IN THE COURT OF COMMON PLEAS of PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT of PENNSYLVANIA

CIVIL TRIAL DIVISION

PATRICIA and MICHAEL DUNGEE	:	
Plaintiffs	:	DECEMBER TERM, 1997
v.	:	
	:	
INTERSTATE HOTELS CORPORATION #209	:	
and	:	
MARRIOTT CORPORATION	:	
and	:	
INTERSTATE CONSHOHOCKEN	:	
PARTNERSHIP, LP	:	
Defendants	:	No. 1793

OPINION

APRIL 28, 2000 GOODHEART, J.

This is the Plaintiffs' appeal from my Order of December 1, 1999, enforcing a settlement reached on July 7, 1999, during trial of this matter. The case is a garden-variety slip-and-fall claim, arising from injuries allegedly suffered by Plaintiff Patricia Dungee when she tripped over some tablecloths at the Defendants' hotel in West Conshohocken, on December 15, 1995.

It is undisputed that the Defendants agreed to pay the Plaintiffs $125,000.00 to settle the case, and it is similarly undisputed that the Plaintiffs agreed to accept that payment in full and final satisfaction of their claims. As has been said here before, once that occurs a contract is made, which will be enforced like any other. Century Inn, Inc. v. Century Inn Realty, Inc., 358 Pa. Super 53, at 58; 516 A.2d 765, at 767 (1986).

Despite the apparent simplicity of this proposition, Petitions to Enforce Settlements have been arriving on my desk with depressing regularity. In this case, Plaintiffs' counsel took exception to the form of the release forwarded by defense counsel and refused to have his clients sign it as originally drafted.

The Plaintiffs did, however, execute and return a revised version of the release, from which their counsel had stricken the provisions he found objectionable; the changes – which, notably, did not involve the amount of the settlement payment – were not acceptable to the Defendants.

The Plaintiffs then filed a Petition to Invalidate Settlement, and the Defendants filed a

cross-Petition to Enforce Settlement; I held a hearing on the competing Petitions on November 8, 1999, where defense counsel admitted that the parties had not discussed (and had not agreed upon) the confidentiality and indemnity provisions that he included in his form of release.

Because there was no dispute over the essential terms of settlement -- indeed, by executing a modified release, the Plaintiffs implicitly confirmed that they had agreed to accept the stated figure – I denied the Plaintiffs' Petition to Invalidate Settlement and granted in part the Defendants' Petition to Enforce it, though without the additional conditions sought by the defense.

I also awarded the Plaintiffs interest at 6% *per annum*, from August 1, 1999 – the date on which they tendered the modified release – to the date of actual payment, reasoning that the Defendants' obligation to pay had become absolute on that date, and that any further delay was directly attributable to the Defendants' insistence that the release contain terms beyond those that had been agreed to.

The day after argument -- about three weeks before I actually rendered my decision on the Petitions -- Plaintiffs' counsel wrote a letter to me in which he took issue with some negative comments that I had made regarding Mrs. Dungee's credibility shortly before the case settled. Mr. Chaiken claimed that I had "foisted" an unacceptable settlement on his clients, and that his clients were therefore entitled to a new trial, notwithstanding the agreed facts of the settlement that had been established at argument the day before.

The comments to which Mr. Chaiken's letter referred were made after Plaintiff Patricia Dungee completed her testimony, which included -- among others -- the following relevant passages :

[Re-direct examination by Mr. Chaiken]

Q. Now, Mrs. Dungee, there was [*sic*] a number of questions put to you about the exhibits marked D-1 through D-5 which were marked. Let me go through them with you. Let's take D-1. What was D-1, it was talked about as being an application for a job. What did the top of that sheet say ?

A. It's a fax.

Q. And who were you faxing to ? How were you getting these names to fax to ? Tell the jury what you were doing.

A. I was going through the Philadelphia Inquirer or the Courier-Post. I picked out things that looked like they maybe [*sic*] something I could do and I would send them a fax.

Q. Now, in some of those, you said that you were working at

the time, and one you said you were a fantastic catheter salesman and another one you said you earned $68,000.00 a year, do you recall that ?

A. Yes.

Q. Mrs. Dungee, why did you put that information down in these fax transmissions ?

[Objection made by defense counsel and overruled]

A. For two reasons, I guess.

[Objection by defense counsel]

THE COURT : Do you know why you put it down ?

A. Yes, sir.

THE COURT : You can say why.

A. I had worked with a headhunter and also another person that had an agency, and they both indicated to me –

[Objection made by defense counsel and sustained]

MR. CHAIKEN : Let me rephrase that question for you.

Q. Did you have conversation with various people before you wrote this ?

A. Yes.

Q. And who were these people that you had conversations with ?

A. A headhunter and an employment agency.

Q. And what was your reason for speaking to these people ?

A. I wanted to find some job that I could do.

Q. Now, as a result of those conversations, tell the jury what you did.

A. I took my regular resume and I added additional things to make myself more desirable in the job market.

Q. Were you working at that time ?

A. No.

Q. Were you having pain in your neck and back at that time ?

A. Yes, I was.

Q. And why didn't you write these things down on the job applications ?

A. Because then I would be wasting a fax. Because no one would want to hire me anyway.

THE COURT : Are you saying that these people counseled you to tell a lie in those letters so you can get a job ?

THE WITNESS : Yes.

THE COURT : You are saying to the jury that you would lie to get a job. Would you lie to get money in this courtroom ?

THE WITNESS : No.

THE COURT : What is the difference ?

THE WITNESS : Because I had somebody telling me that's what I should do to send an application in.

(N.T. 7/7/99, Pp. 73-76).

* * *

[Re-cross examination, by defense counsel, Mr. Tucci]

Q. Mrs. Dungee, you lied in these letter to these prospective employers telling them you were working and lied about the amount of money you were making, is that correct ?

A. Yes, I did.

Q. You would have taken any of these jobs if these employers

had come through for you in the spring of 1997 if they offered you a job ?

A. I would have tried.

MR. TUCCI : That's all I have.

THE COURT : You can step down.

[whereupon the jury left the room.]

THE COURT : Mr. Chaiken, your client admitted to this jury that she lied to get a job and if they don't conclude she would lie to get money in this case, then I am totally unconscious and brain dead….

(N.T. 7/7/99, Pp. 76-77)

In Commonwealth v. Laws, 474 Pa. 318; 378 A.2d 812 (1977), our Supreme Court observed (with internal citations omitted) that :

> "it is always the right and sometimes the duty of a trial judge to interrogate witnesses, although, of course, questioning from the bench should not show bias or feeling nor be unduly protracted….
>
> "The extent to which a trial judge chooses to question a witness is within the trial judge's discretion, and this Court will not find error in the exercise of such discretion except in cases of clear abuse….
>
> "When the questions asked by the trial judge are not too numerous and are designed 'to clarify the witness's testimony to assist the jury in a more intelligent understanding of its import', there is no error."

It was Mrs. Dungee's own testimony – and not my questioning – that revealed her to the jury as a liar. Further, by failing to object at trial – and by failing to raise the issue in their Petition to Invalidate Settlement – the Plaintiffs have waived any possible claim for relief arising from the questions that I asked this witness, or the comments that I made – outside the hearing of the jury – after she completed her testimony.

Finally, if the Plaintiffs were so convinced of the quality of their case, they had a very simple remedy for my alleged coercion : once timely objections had been made and overruled, they could then have refused to settle the case, and raised the comments as a basis for post-trial relief, or for appellate correction.

Mr. Chaiken's November 9, 1999 letter was an utterly inappropriate method to raise the issue of alleged impartiality as a basis for post-trial relief. Given its content, tone and timing, I am convinced that the letter was written precisely because it enabled Mr. Chaiken to raise the issue outside the hearing of his opponent[1], and for that reason, I have made the November 9, 1999 letter a part of the record in this case[2].

The Plaintiffs' true motivation for attempting to avoid the settlement was revealed at argument, when their counsel admitted -- after some prodding -- that his clients' new demand was $250,000.00. Even though the release drafted by defense counsel was admittedly overbroad, the essential terms of settlement became binding at the moment of acceptance, and a subsequent dispute over ancillary provisions cannot negate the enforceability of the agreement to settle.

Because there is no dispute that the parties had agreed to a settlement of $125,000.00 in this case, that agreement is binding, and my ruling in this matter should be affirmed.

BY THE COURT:

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Goodheart, J.

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[1] The letter does indicate that a copy was sent to defense counsel, Mr. Tucci.

[2] It is completely inappropriate for counsel to use post-argument correspondence to raise for the first time a claim of bias on the part of the Court.