IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REBECCA FLEMING, Plaintiff,	:	CIVIL ACTION
v.	:	
LAURENCE A. HECKER, ET AL., Defendants.	:	NO. 2:04-CV-02157-LDD

MEMORANDUM ORDER

AND NOW, this 9th day of December 2004, upon consideration of plaintiff's Motion to Reopen Case and Enforce Settlement Agreement (the "agreement") (Doc. No. 10), filed on November 10, 2004, and Defendant's response thereto (Doc. No. 11), filed on November 22, 2004, it is hereby ORDERED that plaintiff's Motion is DENIED in part and GRANTED in part. Plaintiff's Motion is DENIED to the extent that plaintiff seeks to vacate the dismissal orders and to require defendant to pay plaintiff the sum of $16,000 within seven days of the date of the issuance of the Order. Plaintiff's Motion is GRANTED to the extent that plaintiff seeks the value of reasonable attorneys fees and costs incurred in bringing this Motion. The parties shall confer upon a reasonable fee, and, if the parties cannot agree, plaintiff's counsel may file an appropriate affidavit (with supporting affidavits) within 14 days.

Pursuant to the terms of the agreement, defendants were required to make three payments to plaintiff totaling $16,000. (See Agreement, at ¶ 1). The first payment of $6,000 was due on November 1, 2004. (Id.). The second payment of $5,000 was due on December 1, 2004. (Id.).

The third payment of $5,000 is due on January 1, 2005. (Id.). The agreement states that "time is of the essence for all payment dates." (Id.).

Defendants recognize that a breach of a "time is of the essence" clause in a settlement agreement may be construed as a material breach. See, e.g., Linan-Faye Construction Co., Inc. v. Housing Authority of City of Camden, 995 F.Supp. 520, 524 (D.N.J. 1998) (late payment of 45 days under settlement agreement with "time is of the essence" clause for payments constitutes material breach under New Jersey law, thereby giving plaintiffs the right to void release). Defendants claim, however, that the "time is of the essence" clause is inapplicable to the making of the first payment on November 1, 2004 because the clause only became effective upon receipt of plaintiff's executed version of the agreement. (Def. Mem. In Opp'n to Pl. Mot., at 2). Defendants argument, taken to its logical conclusion, is an argument that there was not a binding agreement until receipt of the plaintiff's executed version of the agreement.

This Court rejects defendants' argument. For a valid settlement agreement to form, the parties must "mutually asset to the terms and conditions of the settlement." Pugh v. Super Fresh Food Markets, Inc., 640 F.Supp. 1306, 1308 (E.D. Pa. 1986) ("essential prerequisite for a valid agreement is that the parties mutually asset to the terms and conditions of the settlement"); see also Swift v. Baskin, 1995 WL 296273, at *9 (E.D. Pa. May 15, 1995) ("agreement to settle a lawsuit which is voluntarily entered into is binding on parties, whether or not it is made in the presence of the court and whether or not it is evidenced by a writing"). On October 8, 2004, plaintiff's counsel confirmed the major points of a agreement in an electronic communication to defense counsel, with both parties agreeing that defense counsel would draft a final agreement containing specific terms, such as a general release of liability against defendants. (See October

8, E-mail confirming terms of agreement, attached as Ex. A to Pl. Mot.). Defendants admit that they assented to the terms of the agreement upon their approval of the final draft of the general release on or about October 26 or October 27, 2004. (Def. Mem., at 6; see also October 26, 2004 E-mail confirming content of release, attached as Ex. D. to Pl. Mot.). The formation of the agreement therefore occurred on or before October 28, 2004, when plaintiff signed an intent to be bound by the terms of the agreement, including the general release, and plaintiff's counsel mailed to defendant a signed version of the agreement. See, e.g., Pennwalt Corp. v. Plough, 676 F.2d 77, 79 (3d Cir. 1982) (settlement agreement treated like contract); see Restatement (Second) of Contracts § 63 (acceptance invited by offer "is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it even reaches the offerror").

Although the agreement was formed, at the latest, on October 28, 2004, this Court finds that defendants have substantially performed under the terms of the agreement. See, e.g., First Capital Corp. v. Country Fruit, Inc., 19 F.Supp.2d 397, 400 (E.D. Pa. 1998) (equitable doctrine of substantial performance excuses minor, technical, and inadvertent variations from terms of contract and "depends upon the surrounding circumstances and the construction of the contract at issue"); Bank of America Nat'l Trust And Savings Ass'n v. Hotel Rittenhouse Assoc., 1989 WL 52480, at * 6 (E.D. Pa. May 15, 1989) (applying substantial performance doctrine to party's compliance with terms of settlement agreement). Indeed, once defense counsel received confirmation of plaintiff's assent to the agreement on November 4, 2004, defendants promptly complied with the terms of the agreement. For instance, defense counsel forwarded the executed release to his clients on the day he received it, with instructions to tender the first payment of

$6,000. (See Def. Mot., at ¶ 10). On November 7, 2004, defendants mailed the first payment to defense counsel, who, after notifying plaintiff's counsel of the delay, forwarded the check to the attention of plaintiff's counsel on November 11, 2004. (See Copy of First Payment, attached as Ex. G to Def. Mem.; November 10, 2004 Notification E-mail to Plaintiff's Counsel, attached as Ex. I to Def. Mem.). Furthermore, as a sign of good faith, defendants then pre-paid the second payment of $5,000 on November 19, 2004, twelve days before the due date under the agreement. (See, Copy of Second Payment, attached as Ex. K to Def. Mem.). Consequently, although defendants did not meet the November 1, 2004 deadline, it is clear that defendants endeavored in good faith to perform their obligations under the settlement agreement after receiving an acknowledgment that plaintiff had, in fact, signed the agreement. Defendants therefore have substantially performed under the terms of the agreement.[1]

Nonetheless, although this Court finds that defendants substantially performed under the terms of the agreement, the agreement itself provides an additional, contractual remedy for failure to make timely payments. According to the agreement, "if payments are not made in full and on time, plaintiff may recover reasonable attorneys fees and costs incurred in collection efforts." (Agreement, at ¶ 2). Defendant's failure to meet the November 1, 2004 deadline, although not a material breach, entitles plaintiff to the contractually agreed upon remedy of

[1]The Court also rests its denial of plaintiff's motion to vacate the dismissal orders and to demand immediate payment of the settlement amount on an alternative basis. The Court notes that plaintiff is not seeking to vacate the agreement, but, instead, to have the Court enforce it. In contrast to the plaintiff's suggestions, however, this Court does not have the power to rewrite the terms of the agreement, such as by requiring defendants to pay the sum of $16,000, the full amount of the agreement, within seven days of the issuance of the Order. (See Pl. Proposed Order, at 1). Therefore, because plaintiff's request for relief concerns enforcement of the terms of the agreement, as written, and because defendants are currently in compliance with the agreement, plaintiff's request to have the Court enforce the agreement is moot.

reasonable attorneys fees and costs. (Id.). Accordingly, plaintiff shall be awarded "reasonable attorneys fees and costs incurred" in bringing this motion.

BY THE COURT:

Legrome D. Davis, J.