

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: PART S

Index No.: L&T 37496/12

WAYNE J. JONES,

Petitioner.

DECISION/ORDER

-against-

ROBERT FLYNN JONES,

Respondent.

HON. JOHN HENRY STANLEY, J.H.C.

	Numbered
Order To Show Cause and Affidavits Annexed	
Notice of Cross-Motion and Affidavits Annexed	1,2
Affidavits/Affirmation in Opposition	3,4
Reply Affidavits/Affirmation	5
Exhibits	6-14,15-16, 17-21
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Sur-reply Affidavit/Affirmation	

DECISION/ORDER

Wayne J. Jones, the Petitioner in this proceeding (“Petitioner”), commenced this licensee holdover proceeding against his brother Robert Flynn Jones (“Respondent”), seeking to terminate Respondent’s right to possession of 986 Morris Avenue, Apartment 4C, Bronx, NY 10456 (“the subject premises”). The parties stipulated to the following facts. This is a project based HUD development which requires yearly income re-certification. The current income affidavit states Petitioner is the head of household. Petitioner and Respondent are brothers by adoption. Their mother passed away in May 2006. Petitioner became head-of-household at the subject premises in May 2007. Petitioner was the legal guardian of Respondent until July 2011

when Respondent reached 21 years of age. In a prior holdover proceeding between the parties, L&T 3057/12, the Honorable Anthony J. Fiorella found that Respondent was an “occupant” and not a tenant.

In this protracted litigation, Respondent submitted two motions. One motion seeks summary judgment (named as a cross-motion) in favor of Respondent. The other motion seeks enforcement of a settlement agreement entered into between the attorneys pursuant to CPLR §2104. Respondent’s second motion asserts that email communications between the attorneys constitute an offer and an acceptance of an enforceable contract. Petitioner counters this argument by stating that the terms in the emails were ambiguous and do not constitute an enforceable contract. If the second motion is granted than an enforceable agreement exists and the first motion is moot because the terms of the settlement include withdrawal of the summary judgment motion. For this reason, the Court first considers whether the email communications between the party’s attorneys constitute an enforceable agreement.

THE PERTINENT LEGAL STANDARD

The issue is whether the email communications between the attorneys constitute an enforceable agreement within the meaning of CPLR §2104. CPLR §2104 states:

An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.

E-mails between counsel can create a binding contract to satisfy New York State’s Statute of Frauds (General Obligations Law Section 5-701) which requires a writing be subscribed. (See, *Williamson v Delsener*, 59 AD3d 291, 874 N.Y.S. 2d 41 [1st Dept.2009][emails exchanged

between counsel constitute signed writings within the meaning of the statute of frauds], *Stevens v Publicis S.A.*, 50 A.D. 3d 253, 255-256, 854 N.Y.S.2d 690 [1st Dept.2008], *lv. dismissed* 10 N.Y.3d 930, 862 333 (court relies upon email exchanged between parties to modify employment agreement); *Naldi v Grunberg*, 80 A.D.3d 1, 908 N.Y.S.2d 639 [1st Dept.2010][court rejects argument that an e-mail can never satisfy the Statute of Frauds]). An offer, an acceptance, consideration, mutual assent and an intent to be bound must be present (22 NY Jur. 2d, Contracts §9). A meeting of the minds requires all material terms be agreed upon for a contract between the parties to exist. (See, *Kolchins v Evolution Markets, Inc.*, 128 A.D.3d 47, 8 N.Y.S.3d 1 (1st Dept.2015); *Kowalchuk v. Stroup*, 61 A.D.3d 118, 873 N.Y.S.2d 43 [1st Dept.2009]). Emails can create an enforceable agreement despite petitioner's subsequent change of mind. (*Maria McBride Prods. v. Badger*, 46 Misc. 3d 1221(A), 2015 WL 819943, at *2 [N.Y. Civ.Ct. Feb. 26, 2015]).

APPLICATION OF THE STANDARD TO THE FACTS

On June 20, 2015 Petitioner's attorney wrote an email to opposing counsel stating that Petitioner's attorney spoke with her client and "(h)e had authorized me to offer your client in addition to the use and occupancy and/or waiver of rent a cash sum of \$1,000. I will call you Monday afternoon but I wanted to let you know the offer."

On June 23rd Petitioner's counsel sends an email to Respondent's counsel inquiring whether counsel spoke to Respondent about the "settlement offer." On June 30th Respondent's counsel states that Respondent "has accepted your client's settlement offer." This email also provides the following terms for the agreement: Waiver of \$11,300 of alleged arrears and/or use and occupancy through June 2015, the withdrawal by Respondent of the motion for summary

judgment, a final judgment of possession on consent in favor of Petitioner, an understanding that each party is responsible for legal fees and Respondent's reservation of his claim against the landlord. The email also inquires whether Petitioner's counsel requires any other terms in the agreement. On July 2, 2015, Respondent's counsel emails Petitioner's counsel stating that it is unnecessary to submit a Reply on the summary judgment motion because Respondent accepted "the settlement offer." On that same day, Petitioner's counsel replies, "Yes. Maybe just get me a stipulation and I will get my client to sign it." A subsequent email on July 6th from Respondent's attorney attaches a copy of a settlement stipulation and requests signatures and the return of the agreement to Respondent's counsel who will countersign and file with the court. The final email from Petitioner's attorney regarding the case is dated July 24th. In pertinent part it reads "(d)espite my telling you my client wants to settle the matter unfortunately at this point he has changed his mind and wants a decision from the court."

CONCLUSION

Upon review of the emails between the parties, it is clear that a contract exists. Petitioner made a bona fide offer to settle this case. The offer included a waiver of all use and occupancy and payment of \$1,000.00 to Respondent. The email of June 20th confirms this offer by explicitly stating a waiver of the use and occupancy and a \$1,000 payment by Petitioner to Respondent. On June 30th, Respondent's attorney emailed Petitioner's attorney an acceptance of Petitioner's offer. The emails set forth the language of the essential terms of an agreement.

The essential terms of an agreement must be set forth in the email exchanges for an enforceable agreement to be created. In this instance, Petitioner was to receive a judgment of possession and, in return, Respondent would surrender any possessory interest because Petitioner

agreed to waive use and occupancy and to pay \$1,000 to Respondent. The substance of the offer was abundantly clear in Petitioner's emails. Respondent clearly accepted the offer in writing and bolstered this acceptance by suggesting that the pending summary judgment motion be abandoned. There was consideration for this agreement as evidenced by the waiver of all use and occupancy and payment of \$1,000 by Petitioner in exchange for a final judgment of possession in favor of Petitioner.

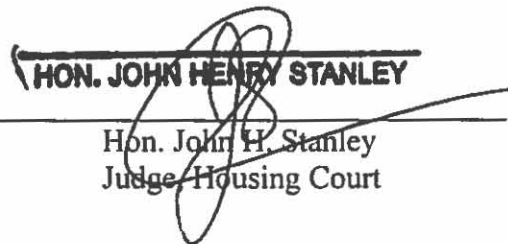
Petitioner argues that there was not a final offer and acceptance because the chain of emails illustrates that changes needed to be made to the agreement. Petitioner relies on the July 2, 2015 email to Respondent's counsel as evidence that ambiguities existed in the agreement. On that day Respondent's counsel emailed Petitioner's counsel requesting confirmation that it was unnecessary for Respondent to prepare a reply affirmation to the summary judgment motion given that Petitioner accepted the "settlement offer." In response, Petitioner's counsel states: "Yes. Maybe just get me a Stipulation and I'll get my client to sign it." Petitioner's claim is that these emails demonstrate that Petitioner's counsel wanted additional terms in the agreement and the use of the word "maybe" demonstrates the provisional nature of the agreement. The Court disagrees. The words "I'll get my client to sign it" are unambiguous. The "maybe" refers to Petitioner's attorney's suggestion that Respondent's attorney draft the stipulation. There was no mention of additional terms essential to effectuating a settlement. There existed mutual assent and an intent to be bound by the agreement. Contrary to Petitioner's position, there is no ambiguity which would defeat the creation of a contract by the acceptance of an offer. After there was an enforceable agreement, Petitioner changed his mind and sought to negate an agreement that was achieved by good faith bargaining.

Accordingly, the emails between counsel are determined to be a signed writing pursuant to CPLR §2104 with all the essential terms expressed. Therefore an enforceable contract exists despite Petitioner's subsequent refusal to sign the agreement.

For the reasons stated above, Respondent's motion pursuant to CPLR §2104 is granted and the parties' written and subscribed emails form the basis of essential terms of a settlement that must be given full force and effect. Accordingly, the Clerk is directed to enter judgment of possession in favor of Petitioner and a money judgment for \$1,000.00 in favor of the Respondent. Issuance of the warrant of eviction is stayed ten days. All use and occupancy is waived. Respondent's motion for summary judgment is withdrawn pursuant to the terms of the settlement agreement.

This constitutes the decision and order of the court.

Dated: Bronx, N.Y.
Sept. 29, 2015


HON. JOHN HENRY STANLEY
Hon. John H. Stanley
Judge, Housing Court

Parties may recover their exhibits from Part S clerk in Room 360 on the third floor of 1118 Grand Concourse, Bronx, NY. If the exhibits are not picked up within 30 days, they may be disposed of in accordance with Administrative Directives.