IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Edbert Johnson,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 16 L 9558
Toyota Motor Corporation, Teerow Grimes, State Farm Mutual Automobile Insurance Company, and Toyota Motor Sales USA, Inc.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

A settlement is valid and enforceable if the client gives express authority to its attorney to negotiate a settlement and the client does not repudiate the agreement. Here, the plaintiff expressly authorized his attorney to settle and failed to repudiate the agreement in a timely manner. The plaintiff's motion to vacate this court's previous dismissal order must, therefore, be denied and the settlement executed as agreed to by the parties.

Facts

On September 27, 2014, a car driven by Edbert Johnson collided with another driven by Teerow Grimes. An airbag in Johnson's Lexus allegedly failed to deploy properly, and Johnson was severely injured. As early as March 20, 2015, Grimes's insurer, State Farm Mutual Automobile Insurance Company, (State Farm) tendered in full its $50,000 policy to settle Johnson's claims. That offer remained open pending the resolution of the rest of the case.

On September 27, 2016, Johnson's local attorneys, McCready, Garcia & Leet (McCready), filed a complaint against

the defendants. On April 18, 2017, this court, pursuant to Illinois Supreme Court Rule 707, granted leave to attorneys Robert Langdon, John Serra, and David Brose of Langdon & Emison LLC (L&E) to file supplemental appearances on Johnson's behalf. After that date, L&E served as Johnson's primary attorneys in this matter. David Ayers of Watkins & Eager, and Denean Sturino of O'Hagan Meyer LLC served as Toyota Motor Corporation's two primary attorneys in this litigation.

Over the next year and a half, the case proceeded through written and oral discovery. Based on that record, the parties agreed to mediate in an attempt to settle the case. The December 6, 2018 mediation achieved only limited progress and, ultimately, the parties failed to resolve their differences. Then, in late April and early May 2019, in the run up to trial, the parties rekindled settlement discussions, the nature, timing, and result of which are highly contested. The specifics of these differences are outlined below. In short, the L&E attorneys and Toyota's attorneys believe that they successfully negotiated a $3-million settlement. In contrast, Johnson believes that, although he approved of L&E continued settlement discussions with Toyota, he never authorized L&E to settle the case.

On Friday, May 10, 2019, three days before the Monday, May 13, 2019 trial date, L&E presented this court with a motion to dismiss the case as to all parties pursuant to a $3,050,000 settlement. The settlement sum consisted of Toyota's $3-million offer and State Farm's offer of Grimes's $50,000 policy. On the same day, this court entered a dismissal order pending completion of the settlement papers.

On June 6, 2019, Johnson contacted L&E and requested that his attorneys file a motion to vacate the dismissal. On June 7, 2019, L&E filed a motion for an extension of time to file such a motion. On June 10, 2019, Johnson, L&E attorneys, and Toyota's attorneys appeared in court on the motion for an extension of time. This court struck L&E's motion, finding that there existed a conflict between L&E and Johnson as to whether he had

authorized the settlement. Based on that finding, this court concluded that L&E could not ethically file a motion on Johnson's behalf. Instead, this court granted L&E's oral motion to withdraw and ordered Johnson to file *pro se* his own motion for leave to vacate the dismissal order. Johnson filed his motion later the same day. That motion states, among other things, that: (1) "I did not agree to settle my case against Toyota Motor Corporation and Toyota Motor Sales Inc., or any of the defendants in this case;" (2) "There was no authority given to settle or dismiss my case;" and (3) "Text messages sent by plaintiff's counsel on Friday, May 3rd, 2019 were not seen or expected by plaintiff."

Johnson and the attorneys next appeared in court on July 24, 2019. At that time, this court expressed its position that the parties' intractable differences made inevitable an evidentiary hearing to provide a record for ruling on the motion to vacate. To that end, this court invited each party and law firm to submit in advance of the hearing a written memorandum and all documents it intended to introduce as evidence. Johnson later objected to L&E submitting and introducing various documents, arguing that they were protected by the attorney-client privilege. This court considered that argument and, in an August 22, 2019 written order, concluded that, based on *Shapo v. Tires 'N Tracks, Inc.* 336 Ill. App. 3d 387, 393 (1st Dist. 2002), and *Millard v. BNSF Ry.*, 2010 U.S. Dist. LEXIS 89777, *8 (N.D. Ill. Aug 21, 2010), Johnson had placed his settlement communications with L&E at issue and, therefore, had waived any privilege over those communications.

November 20, 2019 Evidentiary Hearing

Johnson made a statement that served as his direct testimony. In that statement, Johnson testified that he had originally demanded $17.5 to settle his case. He indicated that, over time, he had consistently come down from that figure in hopes of resolving the dispute. He emphasized that he had wanted the case to be over.

Johnson specifically addressed various events that occurred during a three-day period that is at the center of this dispute. On the evening of Wednesday, May 1, 2019, Brose visited with Johnson at his home for approximately 3½ hours. During that time, Brose answered Johnson's question that he could win his case. According to Johnson, Brose stopped by Johnson's home during the day on Thursday, May 2, 2019, but Johnson was not there because he was attending previously scheduled doctors' appointments. The two did meet, however, later in the day for about 2½ hours. Johnson testified that, during that meeting, he did not give Brose authority to settle the case. On Friday morning, May 3, 2019, Brose returned to Johnson's home for approximately 1½ hours. According to Johnson, Brose asked about settling the case, and Johnson testified the he told Brose, "[N]o, no, no, we're done. . . . It's time to go to trial. We were a week away." Johnson admitted that, in response to Brose's repeated requests, Johnson gave Brose permission to talk to Toyota about "these very low numbers, which I – I was completely against." Johnson understood that the conversation with Toyota was to "get them moving in the right direction. . . ."

After Brose left on Friday morning, May 3, 2019, Johnson took medication and did not wake up until Sunday, May 5, 2019, at approximately 1:00 a.m. At that time, he looked at a text message on his phone indicating that the case had settled. Johnson testified that: "I was dumbfounded." Johnson indicated that he sent an e-mail to Brose and Langdon "stating exactly where I stand . . . and what I wanted to happen moving forward." Johnson went back to bed until Sunday afternoon. At that time, Johnson and his sister left the house to get some documents notarized for his attorneys.

Johnson did not speak with anyone from L&E until Monday, May 6, 2019. Johnson testified that his attorneys had taken the position that Johnson had given them a "take-it-or-leave-it scenario" with Toyota. Johnson disagreed: "I have never spoken that way. I have never even thought that way. I have no idea where this comes from." Johnson stated that the e-mails and

messages during the May 1-3, 2019 period indicate that he did not agree to any settlement; further, he never signed any documents to that effect or acquiesced to a settlement in any way. Johnson testified that he only gave authority to L&E to talk further with Toyota about settling the case.

On cross-examination, Johnson acknowledged various voicemail and text messages between Johnson and his attorneys. In an April 23, 2019 text message from Brose to Johnson, Brose stated that: "Unless we hear otherwise, we will keep negotiating to get at or above $2.5 million as we discussed and worked for at mediation." Johnson admitted that he did not respond to Brose in writing, but had follow-up telephone conversations with him before Thursday, May 2, 2019 rejecting Brose's understanding. Johnson was unable to specify when those conversations had occurred.

Johnson also acknowledged a voicemail message he left for Brose on Thursday, May 2, 2019, at 8:32 a.m. Both a voice recording and a transcription of the message were entered into evidence. In that message, Johnson told Brose that:

> I did a lot of thinking I still didn't get a chance to consult with the family so I just umm you know kinda gave it a lot of thought which I had been doing and umm so what I'm thinking is if we can umm my bottom is gonna be 1.5 so if they can guarantee me 1.5 to walk away with and that's my hush money and that whole thing we were talking about umm that 1.5 is about 8 1/2 percent of demand for me and then you would add on whatever we need to add on to to get you guys paid and get those costs taken care of umm which I think that should still leave us into into like maybe the the maybe 3 million umm or just over range umm I don't think that is un- that still would leave them under you know it would be between 15 and 20 percent of demand so I mean that's uhh really good situation for them and I'm terribly unhappy about that which they say that

> makes for a good deal so to speak if both sides aren't completely happy like we were talking about last night and personally I can't believe I'm talking about these numbers these low numbers but umm anyway you know considering what is coming up in the future what I have to deal with umm and then also the second thing is the the liens umm I know there's some I'd like to have the liens resolved umm and uhh so I there's some different ways to take care of that but those are my two umm basic issues my bottom is 1.5 and uhh I'd like to get the the liens the medical liens resolved umm so I mean I think that's pretty reasonable umm know you can tell me if I'm wrong but umm that's what uhh Bob [Langdon] and I talked about this morning . . . .

Johnson explained that he used the word "bottom" because that was the word the attorneys used. Johnson further acknowledged an immediately following voicemail at 8:34 a.m. telling Brose that Johnson would be available until one o'clock, after which he had an appointment. As explained further below, at or about the same time, Johnson had a telephone conversation with Langdon, which Johnson refers to near the end of the 8:32 a.m. voicemail to Brose. Approximately 15 minutes later, at 8:47 a.m., on Thursday, May 2, 2019, Langdon e-mailed Brose the following: "He will take 3 we will reduce our fees by 150000 tell her [Sturino] he really does not want to settle."

Johnson was also shown text messages between Johnson and Brose. In one, Brose texted on Thursday, May 2, 2019, at 5:51 p.m. that: "Toyota has made a big move. I cancelled my flight and am headed your way." Johnson texts back to Brose at 9:00 p.m. stating: "Thanks so much for stopping by tonight, David. I'm so sorry I didn't see you [*sic*] text while I was on [*sic*] my home. Have a great night & we'll talk tomorrow."

Johnson acknowledged a Friday, May 3, 2019, 8:47 a.m., text from Brose in which he stated: "Headed your way." There is no

response from Johnson. At 1:10 p.m. the same day, however, Brose texted Johnson the following:

> Thank you for even more of your time today. I know that it is extremely difficult to make these types of decisions. I conveyed your take it or leave it offer of $3 million, which is open through 5 pm today. I'll let you know what I hear back.

At 2:50 p.m. the same day, Brose texted to Johnson the following: "Bert, Toyota has agreed to pay the $3 million. Confidentiality applies, and will need to resolve liens. All terms we discussed. Will try to call shortly, but wanted to let you know ASAP." Brose immediately followed with another text:

> Bert, I left you a VM, but I am very happy for you and hope this gives you peace. Most importantly, I'm ready to see you healthy, now that you have the resources to get there. We'd like to set up a meeting next week with the elder attorney (Ken Bloom) on the trust and with the structured settlement folks. Let me know if there are days/times that don't work for you.

Johnson admitted that between Friday, May 3, and Sunday, May 6, 2019, there are no written communications demonstrating that Johnson had changed his mind. On Sunday, May 6, 2019, at 2:02 a.m., however, Johnson sent a text message to Brose and Langdon that stated:[1]

> Hello Bob and David. I apologize for being out of touch. I know that time is of the essence in this case but the past few weeks have been very difficult for me.
>
> I've gotten very little sleep over the past week, and Thursday and Friday, along with – along with the current state of our lawsuit and the weakness and the

[1] This court was unable to locate the transcription as an exhibit in the record. What follows is taken from the hearing transcript as read by Johnson.

vomiting, has taken a lot out of me physically and mentally.

I took my medication to try to get some rest after our conversation on Friday, which was May [3rd]. . . . My body shut down, and I just woke up. Again, this is like 1:00, 2:00 o'clock in the morning. I see that I've missed more time and more days. I apologize for that.

As to our lawsuit, I think you all have done some very good work, but I'm very unhappy with the current state of it. In terms of the latest settlement offer by Toyota, which is unacceptable, I truly appreciate the work and the effort that Langdon & Emison has done on my case thus far but I feel that we are not on the same page.

This is a – this is partially my fault since I have never been a litigious person. All of these proceedings are new to me and may have – I may have misunderstood some of the process in these settlement negotiations. Therefore I feel the need to explain myself, my position in this matter, and why I am unhappy so that there are no misunderstandings on where I stand in this matter and where I stand as your client going forward.

Johnson admitted that he did not send any sort of similar communication between Thursday, May 2 and Friday, May 3, 2019. Johnson also testified that he spent Sunday afternoon, May 5, 2019 with his sister attempting to notarize documents related to the Health Insurance Portability and Accountability Act that he believed Toyota wanted as well as other documents related to various liens. He testified that he did not understand that these documents were related to the settlement. Johnson was unable to locate a notary that Sunday, so he had the documents notarized at the McCready law firm on Monday, May 6, 2019.

Johnson called various family members as witnesses, including his sisters Cheryl Norman, Gretchen Bailey, and brother Eric Idle. Each testified that Johnson never indicated to them that he wanted a take-it-or-leave-it scenario from this case or that he ever used "absolute terms." Various of these witnesses also testified that Johnson never indicated that he had settled with Toyota, that it was their understanding that the case would be proceeding to trial on Monday, May 13, 2019, and that Johnson was unhappy with his attorneys and was thinking of changing them.

Johnson also called as a witness his ex-fiancée, Tara Blakely. Blakely testified that she picked up Johnson from the doctor's office on Thursday, May 2, 2019. According to Blakely, at that time, Johnson was dizzy, lightheaded, afraid he would fall, and was very, very weak. Blakely testified that during their time together on May 2, Johnson expressed his frustration with his attorneys and talked about changing them. She also testified that in her 32-plus years of knowing Johnson, she had not heard him use absolutes in any form or fashion.

Serra testified that he telephoned Daniel Babetch, one of State Farm's attorneys, at approximately 3:00 p.m. on Friday, May 3, 2019. Serra stated that he told Babetch that the case against Toyota had settled and that Johnson was going to accept State Farm's $50,000 policy offer for Grimes as a defendant. On Tuesday, May 7, 2019, Serra and Babetch exchanged by e-mail the settlement documents related to the $50,000 settlement.

Brose testified at length as to various conversations, e-mails, and text messages with Johnson. Brose addressed in particular a text thread from April 23 through May 6, 2019. In that thread, Brose wrote that: "We will keep negotiating to get at or above 2.5 million as we discussed and worked for at mediation." Brose testified that even after the mediation, he had requested Johnson's authority to continue settlement negotiations with Toyota that would aim for a settlement of $2.5 million or more.

Brose further testified that Johnson never told Brose that he had misunderstood Johnson. Rather, Brose stated that he believed Johnson had authorized Brose to settle the case.

Brose testified that at 8:47 a.m. on Friday, May 3, 2019, he received an e-mail from Langdon indicating that Johnson would accept a $3-million settlement from Toyota and that L&E would cut its fees by $150,000. Brose understood Langdon's e-mail to mean that Langdon had spoken to Johnson that morning. After receiving the e-mail, and while driving from Johnson's home to Midway Airport, Brose telephoned Sturino to say that Johnson would accept a $3-million offer. Brose testified that at 12:42 p.m. the same day, Sturino confirmed by e-mail the $3-million settlement and provided the settlement conditions.

Brose testified that he never believed Johnson's physical condition rendered him incompetent to negotiate and agree to a settlement amount. Brose confirmed that by accepting the $3-million settlement from Toyota and by cutting L&E's fees by $150,000, Johnson would receive $1.5 million. Brose testified that during the period following the 8:30 a.m. voicemail on Thursday, May 2, 2019 through the afternoon of Friday, May 3, 2019, Johnson did not contact Brose to rescind, revoke, or withdraw the authority to settle the case if he would receive $1.5 million after fees and costs.

Brose continued that, during his Wednesday, May 1, 2019 conversation with Johnson, Brose told Johnson that Toyota had indicated that if the case were going to settle, it would have to settle that week. Brose testified that he did not want a number from Johnson right then because Brose did not want to put Johnson on the spot. Brose said that he wanted Johnson to think about it and follow up with Brose the next day because Johnson said that the wanted to speak with Langdon as well.

Brose testified that on Thursday, May 2, 2019, Johnson left a voicemail for Brose. After that, the two were able to speak together on the phone. Brose said that he told Johnson that Brose

understood Johnson's position and that Brose would make a demand to Toyota's counsel. Brose testified that he heard back from Sturino later on Thursday, May 2, 2019. Based on that communication, Brose decided not to leave Chicago. Instead, Brose wanted to communicate with Johnson to convey Toyota's position and see if Johnson would accept any amount that would give him less than $1.5 million. Brose said that it was something Johnson needed to think over.

Brose testified that on morning of Friday, May 3, 2019, he met with Johnson for several hours at his house. Brose stated that Johnson said he would accept nothing less than $1.5 million in his pocket. It was not Brose's understanding that Johnson meant that number to be a jumping off point to get Toyota talking in the right direction. Brose testified: "[W]e were talking about finality; that being, here would be the money in your pocket because we would be reducing our fees by this much and we have X dollars in expenses." Brose recalled Johnson saying several times that he would not accept anything less than $1.5 million. Brose further testified that, based on that understanding: "If 1.5 is your number, then let's go and make a demand of 3-point million and they can take it or leave it." Brose said that Johnson then told him: "Yes, that's what we'll do. I don't want to do this anymore. Go tell them that. And if they don't pay it, we'll go to trial." Brose then testified that: "I gave you a hug, as I think I did every time I left your house. And I told you before I was leaving that I was going to convey to Ms. Sturino on my way to the airport a demand of take-it-or-leave-it $3 million."

During the evidentiary hearing, the following colloquy occurred between Johnson and Brose:

Q. Do you not recall me saying, no, that I am ready to fight and go to trial?
A. At no point did you say, no, I'm ready to go to trial.

Q. You don't recall me – You don't recall me saying that and you saying to me that I'm putting up a good fight even at those low levels?
A. What you had said was – When we were talking about would you take 1.4 in your pocket, 1.3 1.2, you said it me, I have already dropped enough; and if Toyota wants to get this case done, they have to come to my number.

To which I asked, okay, If I can get them to give you a settlement where you get 1.5 million in your pocket, that will get the case done? You agreed and that's how we ended up making the offer that we made.
Q. Mr. Brose, how many times did I tell you no to those number during that Friday meeting?
A. At no point in time did you ever tell me no to a settlement in which you would net 1.5 million. Our Friday meeting was solely discussing whether or not you would accept a number below that number.
Q. Wow. Then why did you ask me for permission to continue – If I had given you permission and authority to – to settle the case, why were you still asking me for permission to continue talking with Toyota?
A. Because you are the decisionmaker [*sic*] as I told you before. I said, Listen, you are the one that makes the decision. So if you don't want to try to negotiate with them anymore, if you want to tell them this is the number it's going to take, that is your choice. And so I gave you that choice.
Q. You don't recall saying – you saying to me that I owe it to myself to allow you to go and at least talk to Toyota to see what they would say?
A. No. I said you owed it to yourself when I was discussing numbers at 1.4, 1.3, 1.2 to see if they would pay that because that was not a distinct and big difference from what 1.5 was.
Q. Wow. Clearly we were on a different page. Okay. Do you recall upon your leaving my house on that Friday, May 3rd, that you were supposed to not do

anything until after speaking with me and running whatever your conversation – whatever happened with Ms. Sturino by me first?
A. No. We had specifically discussed that we would take a $3-million take-it-or-leave-it offer, that I would hear from – hear back from Toyota and I would let you know. And we had talked specifically that I would be having that conversation as I drove to the airport.

Slightly later in the direct examination, this colloquy occurred between Johnson and Brose:

Q. You, Mr. Brose, as my attorney, you can settle my case on your word?
A. No. I can settle a case based upon a client verbally authorizing me to settle a case. I can do that.
Q. Okay. Thank you. You can do that as my attorney, but I, as your client, cannot rescind an earlier statement on my word?
A. I'm not saying that.
Q. I have to have – I have to have documentation behind it. I have to send you an e-mail message, a text, or something in writing?
A. I don't believe I have said that.

* * *

Q. But you don't believe me telling you no, telling you no on Friday, and giving you permission only to go back and speak with Toyota, you don't believe that that's a rescinding of that e-mail – that voicemail? I'm sorry.
A. First that didn't happen. I think you can orally revoke or rescind authority but at no time during any of our conversations did you ever orally rescind, revoke, or withdraw the authority.
Q. So I told you specifically to go settle my case for $1.5 million or $3 million, as you put it?
A. You authorized me to make that demand, yes.

Langdon testified that on Thursday morning, May 2, 2019, he had a telephone conversation with Johnson. After that conversation, Langdon sent an e-mail to Brose indicating that Johnson would accept a $3-million offer from Toyota. Langdon did not receive any further communication from Johnson until he went to work on Monday, May 6, 2019. On that morning, Langdon had a short telephone conversation with Johnson in which Langdon testified that he told Johnson: "You can't back out. You settled the case. You can't back out." Langdon further testified that a $3-million settlement from Toyota would ensure that Johnson would receive $1.5 million because, in part, L&E would cut its fees.

Analysis

Johnson's motion to vacate the May 10, 2019 dismissal order raises two points of law. First, this court must determine whether Johnson gave his attorneys express authority to settle with Toyota. Second, this court must determine whether Johnson effectively repudiated the settlement, assuming that one had been agreed to. These issues will be addressed sequentially.

Illinois law consistently holds that the authority a client bestows on an attorney for purposes of representation and for purposes of settlement is entirely distinct. *See Brewer v. National R.R. Passenger Corp.*, 165 Ill. 2d 100, 105 (1995). As to the latter, an attorney must receive express authorization. *See id., citing Danziger v. Pittsfield Shoe Co.*, 204 Ill. 145, 149-50 (1903); *McClintock v. Helberg* (1897), 168 Ill. 384, 391-92 (1897); and *Colvin v. Hobart Bros.*, 156 Ill. 2d 166, 176-77 (Harrison, J., dissenting) (1993). A court rightly presumes, however, that an attorney is authorized to settle a client's case unless affirmative evidence establishes the contrary. *See Szymkowski v. Szymkowski*, 104 Ill. App. 3d 630, 633 (1st Dist. 1982) *citing* cases; *Chernyakova v. Puppala*, 2019 IL App (1st) 173066, ¶ 27.

A party alleging express authority has the burden of proving it. *See Kulchawik v. Durabla Mfg. Co.*, 371 Ill. App. 3d 964, 969,

(1st Dist. 2007), *citing Shapo v. Tires 'N Tracks, Inc.*, 336 Ill. App. 3d 387, 399 (1st Dist. 2002). Yet if a client stands silent while an attorney acts with presumed authority, the client will be estopped later from denying the attorney's apparent authority. *See Szymkowski*, 104 Ill. App. 3d at 633. To establish the existence of an agency relationship for purposes of settlement (or lack thereof), a court may consider direct evidence as well as circumstantial evidence "with reference to the surrounding circumstances and acts of the parties." *Id. citing Kalman v. Bertacchi*, 57 Ill. App. 3d 542, 548 (1st Dist. 1978). The evidence may, of course, lead to different results. *See, e.g., Brewer*, 165 Ill. 2d at 107 (no settlement because uncontroverted evidence established that plaintiff never explicitly authorized attorney to include term requiring plaintiff's resignation); *cf. Hernandez v. New Rogers Pontiac*, 332 Ill. App. 3d 461, 464, 467-68 (1st Dist. 2002) (settlement authorized based on attorney's testimony that he relayed settlement offer to plaintiff, who responded, "Great. That's fine." and told plaintiff that case would be dismissed if she accepted, to which she replied, "Great.").

The documentary and testimonial evidence presented to this court establishes that Johnson provided express authority to L&E, in general, and Brose and Langdon, in particular, to settle with Toyota for $3 million. Various facts lead to this inexorable conclusion, many of which are taken from Johnson's lengthy Thursday, May 2, 2019 voicemail message to Brose at 8:32 a.m. First, in that message, Johnson twice states that his bottom number, *i.e.*, what he wants to get from the settlement, is $1.5 million. It is true that Johnson never stated words to the effect: "I expressly authorize you to settle my case for $3 million." Yet the law does not require such explicit and defined words to establish express authority for settlement purposes.

What the record presents instead is that Johnson had a subtle and sophisticated understanding of the settlement's components. Johnson's voicemail message indicated that he understood that L&E's costs and expenses would have to be covered and all liens paid from the total settlement sum. Given

those priority payments, Johnson explicitly and correctly acknowledged that the overall Toyota settlement would probably have to be $3 million or more. Johnson plainly did not know what that figure would be, but that was ultimately irrelevant as long as he received $1.5 million.

Second, Johnson's argument that the word "bottom" was his attorneys' word is unavailing. Brose and Langdon may have introduced Johnson to the word "bottom" as it relates to a settlement, but the word does not present a particularly difficult concept for anyone, even a first-time litigant, to comprehend. Again, it is plain that Johnson understood the word "bottom" because he repeated that he was willing to take $1.5 million apart from any other payments to attorneys or lienholders.

Third, the same voicemail message unquestionably put Brose on notice that Johnson understood the finality of his decision. That conclusion must be true given Johnson's statement: "personally I can't believe I'm talking about these numbers these low numbers. . . ." In other words, Johnson comprehended the difference between the numbers being discussed in May 2019 versus the $17.5 million he had demanded at the beginning of the case. The $1.5-million figure was generally consistent with the numbers the parties had discussed at the unsuccessful mediation five months earlier.

Fourth, the voicemail indicated that Johnson understood the consequences of his decision to settle with Toyota. He stated that, "I'm terribly unhappy about that which they say that makes for a good deal so to speak if both sides aren't completely happy. . . ." Those were not words of a person who believed that additional negotiations would result in a substantially larger settlement; rather, this was a statement of someone who had acknowledged that both he and Toyota had compromised on a number with which neither side was happy, but indicated a good settlement.

Fifth, Johnson's voicemail message left open the door for Brose or Langdon to tell Johnson that he misunderstood the

settlement's terms. On that point, Johnson explicitly stated: "[S]o I mean I think that's pretty reasonable umm know you can tell me if I'm wrong but umm that's what uhh Bob [Langdon] and I talked about this morning. . . ." In other words, Langdon also spoke with Johnson about the settlement's terms. It is unquestionable that had Brose or Langdon believed Johnson misunderstood either the settlement sum or its terms, they would have immediately corrected that misimpression.

The lengthy Thursday, May 2, 2019 voicemail message cannot be the only basis supporting this court's conclusion that Johnson gave Brose and Langdon express authority to settle the case. If that were the only basis, it could still be argued that Brose, somehow, misapprehended Johnson's negotiating position and ultimate settlement goal. That would present this court with a case of "he-said-he-said" and constitute a substantial factual question. The record does, however, provide more.

It is uncontroverted that Langdon reached the identical understanding as Brose based on Langdon's separate telephone conversation with Johnson on the morning of Friday, May 3, 2019. That must be true because, immediately after that telephone call, Langdon sent to Brose – not the other way around – a text message confirming that Johnson had agreed to a $3-million settlement. It would be one thing for either Brose or Langdon to have separately misunderstood their client's position; it is quite another to believe that two competent, highly skilled plaintiffs' attorneys who have previously settled hundreds of cases, independently arrived at the identically incorrect conclusion based on separate in-person and telephone conversations with their client. The evidence simply does not support such a fantastical result. This court's reliance on this fact is bolstered by the fact that Johnson failed to provide any evidence or even an explanation as to how two of his attorneys could have reached the same misunderstanding of what he now contends was his plain intention at the time.

In sum, the evidence drives this court's conclusion that by Thursday, May 2, 2019, Johnson had expressly authorized L&E to reach a settlement with Toyota that would net Johnson $1.5 million. Given Brose and Langdon's understanding of Johnson's intent, it follows that Toyota's attorneys properly relied on Brose and Langdon's final $3-million demand and accept it with the $3-million offer to settle the case. No other conclusion is reasonable based on the record.

The remaining legal question is whether Johnson effectively repudiated the settlement that he authorized. Illinois law is plain that if "a party stands by silently and lets his attorney act in his behalf in dealing with another in a situation where the attorney may be presumed to have authority, the party is estopped from denying the agent's apparent authority to a third person." *Condon & Cook, L.L.C. v. Mavrakis*, 2016 IL App (1st) 151923, ¶ 63, *quoting Kulchawik*, 371 Ill. App. 3d at 971. In instances in which a party repudiates a contract prior to the time of performance, "the other party may act on that repudiation and bring an action to enforce its terms notwithstanding the fact that time of performance under the terms of the contract is in the future." *Bonde v. Weber*, 6 Ill. 2d 365, 380 (1955) (citing *Chicago Title & Trust Co. v. Sagola Lumber Co.*, 242 Ill. 468 (1909); *Collins Ice Cream Co. v. Stephens*, 189 Ill. 200 (1901); *Fox v. Kitton*, 19 Ill. 519 (1858)). Generally, such an action is for specific performance, in which the aggrieved party must allege: "(1) the existence of a valid, binding, and enforceable contract; (2) compliance by the [party] with the terms of the contract, or proof that the [party] is ready, willing, and able to perform the contract; and (3) the failure or refusal of the [other party] to perform his part of the contract." *Hoxha v. LaSalle Nat'l Bk.*, 365 Ill. App. 3d 80, 85 (1st Dist. 2006). "Specific performance is an equitable remedy and is a matter of sound judicial discretion controlled by established principles of equity and exercised upon a consideration of all the facts and circumstances of a particular case." *Omni Partners v. Down*, 246 Ill. App. 3d 57, 62 (2d Dist. 1993). A circuit court is to balance the equities between the parties when determining whether to exercise its equitable powers, and "may refuse to grant specific

performance where the remedy would cause a peculiar hardship or inequitable result." *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461, 477 (1st Dist. 2004).

Johnson's motion to vacate this court's dismissal order is the equivalent of an action in equity by Toyota for specific performance. In other words, Johnson is seeking to repudiate the settlement agreement although the heart of the agreement – Toyota's payment of the $3-million settlement sum – would occur in the future after the execution of the necessary documents. The problem for Johnson is that his repudiation claim is factually baseless and legally too late.

The factual and legal impossibility of Johnson's position is crystalized in one of the colloquies with Brose during the evidentiary hearing. Johnson attempts to point out an inconsistency – that Brose could bind Johnson by making an oral demand to Toyota, but Johnson had to have written proof that he did not authorize the settlement. As a factual matter, the record makes plain that Johnson authorized Brose and Langdon to settle with Toyota at whatever number would guarantee Johnson $1.5 million. At to the law, Johnson certainly could have orally rescinded his authority to L&E to settle with Toyota, but the window for that opportunity closed once Sturino called Brose on Friday, May 3, 2019 and accepted the $3-million demand. That never happened.

Johnson's argument that he never spoke in absolute terms is equally unavailing. Even if Johnson never spoke that way, there is no indication he ever let Brose or Langdon in on that convention. Besides, the Thursday, May 2, 2019 voicemail to Brose made it plain that Johnson fully understood the ramifications of the $1.5-million absolute bottom line he drew to settle the case. As a legal matter, Johnson's argument is unavailing because, when it comes to settling a lawsuit, absolutes are required. Settlements are always based on specific financial and other agreed-upon terms. If the opposite were true and

Johnson correct, no settlements would ever be agreed to or subject to court enforcement.

Johnson's position also makes no sense because he is conflating the pre-May 3, 2019 unknown total settlement sum with his absolute $1.5-million bottom line. At the evidentiary hearing, Johnson argued that he believed his attorneys were still negotiating with Toyota for a higher settlement sum. That may have been correct, but a larger settlement sum would not necessary have resulted in a larger net sum for Johnson. For example, L&E might have demanded $3,150,000, but that would not have increased Johnson's net; rather, it would have meant only that L&E would not have had to cut its fees by $150,000. That L&E cut its fees benefitted Johnson enormously by permitting him to get his $1.5-million bottom line and avoiding the risk that Toyota would have rejected a higher number.

Finally, Johnson argues that he could not have repudiated the settlement because his medical condition made him unavailable after speaking with Langdon on Friday, May 3, 2019. While this court is certainly sympathetic to what appear to be Johnson's substantial and debilitating medical conditions, to accept his argument would excuse factual and legal certainty with sympathy. Johnson had already given Brose and Langdon authority to reach a settlement that netted Johnson $1.5 million. There was simply no further need for Johnson to approve of anything else as long as he was assured of receiving $1.5 million. The buyer's remorse Johnson apparently felt on Sunday, May 5, 2019 is neither unusual for a settling party nor a factual or legal basis to undo an expressly authorized and wholly enforceable settlement agreement.

Conclusion

For the reasons stated above, it is order that:

1. Johnson's motion to vacate this court's May 10, 2019 dismissal order is denied;

5285

2. Johnson is ordered to execute any and all necessary documents necessary to effectuate the settlement with all defendants by no later than March 3, 2019; and 4251

3. The case management conference scheduled for 8:30 a.m. on February 19, 2019 is stricken. 4331

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

FEB 18 2020

Circuit Court 2075