NEUTRAL NOTES

THE JACOBS CENTER FOR JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION™

April 2012

Volume I, Issue 3

ENFORCEMENT OF MEDIATION SETTLEMENTS

Beim v. Sawyer (f/k/a Beim) was decided recently by the Appellate Division. The case has received commentary particularly since it attempted to set aside a "settlement" reached at mediation. Recognizing that family court/divorce support and other issues are complicated, the Appellate Court went out of its way to note the time and effort involved as well as the role of counsel for all sides.

The case arose out of a motion to vacate a settlement.

The Court also noted facts which I will only mention but not comment upon. The marriage occurred in 1985 and there are no children from the marriage. Plaintiff was in his 80's and defendant was in her 70's. From November 1994 until June 2008 Jetty Sawyer (f/k/a Jetty Beim) held a power of attorney and conducted substantially all of the parties' financial dealings. Joseph Beim was unconscious for several months prior to the filing of the divorce complaint as a result of injuries from an automobile accident.

There were multiple ADR events in an attempt to settle the controversy. The parties went to an early settlement panel on July 13, 2009 and were referred to Donna P. Legband, Esq. for economic mediation. Mandatory economic mediation occurred on October 8, 2009 as well as an intensive settlement conference on March 22, 2010 and a second economic mediation session with Legband on June 10, 2010. The opinion reported that the second mediation session lasted for several hours and resulted in a settlement agreement which was signed by defendant, defendant's attorney, plaintiff, and plaintiff's attorney.

Plaintiff attended the June mediation with his attorney, Daniel B. Tune, Esq. Defendant attended with Adelaide Riggi, Esq., an associate at Norris McLaughlin & Marcus. Her primary attorney, Michael Stanton, Esq., did not attend. The Court noted that

> After hours of mediation, both sides, with the help of Legband, composed the four-page settlement agreement. Legband typed two pages of the document, the third page was photocopied from one of defendant's prior submissions, and the last page was written by Tune. Handwritten paragraphs were added to the typed document and certain sections were deleted completely.

A further handwritten section significantly stated:

> [t]he undersigned agree that they intend to meet with their attorneys and have a property/martial [sic] settlement agreement drafted consistent with the terms of this agreement. Both parties further agree that this document constitutes a binding settlement agreement. [(Emphasis supplied.]

The agreement also provided for the withdrawal of pending motions. The parties and respective counsel signed and dated the settlement agreement and each page of the agreement was signed and initialed.

On June 29, 2010, plaintiff submitted a notice of motion to enter partial judgment to enforce the agreement and about one month later defendant filed a cross-motion asserting that the "binding settlement agreement" be deemed unenforceable.

Judge Anthony F. Picheca, Jr. entered an order on October 8, 2010 granting plaintiff's request for partial judgment consistent with the agreement and in January 2011 entered an amended dual final judgment of divorce as well as counsel fees of $8,285.53 to plaintiff.

Defendant urged the Appellate Panel that she only felt

Cont'd on pg. 3

INSIDE THIS ISSUE:

The Jacobs Center for Justice and Alternative Dispute Resolution is dedicated to assisting individuals and companies in resolving problems and disputes of all types.

MEDIATION REQUIREMENT TRUMPS RIGHT TO LITIGATE

In Decilveo v. Decilveo, in a post-judgment matrimonial matter, the Appellate Division rejected Stephanie Wolf's attempt to jump back into court even though the parties had entered into a property settlement and support agreement which was incorporated into the judgment of divorce. Paragraph seven of the agreement provided for a dispute resolution mechanism as follows:

> In the event that any differences arise out of the interpretation, construction or operation of this Agreement, the parties further specifically agree as follows:
>
> (a) They shall first attempt in good faith to resolve such differences amicably and directly with each other, retaining the right to seek advise of counsel;
>
> (b) If they are unable to resolve any dispute between themselves or with the assistance of counsel, or through mediation, either side may submit same to a Court of competent jurisdiction for resolution.

There were numerous ongoing disputes between the parties.

The background in Decilveo is interesting. On January 26, 2010, plaintiff filed a motion for enforcement of litigant's rights with thirty-four specific requests for relief and defendant filed a cross-motion. On March 19, 2010, the motion judge ordered the parties to contact a mediator within fourteen days, attend mediation, and then return to court. However, the parties did not attend mediation within the ordered time frame but filed new, nearly identical motions.

The Court denied the parties' motions and, again, ordered them to comply with the order to attend mediation. The parties attended mediation and reached a comprehensive agreement on the disputed matters. While the mediation settlement was being drafted, however, an issue arose concerning whether and when additional alimony and child support over the base amount was payable to plaintiff due to payments defendant had received from his new employer in 2010. The parties had not addressed this "fresh dispute" during mediation.

The Court entered the consent order memorializing the parties' mediation agreement which stated that they had addressed and resolved all issues in their various motions.

Ten days after the consent order was entered plaintiff filed the motion for enforcement of litigant's rights. In her moving papers she made thirteen requests for relief, many of which had been included in the prior motion. She also sought relief for events subsequent to the mediation including compelling defendant to pay $10,000 for a late wire transfer, completion of a $40,000 payment, requiring defendant to replenish the son's college account and deposit $100 per day for every day the balance was below $5,000, and requiring defendant to pay all future bank transfer fees and reimburse her $25, among other things.

Defendant argued that plaintiff's and counsel's bad faith caused the unnecessary delay in completion and submitted evidence showing that funds had been in defense counsel's trust account two weeks before the due date. Other requests followed by both parties including defendant's comment that plaintiff spoke to their son about the trust account and a shorting of the trust account. The Court concluded that plaintiff and her attorney acted in bad faith by not cooperating in the transfer of the $40,000 and denied requests for an additional $10,000 due to late transfer.

Regarding conduct by the parties the Court wrote as follows:

> [W]hen [defendant] and his attorneys tried to comply with the Consent Order to wire funds to [plaintiff], neither [plaintiff] nor her attorneys cooperated with the process. It is clear from the documentation provided that neither [plaintiff] nor her attorneys had any intention to act in good faith to get the funds deposited. [Plaintiff] would have benefited by the less than twenty-four hour delay in receipt of the monies into her account. In fact, she asked this Court to sanction [defendant] due to this delay.

The back and forth recriminations are not fully reported here. Rather, the Court's comments regarding the mediation process are more significant. The Court noted that in the parties' settlement agreement they agreed to resort to the court only if unable to resolve disputes "between themselves, or with the assistance of counsel, or through mediation."

Plaintiff failed to seek mediation but, nonetheless, argued that the Judge was in error in holding her in violation of the agreement. Contrary to authority relied upon by plaintiff, in which the Court had been concerned about an impermissible restraint on parties' due process rights, here the parties "voluntarily agreed in their PSSA to attempt to settle their disputes through mediation before filing in court."

The Court noted that mediation is a recognized and appropriate process for the voluntary resolution of family disputes. The New Jersey Supreme Court has approved voluntary agreements between parties to use alternate methods to settle marital disputes. Consequently, the Court concluded that it was "satisfied that the judge did not abuse her discretion in requiring the parties to follow their own agreement … to mediate prior to filing in court." The Court also stated that the trial judge was correct that unmediated issues which were now raised were also appropriate for future mediation in accordance with the agreement.

The Court found no abuse of discretion by the judge and concurred with the award of attorneys' fees.

There are several lessons learned from Decilveo many of which I am not commenting on since they have to do

Cont'd on pg. 3

Enforcement of Mediation Settlements (Cont'd from pg. 1)

comfortable being represented by lawyer Stanton from Norris McLaughlin even though Laurie Poppe, a former associate, had filed motions and made appearances for her on other occasions. Defendant argued that she agreed to attend mediation but was not planning to commit herself to a final agreement that day.

Defendant relied upon the following statement in the mediation retainer agreement:

> At the conclusion of mediation, I will prepare a memorandum of understanding reflecting the agreements you have reached. This memorandum is not to be signed and is not to be regarded as binding until the agreements therein are incorporated in a Property Settlement Agreement prepared by your attorneys and signed by you.

Defendant stated that she contacted Stanton to let him know she was not comfortable with the document drawn up by Legband and that the parties were required to sign. Stanton thereafter advised plaintiff's attorney of her position.

The appeal urged error by the trial judge finding that a binding settlement was entered into and that Legband exceeded her authority and breached her role as mediator "by partially preparing and presenting to the parties the settlement agreement." She also urged that the agreement be set aside because she was not represented by Stanton and did not intend to enter into the agreement.

The Court rejected all claims by Jetty Sawyer. The Appellate Court noted the contractual underpinnings of a settlement which is to be enforced as written "absent a demonstration of fraud or other compelling circumstances." The Court also noted the Uniform Mediation Act and Supreme Court Rule 1:40 recognizing the role of complementary dispute resolution to assist parties to resolve their disputes short of a trial. The Court stated that the parties were represented by counsel and had ample time to discuss the agreed upon provisions with their lawyers. Further, quoting Judge Picheca, "the parties and their counsel [had] the ability to decide, throughout the course of negotiations, that they would contract to make the agreement binding."

The Appellate Division concluded that "[a] change of heart after accepting a settlement is not a basis to set aside the agreement." Further, the Court found that the specific language of the agreement as to its binding nature "belies the defendant's assertion that she did not understand its consequences" particularly since she signed the agreement with counsel present.

Defendant also raised the question of unconscionability which the Court rejected. It characterized her assertions as "vague and unsupported allegations of harm caused by the absence of her 'principal attorney,' as well as alleged overreaching by Legband…." The Court said these issues were "insufficient to satisfy the high standard of unconscionability." She provided no factual support for her proposition that she was not prepared for settlement nor did she suffer unjustified economic harm by the division of property in the settlement agreement. The Court found no reason to set aside Judge Picheca's ruling. The Court further ruled that on the date of the settlement discovery was complete and presumably defendant was sufficiently informed as to the values of assets "particularly because she had controlled her husband's financial affairs for years."

The message to mediators and the mediation community: The role of mediation defined in Rule 1:40 is clear. Whether mediators should individually prepare agreements is open for discussion among mediators. Personally, I do not and leave the drafting to the parties. However, the Appellate Division has made clear that where there is both a literal and physical meeting of the minds, counsel is present, and a signed writing exists, it is unlikely that courts will overturn such an agreement developed in mediation particularly, as the Appellate Division noted, because mediation is an integral part of the judicial process and recognized by the courts to assist the parties to a litigated matter to resolve their dispute short of trial.

Mediation Requirement Trumps Right to Litigate

(Cont'd from pg. 2)

with recriminations between parties and counsel. However, the Court was very clear that when the parties agree to mediation in their agreement, skipping that step - barring some other fact or extraordinary reason - is likely to have the Appellate Court send it back to honor the agreement particularly in light of the favored position of mediation in resolving disputes on family matters.

QUICK NOTES

The Appellate Division in New York, in In re Jack J. Grynberg, et al v. BP Exploration Operating Company Limited, et al., rejected, in part, an arbitrator's award of $3 million in sanctions against Jack Grynberg. The Court said the award in sanctions was "punitive in nature, regardless of the label attached." Accordingly, the Court vacated the award as violative of public policy. Note to arbitrators: Do you have the authority to impose sanctions? If so, how much?

SUBSTITUTE ARBITRATORS

The Third Circuit Court of Appeals had an opportunity to address this question which is a matter of first impression for the Circuit. In Kahn v. Dell Inc., the Court determined whether Section 5 of the Federal Arbitration Act (FAA) required the appointment of a substitute arbitrator when the arbitrator designated by the parties was unavailable.

The case involved a $1,200 computer purchased by Kahn online through Dell's website in which he was required to click a box stating that he agreed to the conditions of sale which included resolution through arbitration. Paragraph 13 addressed binding arbitration stating that disputes "SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM (NAF)." Rule 1 of the NAF's Code and Procedure stated that the Code shall be administered only by the NAF or by any entity or individual providing administrative services by agreement with the NAF. The Court noted that no replacement forum was designated in the event the NAF was unavailable for any reason but the agreement incorporated the terms and conditions of the FAA.

The agreement provided that Texas law would govern interpretation of the agreement and any of its sales but did not contain a severance provision.

Khan alleged defects in his Dell. After the third replacement Dell refused to issue another replacement to him claiming the warranty had expired. Khan filed a putative class action asserting claims under the New Jersey Consumer Fraud Act, breach of express and implied warranty, fraud, negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, and unjust enrichment.

AT THE TIME THE LAWSUIT WAS FILED THE NAF HAD BEEN BARRED FROM CONDUCTING CONSUMER ARBITRATIONS BY CONSENT JUDGMENT WHICH RESOLVED LITIGATION BROUGHT BY THE ATTORNEY GENERAL OF MINNESOTA. The consent judgment barred the NAF from the business of arbitrating credit card and other consumer disputes and ordered the NAF to stop accepting any new consumer arbitrations.

Dell moved to compel arbitration arguing that the arbitration provision was binding regarding all of Khan's claims. Khan did not dispute the agreement. However, he asserted that the arbitration provision was unenforceable because NAF, which had been designated as the arbitral forum, was no longer permitted to conduct consumer arbitrations.

The Court stated that because this is a question of arbitrability, it is governed by the FAA. By looking to the FAA the Court said the unavailability of the NAF is addressed in Section 5 of the FAA which provided a mechanism for substituting an arbitrator when the designated arbitrator is unavailable.

The District Court had ruled that the arbitration provision was rendered unenforceable because it provided for a forum that was unavailable when Khan commenced suit. The Court of Appeals agreed with a line of cases following Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217 (11th Cir. 2000). The Court opined that in light of the liberal federal policy in favor of arbitration, the Brown position is favored. The Court stated that:

> The language relied on by Kahn is at best ambiguous as to whether the parties intended to have their disputes arbitrated in the event that NAF was unavailable for any reason. Because of the ambiguity, it is not clear whether the designation of NAF is ancillary or is as important a consideration as the agreement to arbitrate itself.

The Court noted that the arbitration provision in the "Terms and Conditions" specifically incorporated the FAA thereby suggesting that in the event of the NAF's unavailability the FAA's procedures for addressing such a problem should apply. The Court noted, with finality, that when Khan agreed to the Terms and Conditions he agreed that disputes would be resolved through arbitration "rather than through litigation." The Court used a double negative to conclude its opinion and stated that "[t]he contract's language does not indicate the parties' unambiguous intent not to arbitrate their disputes if NAF is unavailable. Section 5 of the FAA requires a court to address such unavailability by appointing a substitute arbitrator."

I also note a spirited and compelling dissent by Circuit Judge Sloviter in which she disagreed and found that the designation of NAF was "integral to the agreement" which led her to hold that Section 5 of the FAA was inapplicable and that the unavailability of the NAF precluded arbitration. She stated that the phrase "EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM" was written in all capital letters yet surrounded by clauses written in lower case letters.

> This aesthetic prominence indicates the parties' intent for the entire phrase to be read together and emphasized as an essential part of the agreement. Moreover, as noted by the District Court, "[t]he NAF is expressly named, the NAF's rules are to apply, … no provision is made for an alternate arbitrator…."

She concluded that it "cannot be insignificant that Dell named NAF as the exclusive forum in its arbitration clauses." The Judge commented on NAF accepting a consent judgment barring it from administering and participating in all consumer arbitrations and at least implicitly criticizing Dell's selection of such a party as its neutral and stated that "it is evident that this is not an ordinary case…."

PRACTICE TIPS: The selection of a substitute arbitrator should be specified in the agreement or at least contemplated. When large consumer arbitrations are to be handled by a particular service or panel, some contemplation of alternate processes should be made so that the parties' intention is both clear and can be carried out.

WAIVER OF ARBITRATION

In T & Beer, Inc. v. Wine Source Selections, L.L.C., d/b/a Grape Solutions, et al., the parties engaged in back and forth discussions regarding enforcement of a restrictive covenant dealing with the terms of a distribution agreement executed between the parties. The agreement stated that disputes were subject to arbitration.

T & Beer, Inc. is engaged in the wholesale distribution of beer and wine primarily in New York and New Jersey and defendant is a supplier and importer. The agreement stated that all disputes would be subject to arbitration through the American Arbitration Association (AAA) with the commercial litigation rules of AAA and waiving rights to have disputes decided by a court or a jury. The agreement required written modification or waiver to avoid its provisions and signing by the parties.

Arbitration did not immediately occur. The respective attorneys engaged in extensive negotiations and letter writing. In nearly all of the documents and e-mails, the demand for arbitration by T & Beer was withdrawn. Each of the back and forth documents started in paragraph 1 with a comment on suspension or withdrawal of arbitration. The dispute began in September 2010 and discussions and negotiations continued. The matter proceeded into court and a preliminary injunction temporarily restraining defendants was ordered. Sometime subsequent a motion to dismiss plaintiff's complaint was filed relying upon the arbitration provision and stating that defendant Wine Source "**never agreed** to have any disputes … decided by this [c]ourt."

The Appellate Court concluded that the agreement expressly and unequivocally called for arbitration of disputes between the parties and written modification of any terms. However, it disagreed with the conclusion that there was no written modification since the emails exchanged between the parties were clear evidence of defendant's knowing and voluntary waiver of the arbitration provision. Counsel also acted accordingly and accepted service of the summons and complaint. The Appellate Court relied upon the colloquy below in which both counsel agreed that the arbitration provision had been waived.

> [I]t was the court that inquired whether both parties were waiving the arbitration provision. Plaintiff's counsel responded affirmatively and advised the court that a letter had been sent to the AAA withdrawing the arbitration. Defense counsel, in response to the court's question whether he agreed with plaintiff's counsel's position, responded:
>
> > I do. There is still [an] issue, actually[,] as to the jurisdiction requirement. We did have an agreement, but we never met and I'm not sure if that agreement is upheld. There was an email that set forth that there was going to be a meeting. And the not law [sic] defendants were – in that. So I'm just letting Your Honor know I haven't had a chance to address it[. T]he arbitration was filed against Grape Solutions and R[io]ndo USA. Charles Mass[ie] is a resident of New Jersey. But as far as Cant[ine] R[io]ndo, I'm not sure this [c]ourt has jurisdiction over them. And as far as choice of law, that has not been discussed, because it clearly states a choice of law [as] New York. But I haven't had an opportunity to address that with the clients.

The Court concluded that based upon the actions of the attorneys on behalf of their clients there was an unequivocal intention to waive arbitration.

A few points from T & Beer: Arbitration provisions are usually enforced. Arbitration provisions can be waived if the parties, through conduct and comments, evince an unambiguous intention to waive. Surely, proceeding as the parties did in T & Beer, litigating the matter and then having a change of heart is not likely to divest the court of jurisdiction to restart the process at arbitration.

Again, arbitration agreements should be clearly written and followed. If subsequent conduct by parties and counsel uses terms like "waiver of arbitration" on a repeated basis it is, obviously, at their peril.

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