New Jersey Supreme Court Mandates All Mediation Settlements Must be Reduced to a Signed Written Agreement

On August 15, 2013, the New Jersey Supreme Court in *Willingboro Mall, LTD. v. 240/242 Franklin Avenue, L.L.C.,*[1] unanimously affirmed the Appellate Division's decision that the plaintiff expressly waived the mediation-communication privilege normally afforded to mediation sessions, and upheld as binding the parties' oral settlement agreement. Going forward, however, the Court clarified that in order to have an enforceable settlement parties to a mediation must execute a written settlement agreement before the mediation comes to a close.

I. Factual Background and Procedural History[2]

In February 2005, the plaintiff, Willingboro Mall, LTD. ("Willingboro"), owner of the Willingboro Mall, sold its property to the defendant, Franklin Avenue, L.L.C. ("Franklin"). To secure part of Franklin's obligation, the parties executed a promissory note and mortgage on the property. On August 3, 2005, Willingboro filed a mortgage-foreclosure action alleging Franklin defaulted on its contractual obligations. The trial court directed the parties to participate in a non-binding mediation, which took place on November 6, 2007, over the course of several hours. After each side privately deliberated with the mediator, Franklin offered $100,000 to Willingboro in exchange for settlement of all claims and for a discharge of the mortgage on the mall property. Willingboro's manager orally accepted the offer in the presence of the mediator who reviewed with the parties the terms of the proposed settlement. Willingboro's manager also affirmed that he gave his attorney authority to enter into the settlement. The terms of the settlement were not reduced to a signed writing before the conclusion of the mediation session.

On November 9, 2007, Franklin forwarded to the trial judge and Willingboro a letter memorializing the purported terms of settlement in eight numbered paragraphs, and also sent Willingboro a separate letter requesting it file a stipulation of dismissal in the foreclosure action and deliver a mortgage discharge before the money was disbursed. On November 30, 2007, Willingboro rejected the settlement and in December, Franklin filed a motion to enforce the settlement agreement, attaching certifications from its attorney and the mediator that revealed communications made between the parties during the mediation, averring that the parties voluntarily entered into a settlement and that the settlement terms were accurately reflected in Franklin's letter to the court. Instead of contesting the motion based on a breach of the mediation-communication privilege, Willingboro filed a motion in opposition, attaching a certification from its manager disclosing the substance of the parties' discussions during the mediation.

During discovery the parties agreed to waive any issues of confidentiality with regard to the mediation process and consented to an order compelling the mediator to testify. Testimony given during a four-day evidentiary hearing by the mediator, Willingboro's manager and attorney revealed additional communications made between the parties during the course of the mediation. Willingboro's newly retained counsel restated its position on the record that the parties waived confidentiality on the issue, however, on the second day of the hearing Willingboro reversed course and moved for an order expunging "all confidential communications" disclosed and "barring any further mediation-communication disclosures." The trial court ruled that Willingboro waived the mediation-communication privilege and the hearing resumed. In light of the evidence, the trial court

[1] *Willingboro Mall, LTD. v. 240/242 Franklin Avenue, L.L.C.* (A-62-11) (069082) (N.J. Feb. 27, 2013), available at http://www.judiciary.state.nj.us/opinions/supreme/A6211WillingboroMallvFranklinAve.pdf (the "Opinion").

[2] The factual background is summarized from the background set forth in the Court's opinion, which was primarily adduced at an evidentiary hearing on a motion to enforce an alleged oral settlement agreement between the parties.

held that a binding settlement agreement was reached, "[e]ven though the [settlement] terms were not reduced to a formal writing at the mediation session," and enforced the settlement as memorialized in Franklin's November 9 letter.

On appeal, the Appellate Division rejected Willingboro's argument that the court's mediation rule, R. 1:40-4(i), required contemporaneous reduction of the settlement terms to writing and obtaining signatures on the document at the mediation. As a result, the panel found there was substantial credible evidence in the record to support the trial court's findings that the parties reached a binding settlement agreement. The Supreme Court granted Willingboro's petition for certification.

II. The Decision of the New Jersey Supreme Court

On review, the Court considered *de novo*, whether New Jersey's Uniform Mediation Act, its rules of evidence and the court's mediation rules[3] required a settlement agreement reached at mediation to be reduced to writing and signed at the time of mediation, and whether Willingboro explicitly waived the privilege that protects from disclosure any communication made during the course of mediation.

The Court initially recognized that these rules each confer a privilege on mediation communications and are intended to enhance the quality and efficacy of the judicial process, in part by preserving confidentiality in the mediation process.[4] Accordingly, "[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."[5] Despite the broad scope of the privilege, the Court identified two limited exceptions where confidential mediation communications may be properly disclosed, including the signed-writing exception and waiver.[6]

The signed-writing exception allows a settlement agreement reduced to writing and properly adopted by the parties to be admitted into evidence to prove the validity of the agreement.[7] Although this rule does not specify that a written agreement must be signed by the parties, the UMA and rules of evidence both provide that "an *agreement evidenced by a record signed by all parties to the agreement* is an exception to the mediation-communication privilege."[8] The Court relied on comments of the UMA drafters for insight regarding the intended scope of the words "agreement evidenced by a record" and "signed" to determine that it applies not only to "written and executed agreements," but also to "those recorded by tape...and ascribed to by the parties on the tape."[9]

In light of the facts, the Court concluded that the signed-writing exception did not apply in this case because Willingboro did not seek to bar enforcement of the settlement based on the lack of a signed written

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[3] *See* New Jersey Courts, *Complementary Dispute Resolution Programs*, Rule 1:40 – 1:40-12, available at http://www.judiciary.state.nj.us/rules/r1-40.htm; New Jersey Uniform Mediation Act ("UMA"), *N.J.S.A.* 2A:23C-1 – C-13; New Jersey Rules of Evidence, *N.J.R.E.* 519.

[4] Opinion at 15-16 (citing *N.J.S.A.* 2A:23(C)-4(a); *N.J.R.E.* 519 (a)(a)); *See also State v. Williams*, 184 N.J. 432, 446-47 (2005); *Herrera v. Twp. Of S. Orange Vill.*, 270 N.J. Super. 417, 424 (App. Div. 1993).

[5] *Id.*at 16 (quoting R. 1:40-4(d)).

[6] *Id.* at 19, 21.

[7] *Id.* at 19; R. 1:40-4(i).

[8] *Id.* at 20 (citing *N.J.S.A.* 2A:23C-6(a)(1); *N.J.R.E.* 519(c)(a)(1)).

[9] *Id.* at 20 (quoting *UMA Drafters' Comments,* at Nat'l Conference of Comm'rs on Unif. State Laws, *Uniform Mediation Act* § 6(a)(1), comment 2 (2003)).

agreement early enough in the proceedings. The Court noted that even if Willingboro intended to rely on the signed-writing doctrine, it was obliged to stand by this rule and not litigate the oral agreement.[10] In addition, the Court found that the certifications filed by Franklin's attorney and the mediator also revealed confidential "mediation communications," as defined by the rule.[11] Moreover, the mediator's disclosures, validating the contents of Franklin's letter, went far beyond merely communicating to the court that the parties reached a settlement and as a result, the Court concluded the mediator breached the privilege.[12] Although Willingboro did not consent to these disclosures of mediation communications, it did not timely move to strike or suppress them.

With respect to the alternative exception of waiver, the Court confirmed a valid waiver requires not only that a party "have full knowledge of his legal rights," but also that the party "clearly, unequivocally, and decisively" surrenders those rights.[13] The Court rejected Willingboro's assertion that its own disclosures of mediation communications were permitted in opposing Franklin's motion to enforce the oral settlement agreement.[14] Instead, the Court concluded that Willingboro expressly waived the privilege by engaging in "unrestricted litigation...which involved wholesale disclosures of mediation communications."[15] Moreover, the Court referred to Willingboro's agreement to "waive any issues of confidentiality with regard to the mediation process" at the mediator's deposition and its unequivocal consent to having the trial judge direct the mediator to testify, as further evidence of an express waiver.[16] Additionally, the Court rejected as untimely, Willingboro's argument that it sought to invoke the privilege on the second hearing date.[17] In reaching its conclusion that Willingboro expressly waived the mediation-communication privilege, the Court affirmed that the oral settlement agreement was binding.

To avoid such disputes in the future, the Court clarified that going forward, "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" or else it will not be enforced.[18] In instances of delayed settlement, the mediation session should be continued for a "brief but reasonable period of time to allow for the signing of the settlement." The Court also confirmed that audio- or video-recorded agreements to which the parties ascribe would meet the test of "an agreement evidenced by a record signed by all the parties to the agreement."[19]

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[10] *Id.* at 22.

[11] *See N.J.S.A.* 2A: 23C-2.

[12] *Id.* at 22-23 (citing *N.J.S.A.* 2A:23C-7(a)-(b); *N.J.R.E.* 519(d)). The Court also relied on a Third Circuit decision to support the principles guiding its conclusion that, "[i]n the absence of a signed waiver, it is difficult to imagine any scenario in which a party would be able to prove a settlement was reached during the mediation without running afoul of the mediation-communication privilege." *Id.* at 23 (citing *Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429, 434-36 (3d Cir. 2005)).

[13] *Id.* at 21 (quoting *Knorr v. Smeal*, 178 N.J. 169, 177 (2003)); *N.J.S.A.* 2A:23C-5(a); *N.J.R.E.* 519(b).

[14] *Id.* at 26 (citing *N.J.S.A.* 2A:23C-4).

[15] *Id.* at 25.

[16] *Id.* at 27.

[17] *Id.* at 28.

[18] *Id.* at 29.

[19] *Id.* (citing *N.J.S.A* 2A:23C-6(a)(1) and *N.J.R.E.* 519(c)(a)(1)).

III. Significance of the Decision

In this decision, the New Jersey high court articulated a bright-line standard for enforceable settlement agreements reached at mediation. While reinforcing the broad scope of the mediation-communication privilege, this decision also serves as a reminder that a party wishing to avail itself of the protection of the privilege must timely invoke the privilege.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Lindsey Frischer at 212.701.3143 or lfrischer@cahill.com.

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