NEW ENGLAND CRAB COMPANY, INC., & others[1] vs. GARRY PRIME & others.[2]

1 Evercel, Inc., and Sontek Medical, Inc.
2 Mark Newbert and Peter Prime.

14-P-887

APPEALS COURT OF MASSACHUSETTS

2015 Mass. App. Unpub. LEXIS 407

May 12, 2015, Entered

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009)*, ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO *RULE 1:28* ISSUED AFTER FEBRUARY 25, 2008, *MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE CHACE V. CURRAN, 71 MASS. APP. CT. 258*, 260 N.4 (2008).

JUDGES: Kantrowitz, Trainor & Fecteau, JJ.[6]

6 The panelists are listed in order of seniority.

OPINION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

New England Crab Company, Inc., Evercel, Inc., and Sontek Medical, Inc. (collectively, NE Crab), appeal from a judgment entered by a judge of the Superior Court that allowed the defendants' motions to enforce a settlement agreement and dismiss the complaint.[3] NE Crab contends, procedurally, that the judge improperly converted the defendants' motions, in effect, into summary judgment motions without proper warning and prevented NE Crab from utilizing discovery it intended to utilize but which the defendants had refused; NE Crab also contends, substantively, that the judge incorrectly determined that the two-page settlement memorandum (memorandum) was a binding agreement warranting dismissal of the complaint. Because we agree with NE Crab's second argument, we reverse.[4]

3 Peter Prime and Mark Newbert together, and Garry Prime individually, filed motions to enforce the settlement memorandum and to dismiss the complaint, but neither party specified a rule of civil procedure pursuant to which their motions were filed. Likewise, the judge did not specify a particular rule in granting the motions and dismissing the complaint. On appeal, as below, Peter Prime and Mark Newbert are represented by the same attorney, while Garry Prime is represented individually.

4 We need not address NE Crab's procedural argument in light of our determination that the memorandum is not binding; however, we note that courts routinely consider extrinsic evidence when ruling on motions to enforce, even if the motion was not filed pursuant to *Mass.R.Civ.P. 56*, *365* Mass. 824 (1974). See, e.g., *Basis Technology Corp. v. Amazon.com, Inc., 71 Mass. App. Ct. 29 (2008)*. Therefore, were we to decide this issue, error has not been made to appear in the judge's procedural method.

A binding settlement agreement made before litigation is terminated is enforceable in the court in which the action is pending. See, e.g., *Correia v. DeSimone, 34 Mass. App. Ct. 601, 602-603 (1993)*. To be considered enforceable, an "agreement requires (1) terms sufficiently complete and definite, and (2) a present intent of the parties at the time of formation to be bound by those terms." *Targus Group Intl., Inc. v. Sherman, 76 Mass. App. Ct. 421, 428 (2010)*. Regarding the first prong, we review the terms of the parties' settlement agreement de novo to determine whether they establish a "sufficiently clear and complete agreement." *Basis Technology Corp. v. Amazon.com, Inc., 71 Mass. App. Ct. 29, 36 (2008)*. As for the second prong, the factual finding of a contemporaneous intent to be bound is reviewed under the "clearly erroneous" standard of *Mass.R.Civ.P. 52(a)*, as amended, *423 Mass. 1402 (1996)*. *Ibid.* The record before us demonstrates that there was neither sufficient completeness nor present intent to be bound by the proposed settlement terms. The memorandum is two pages in length and includes a mere seven provisions; the majority of those provisions are neither sufficiently complete nor definite. For example, the memorandum provides that "Peter Prime agrees to enter into a covenant not to compete for two years," but the scope and extent of this clause is undefined in either its geographic reach or in the nature of the business to be included. The ambiguity of this clause is borne out by the parties' divergent understandings of it, as evidenced in their subsequent discussions. NE Crab maintains that the clause would not allow Peter Prime to work in any capacity for Atlantic Red Crab Company, Inc., its competitor, while Peter Prime takes the position that the clause allows him to work for that company as long as it is in relation to a type of crab that NE Crab does not process. That the parties could have such different interpretations of the non-compete clause evinces the inadequacy of definition in the nature of that clause.

Additionally, the parties "agree[d] to liquidated damages" in the event that Peter Prime violated the non-compete clause, but no exact amount, or method for determining that amount, was provided. Compare *Lafayette Place Assocs. v. Boston Redev. Authy., 427 Mass. 509, 517-519 (1998)* (approving a formula for calculation of the price of redevelopment land amid later major uncertainties); *Amazon.com, Inc., 71 Mass. App. Ct. at 38-39* ("[T]hey furnished an objective method for determination of a variable contractual element"). In fact, and demonstrating this provision's lack of definiteness and completeness, an attorney for NE Crab originally handwrote in an amount before the memorandum was signed, but the amount was crossed out and the parties were never close to agreeing on any amount.[5]

5 Further illuminating the incomplete nature of the memorandum is that the memorandum is not reasonably susceptible to future enforcement in the event that one party alleges a breach. A judge faced with such an undertaking would be required to construct provisions, such as a liquidated damages amount, to give meaning to some of the material terms. Although a judge may be able to fashion reasonable provisions, these would not be the terms agreed upon or contemplated by the parties.

Moreover, the circumstances under which the memorandum was signed, and the fact that the parties reached an impasse concerning the material terms of the memorandum following extensive discussion thereafter, strongly indicate that the parties did not have a present intent to be bound by the memorandum. Board members from NE Crab were not present when the memorandum was signed, as they had departed shortly before the mediator drafted it; only an attorney for NE Crab remained at that point. Additionally, the parties made handwritten alterations to the memorandum, some of which were later crossed out. Simply put, the circumstances did not indicate a setting in which the memorandum was intended to be a binding settlement agreement.

Moreover, the parties' extensive negotiations following the signing of the memorandum clearly indicate that little of what was contemplated in the memorandum was actually agreed upon, as the parties debated almost every material clause in the memorandum. This is not a case where one party sought to add or modify terms after the fact, but one where the parties clearly never came to a specific meeting of the minds concerning multiple, material provisions. See *Targus Group Intl., Inc., 76 Mass. App. Ct. at 434* ("[A]cceptance of specific terms followed by grumbling or by request for addition or modification does not negate agreement upon those terms").

Finally, we reject Garry Prime's argument that the portions of the memorandum applicable to him are sufficiently binding and divisible from the remainder. Garry Prime was subject to at least one clause that is not sufficiently complete nor definite: the mutual release clause. That clause did not specify whether such release would be general or specific, and the parties' subsequent understandings of that clause have been shown as vastly different. Consequently, the judgment dismissing the complaint is reversed, and the matter is remanded for further proceedings.

So ordered.

By the Court (Kantrowitz, Trainor & Fecteau, JJ.[6]),

6 The panelists are listed in order of seniority.