlement agreements, with the proviso that the mediator does not have to testify. See N.J.S.A. 2A:23C-6(b)(2) and (c). While not a model of legislative clarity (the core text came from the National Conference of Commissioners on Uniform State Law and the ABA Board of Governors), that provision permits proof of "a claim…or a defense to avoid liability on a *contract arising out of the mediation*." (Emphasis added.) Translation: oral contracts may be enforced or denied as the proofs may show, if the judge, arbitrator or administrative judge makes a preliminary finding, in camera, "that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in" contract enforcement proceedings.

The *Willingboro Mall* case has superimposed a default rule on the statutory text, namely that oral settlements (or written but unsigned settlements) are *only* enforceable if the parties consent to the discoverability and/or admissibility of otherwise privileged evidence. The ruling is not limited to court-referred or court-annexed mediation: it is directed at purely private mediations as well, and for understandable reasons. Our Supreme Court seeks to discourage litigation arising from mediated settlement negotiations, and such litigation has occurred far too often in our jurisdiction. See, e.g., *Lehr v. Afflitto*, 382 N.J. Super. 376, 398-99 (App. Div. 2006) ("[T]hese parties [had] an opportunity to expeditiously resolve their matter without the cost and burden of plowing through the adversarial system…so that they could move on with their lives. That did not happen here."). A party who opposes enforcement of an oral settlement agreement arising out of mediation must promptly object to discovery or admissibility of privileged mediation communications.

In the future, such failures will likely be deemed a deviation from accepted standards in the field of trial law. That is because waiver of the objection may result in an enforceable settlement that the opposing party could have defeated simply by refusing to testify and objecting to testimony by the mediator, the other party or any third-party participants (lawyers, experts and any other attendees).

Conclusions

Our Supreme Court has made a strong public policy choice in barring enforcement of oral settlement agreements: If the purported agreement is not in writing and signed by the parties to be bound or their authorized agents, or proved by electronic means, then it will not be enforced—unless both parties consent to admission of otherwise privileged mediation communications.

Oral settlement agreements arising from mediation, including written but unsigned versions of settlements, are no longer admissible or enforceable in New Jersey, absent a party's timely objection to a violation of mediation privilege. Lawyers are obliged to understand and apply the laws of mediation confidentiality and settlement, or our clients and we shall suffer the consequences.■