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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF OAKLEAF

URSULA JONES,

Plaintiff,

vs.

AGNES JONES,

Defendant.

_____/

AGNES JONES,

Cross-Complainant,

vs.

URSULA JONES,

Cross-Defendant.

_____/

Case No. 12345

POINTS & AUTHORITIES IN SUPPORT OF MOTION TO ENFORCE SETTLEMENT AGREEMENT (CCP § 664.6)

Date:
Time:
Dept:

Complaint filed:
Trial date:

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INTRODUCTION

Through this motion, Agnes Jones seeks to enforce an oral agreement the parties made to extend the closing date of their written settlement agreement at a December 18, 2000 status conference presided over by Commissioner John White. Agnes Jones cross-complained in this action for, among other claims, her sister Ursula Jones's breach of a contract to convey ownership of the family business, Soeur Software. After eight pretrial conferences and several continuances of the trial date, on November 21, 2000, Agnes and Ursula Jones entered into a written settlement agreement under which Agnes would buy Ursula's stock in Soeur Software.

At the status conference, the parties orally agreed to extend the closing date set in the Stock Purchase Agreement to allow Agnes to complete financing arrangements necessary to effect the purchase, and to continue the trial on Agnes's cross-complaint. A full statement of the relevant facts, including the subsequent discussions between the parties, appears in the attached declarations of John Lee and Agnes Jones.

Just two days before the original closing date, on January 29, 2001, Ursula Jones indicated for the first time that she did not view the oral extension to the settlement agreement as binding, and she ultimately refused to sign the writing memorializing that oral agreement. Nevertheless, in reliance on Ursula's repeated representations through her counsel that she would abide by the new, extended closing terms, Agnes invested some $30,000 to finalize the financing commitments necessary for the stock purchase.

As set forth in detail below, the parties reached a valid oral modification to their settlement agreement at the December status conference. Even though the Stock Purchase Agreement's terms call for all modifications to appear in writing, the doctrine of equitable estoppel bars Ursula from defending against enforcement of the oral modification on that basis. Additionally, enforcement of the oral modification is proper under Code of Civil Procedure § 664.6 even though Ursula did not personally attend the December status conference because the parties included all the material terms of their

settlement in a writing. The facts surrounding this settlement agreement demonstrate that the closing date was not a material term, but was set for March 1, 2001, because of the scheduled trial date. Agnes agreed to continue the trial date as consideration for the additional time to finalize the financing, based on the oral agreement. Ursula obtained the advantage of the trial continuance, and thus must be deemed to have waived the right to rely on the original closing date.

Finally, Agnes requests that, if possible, Commissioner White be assigned to preside over the hearing on this motion. He witnessed the parties make the oral agreement, and is therefore in a unique position to ascertain its validity and terms. His presiding over the hearing of the § 664.6 motion would expedite the proceedings and serve the interests of justice.

ARGUMENT

1. The court has the power to enforce settlement agreements under the summary procedure set forth in Code of Civil Procedure § 664.6.

If the parties to pending litigation stipulate, in a writing they signed outside the court or orally before the court, for settlement of the case or any part of it, the court may entertain a motion to enter judgment under the settlement agreement's terms. Code Civ. Proc. § 664.6. Section 664.6 provides a summary procedure by which the trial court can specifically enforce an agreement settling pending litigation without the need of a second lawsuit. *Kirby v. Southern Cal. Edison* (2000) 78 Cal.App.4th 840, 843. On its face, § 664.6 appears to provide a vehicle by which parties who have settled their litigation may move by stipulation to have judgment entered according to the settlement's terms.

The statute does not particularly discuss an adversary proceeding. Nevertheless, sometimes parties appear to have reached on oral agreement at a judicially supervised settlement conference but then are later unable to reduce that agreement to writing, perhaps because one party is attempting to renege on the settlement. See, e.g.,

Weddington Productions, Inc. v. Flick (1998) 60 Cal.App.4th 793, 796. In such a case, a § 664.6 motion is often brought by a party who wants to enforce the settlement against a party who later claims there had been no meeting of the minds sufficient to create a contract. See, e.g., *Datatronic Systems Corp. v. Speron, Inc.* (1986) 176 Cal.App.3d 1168, 1174-1175.

In contrast with a motion for summary judgment, judgment under a § 664.6 motion may be proper even if there are disputed facts regarding a settlement, provided the parties had earlier agreed on the agreement's material terms, or had a "meeting of the minds" so as to make the settlement binding. See *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 905. In determining whether the parties entered into a binding settlement, the trial court should consider: whether the parties explicitly defined the material terms; whether the supervising judicial officer questioned the parties regarding their understanding of the terms; and whether the parties expressly acknowledged their understanding of, and agreement to be bound by, those terms. See *Account Management Associates v. Sanglimsuwan* (2001) 91 Cal.App.4th 773, 778-781. To make this factual determination, the court, in its discretion, may receive oral testimony or determine the motion on declarations. *Account Management Associates, supra,* at 778. Where the judge who presided over the settlement conference also presides over the § 664.6 hearing, she may rely on her own recollection as to what transpired. *Kohn v. Jaymar Ruby, Inc.* (1994) 23 Cal.App.4th 1530, 1533.

2. Agnes Jones may properly invoke the procedure set forth in Code of Civil Procedure § 664.6 to enforce the terms of the Stock Purchase Agreement, as orally modified by the parties.

A. Enforcement of the oral modification of the Stock Purchase Agreement under § 664.6 is proper because Ursula Jones signed an agreement incorporating all material terms of the settlement.

Whether written or oral, the litigants themselves must clearly indicate their assent to the material terms of a settlement agreement for it to be enforceable under § 664.6. Both Ursula and Agnes Jones signed the Stock Purchase Agreement, which embodied all material terms of their agreement to settle this action. As the facts of this case reveal, the closing date of the purchase was not a material term, but was chosen by the parties based on the scheduled trial date of March 1, 2001. As explained in detail below, even though Ursula was not present at the December 2000 conference to state directly to Commissioner White that she agreed to this oral modification to the Stock Purchase Agreement, her repeated representation, through her agents, coupled with detrimental reliance on Agnes Jones's part, estop her from defeating enforcement of the oral extension of the closing date based on her failure to sign the writing memorializing this agreement.

In *Levy v. Superior Court* (1995) 10 Cal.4th 578, the supreme court held that, in providing an enforcement mechanism for settlement by "parties" under § 664.6, the Legislature intended the term literally to mean the litigants personally. *Id.* at 583. The court acknowledged that, in many contexts, the term "parties" may refer both to the litigants and their attorneys of record. *Id.* at 583. Nevertheless, it concluded that the narrow interpretation of the term should apply when "the subject of the statute may affect the substantial rights of the litigants themselves . . . ." *Ibid*. It reasoned that "[b]ecause the settlement of the lawsuit is a decision to end litigation, it obviously implicates a substantial right of the litigants themselves." *Id*. at 584. The supreme court therefore

held that, for a written settlement agreement to be enforceable under § 664.6, the litigants themselves must sign it. *Id.* at 586.

Although the facts in *Levy* involved a written settlement agreement, the majority opinion stated in a footnote that enforcement of an oral settlement agreement made in a judicially supervised setting, "must be read in the context of requiring direct party-litigant participation in the settlement." *Id.* at 584-586 fn. 3 (citing *In re Assemi*, *supra*, 7 Cal.4th at 906). Thus several appellate decisions dealing with the enforcement of oral settlement agreements have interpreted this "direct participation" statement in *Levy* to require that the party attend the conference where the agreement was made and affirm his assent to it to the presiding judicial officer. See, e.g., *Account Management Associates*, *supra*, 91 Cal.App.4th at 779-780.

In *Account Management*, the plaintiff and the defendant settled a prior action by way of an open-court settlement, later reduced to a written "stipulation for judgment." The defendant was not present during the open-court settlement. The stipulation required the defendant to make monthly payments, secured by a trust deed on his residence. The defendant's attorney signed the stipulation, but the defendant personally signed only the deed of trust. The defendant made 13 payments according to the terms of the stipulation; two payments were returned for insufficient funds. The plaintiff later filed an independent action to foreclose on the deed of trust. At trial on that action, the defendant moved for a nonsuit on the grounds that the written stipulation was unenforceable under § 664.6, which led to consideration of this issue on appeal.

The court of appeal held that the defendant's signature on the deed of trust, a collateral document, was insufficient to demonstrate his deliberate assent to the material terms of the settlement agreement under § 664.6 and *Levy*. *Account Management*, at 779-780. The court observed that the defendant's signature on the deed of trust, in and of itself, did not demonstrate that the defendant had agreed to significant, material terms contained in the written stipulation, such as the monthly deadline for making payments,

an acceleration clause, payment of a larger amount if a payment was missed, or permission for plaintiff to use an ex parte procedure to foreclose on the trust deed in the event of a default. *Id.* at 780. "In our view, if the litigant does not sign the document containing the terms of the settlement but instead signs a collateral document that does not refer to, or incorporate, the terms of the principal document, section 664.6 does not apply." *Ibid*.

In contrast with the facts described in *Account Management*, the parties in this case signed the Stock Purchase Agreement, which is a writing embodying all the material terms of the settlement. Although the *Levy* decision emphasized the importance of the litigants themselves manifesting their assent to *material* terms of the settlement, one cannot reasonably interpret it as abrogating basic principles of contract and agency law where modifications of immaterial terms become necessary. Further, even though the Stock Purchase Agreement requires that any modification to it be in writing (Agreement, § 14 at 12), Ursula Jones is properly estopped from asserting the invalidity of the oral modification based on her representations and course of conduct.

B. The March 1, 2001 closing date was not a material term of the settlement because of the scheduled trial date of June 1, 2001.

As explained in *Levy*, the purpose of requiring the parties themselves to agree to a settlement in writing or appear at a proceeding where an oral settlement is reached is to ensure "their mature reflection and deliberate assent." *Levy, supra,* 10 Cal.4th at 585. The supreme court thus indicated:

> This protects the parties against hasty and improvident settlement agreements by impressing upon them the seriousness and finality of the decision to settle, and minimizes the possibility of conflicting interpretations of the settlement. [Citations.] It also protects parties from impairment of their substantial rights without their knowledge and consent.

Ibid.

As shown by the history of the contract negotiations and the discussions at the December 2000 status conference, the March 1, 2001 closing date was not material to the settlement and Stock Purchase Agreement. The parties specified that closing date because trial was set to commence on June 1, 2001. Nothing in the *Levy* decision suggests that it would impair a party's substantial rights if her attorney were to negotiate an oral modification to an immaterial or nonessential term of the settlement agreement outside of a judicially supervised setting with the party also attending. The materiality of the contract term is an issue of fact, which can be considered as part of the § 664.6 motion. See Civ. Code § 1636 (contracts should be enforced according to the parties' intent as it existed at the time of contracting). Therefore, the fact that the parties orally amended a single term to a written settlement agreement, without one party signaling her assent in the presence of a judicial officer, does not preclude enforcement of the oral modification under § 664.6 as a matter of law.

3. The doctrine of equitable estoppel bars Ursula from defending against the oral extension agreement on the ground that she did not sign the written amendment.

A. A party cannot deny an oral modification to a written agreement if, by representations or conduct, she led the other party to rely on its validity to her detriment.

Even where a written agreement expressly provides that any modification must be in writing, an oral modification may still be valid under the doctrine of estoppel. Civ. Code § 1698(c), (d). Estoppel sufficient to enforce an oral amendment to a written agreement may take several forms. See, e.g., *Sutherland v. Barclays/American Mortgage Co.* (1997) 53 Cal.App.4th 299, 312 (oral modification agreement unsupported by consideration and unenforceable under Civil Code § 1698(c) may nonetheless be enforced

under doctrine of promissory estoppel).

"Equitable estoppel" or estoppel by conduct is a defensive doctrine, which "operates to prevent one party from taking unfair advantage of another." *San Diego Mutual Credit Union v. Smith* (1986) 176 Cal.App.3d 919, 922-923. As codified, the doctrine of equitable estoppel states: "Whenever a party has, by his own conduct, intentionally and deliberately led another to believe a particular thing is true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." Evid. Code § 623. The existence of an estoppel is a question of fact. *Ibid*. See also *Wagner v. Glendale Adventist Medical Center* (1989) 216 Cal.App.3d 1379, 1388, 1391 (recognizing that written contract may be modified by contrary oral representations or conduct that induces reliance thereon by another party, but holding evidence insufficient to establish such a modification). Proof of actual fraudulent intent is not necessary to raise an estoppel—merely careless conduct that induces reasonable reliance by the other suffices. See *Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1334-1335 & fn. 3.

The representations and conduct of Ursula and her agents estop her from asserting the terms of the Stock Purchase Agreement requiring that the amendment extending the closing date be in writing to become enforceable. The Stock Purchase Agreement includes a provision that explicitly provides: "Waivers or modifications of this Purchase Agreement, or any covenant, condition, or limitation contained herein, are valid only if in [a] writing that is separately signed by the Party to be charged." Stock Purchase Agreement, § 14 at 12 (Exhibit 1). Nevertheless, the course of conduct by Ursula and her counsel between the December 2000 status conference, when Mr. Black and Mr. Green stated that Ursula had agreed to extend the closing date, and Ursula's refusal to sign the written amendment on or about March 1, 2001, in conjunction with Agnes's detrimental reliance on the oral agreement's validity, establish the elements of equitable estoppel. Ursula therefore cannot now deny the validity of the oral modification simply because the

Stock Purchase Agreement called for a writing.

As witnessed by Commissioner White, Mr. Black represented at the status conference that he had previously discussed the matter of the closing date with Ursula, and that she had agreed to extend this date to a time far enough in the future to allow Agnes a reasonable opportunity to complete the financing arrangements. Mr. Black suggested the March closing date. John Lee Declaration, ¶ 4. In exchange, Agnes agreed to continue the trial on her cross-complaint. Lee Declaration, ¶ 5. Mr. Green offered to reduce the agreement to a writing, but never indicated that he would need Ursula's additional approvals of the terms. Additionally, despite many conversations with Mr. Lee about his delays in drafting the amendment, Mr. Green never made the least suggestion that Ursula had changed her mind about extending the closing date. To the contrary, Mr. Green stated that Ursula would sign the amendment up through March 29, 2001, only two days before the closing set in the Stock Purchase Agreement. Lee Declaration, ¶ 10.

From December 18, 2000, when the parties made the oral extension agreement, until they purported to terminate the Stock Purchase Agreement, Ursula and her counsel knew (or had reason to know) that Agnes was relying on the extended closing date in pursuing her financing negotiations with Solid Gold Capital. At the status conference, Agnes discussed the status of these negotiations with Mr. Green, who remarked that the terms sounded favorable. During ensuing discussions, Mr. Lee kept Mr. Green informed about the progress Agnes and Solid Gold Capital were making in reaching a final commitment. Lee Declaration, ¶ 11. Mr. Lee even arranged for Mr. Green to speak personally with Mr. Allen from Solid Gold Capital to confirm that it was eager to finance the stock purchase. Lee Declaration, ¶ 10.

Finally, Agnes relied to her detriment on the oral modification's validity. At the time of the December 2000 status conference, Agnes knew that it was highly unlikely that she could finalize a financing arrangement with Solid Gold Capital before the original closing date of March 1, 2001. A. Jones Declaration, ¶ 9. Based on the representation

that she would have up until March 2000 to conclude her financing arrangements, even though she did not need that long, Agnes invested approximately $30,000 to ensure that she could close the stock purchase promptly after she received a commitment from Solid Gold Capital. A. Jones Declaration, ¶ 10. Agnes would not have incurred these substantial expenses but for the continued assurances that Ursula had agreed to extend the closing. A. Jones Declaration, ¶ 11.

Agnes can prove all of the elements essential to raise a claim of equitable estoppel under Evidence Code § 623. Thus Ursula cannot defend against enforcement of the extension agreement because it was oral rather than in writing.

B. At the December 2000 status conference, the parties reached an enforceable oral agreement.

Parties may engage in preliminary negotiations, oral or written, in order to reach an agreement. These negotiations ordinarily result in a binding contract when all the material terms are understood, even though the parties intended that a formal writing embodying these terms would be executed. *Pacific Grove-Asilomar Operating Corp. v. Monterey* (1974) 43 Cal.App.3d 675, 686.

To form an enforceable contract, the parties must outwardly manifest their mutual assent to all terms material to the agreement. See *Weddington Productions, supra,* 60 Cal.App.4th at 810-811 (observing that a settlement agreement is a contract and therefore subject to general principles of contract law). Mutual assent means that the parties "agree on the same thing in the same sense." Civ. Code § 1580; see also Civ. Code § 1636 (contracts must be enforced according to the "mutual intention of the parties as it existed at the time of contracting."). "In order for acceptance of a proposal to result in the formation of a contract, the proposal 'must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.'" *Weddington Productions, supra,* 60 Cal.App.4th at 811 (citing 1WITKIN, SUMMARY OF

CALIFORNIA LAW (9th ed. 1987) *Contracts*, § 145, p. 169).

At the December status conference, the parties manifested their mutual assent to ascertainable terms and obligations so as to create an enforceable oral agreement to extend the closing date. With Ursula's prior approval, Mr. Black offered to extend the closing date of the Stock Purchase Agreement until March 1, 2001, with the closing to occur earlier at Agnes's election as buyer. In exchange, Agnes agreed to take the trial of her cross-complaint off the "fast track" and continue it until after the new closing date. Lee Declaration, ¶ 14. These terms are clear and unequivocal. Thus, after that point, a writing memorializing the oral agreement was necessary only to satisfy the modification term of the Stock Purchase Agreement and, presumably, the statute of frauds.

The small modifications the parties made to the written amendment were insufficient to supersede the oral agreement. Although the first draft of the amendment omitted the provision allowing Agnes to close the purchase at a date earlier than March 29, 2001, if she so elected, Mr. Green acknowledged that this was an oversight, and that the parties had agreed to that term at the status conference. Lee Declaration, ¶ 3. The written amendment's specification of the closing date as March 31, 2001, rather than May 1, 2001, did not change a material term of the oral agreement. But even if it did, Agnes accepted the "counteroffer" and signed the amendment. Lee Declaration, ¶ 6.

As these facts demonstrate, the parties reached an enforceable oral modification to the Stock Purchase Agreement. Even though the agreement itself required any modification to appear in a signed writing, the doctrine of equitable estoppel bars Ursula from invoking this requirement to defend against enforcement of the oral agreement to extend the closing date. The court should therefore order Ursula to comply with that oral agreement, and to perform her contractual obligations to ensure that the parties can close the stock purchase.

4. The court should exercise its equitable power under Civil Code § 128 to request that the Presiding Judge assign the hearing of Agnes's § 664.6 motion to Commissioner White.

The California courts have inherent equitable, supervisory, and administrative powers, as well as the inherent powers to control litigation before them. Code Civ. Proc. § 128. These inherent powers derive from the state Constitution, and are not confined by, or dependent on, a statute. *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1377.

Where a judge presided over a conference or other proceeding in which parties orally agreed to settle litigation, that judge may rely on personal recollection in ruling on a motion under § 664.6. *Kohn, supra,* 23 Cal.App.4th at 1533. Even where a settlement agreement is entirely oral, and not memorialized in a transcript, it is not *essential* that the same judge preside over the hearing on the § 664.6 motion. The statute makes no special provision for this. But, understandably, the presence of the same judge at both proceedings furthers the interests of justice by providing the recollection of an impartial witness to the oral statements of the party opposing the enforcement of the agreement.

In this case, the material terms of the parties' settlement agreement are contained in the written Stock Purchase Agreement, but the term Agnes seeks to enforce (the extension of the closing date beyond January 31, 2001) was agreed to orally, in front of Commissioner White. Based on the new but intractable position Ursula has taken concerning this settlement agreement in the past two weeks, Agnes anticipates that, at the hearing on this motion, Ursula's counsel will deny that they spoke to Agnes about the extension before the status conference and that she agreed to it. Agnes cannot reasonably call Commissioner White to appear as a witness to what transpired at the settlement conference. But if Commissioner White presides over the hearing on Agnes's § 664.6 motion, this would serve the same purpose by breaking a "tie" between the two opposing sides in a contest of credibility. For these reasons, Agnes respectfully requests that this court assist her in having the hearing on this motion assigned to Commissioner White.

CONCLUSION

The parties entered into a valid, enforceable oral agreement to extend the closing date under their written settlement agreement, the Stock Purchase Agreement. The history of the written contract's negotiations, the circumstances behind execution of the oral modification, and Ursula's subsequent conduct and representations through counsel show that the closing date for this stock purchase was *not* an essential term of the settlement, except that this occur before the trial commenced. The court should issue an order compelling Ursula Jones to honor the oral agreement extending the closing date, and permit final consummation of the settlement under the terms of the Stock Purchase Agreement.

Dated:

Respectfully submitted,

OPAL SMITH
Attorneys for Agnes Jones