

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DONNA RADASZEWSKI,)	
Guardian, on behalf of Eric Radaszewski,)	
)	
Plaintiff,)	
)	
vs.)	No. 01 C 9551
)	
BARRY MARAM,)	Judge John W. Darrah
Director, Illinois Department of)	
Healthcare and Family Services,)	Magistrate Judge Ian H. Levin
)	
Defendant.)	

Plaintiff’s Reply Memorandum Concerning Enforcement of the Settlement Agreement

I. Introduction

The Court asked the parties to brief the options for an effective enforcement means of a settlement agreement between the partes. Plaintiff submitted her memorandum in response to the Court’s request. Defendant responds by asking the Court to enforce a draft settlement agreement that defendant inaccurately claims embodies the parties’ agreement and by asking the Court to enter an order and General Release to which plaintiff has never agreed. Although the parties reported to Magistrate Judge Levin on September 23, 2005, that they had agreed on the substantive terms, key provisions, including enforcement, the scope of any release, and confidentiality were not completed. At the September 23, 2005, meeting the main focus of negotiation was on the number of additional hours that plaintiff could obtain on a showing of medical necessity. The parties were able to agree on that point. However, the parties did not detail all the material terms of the proposed agreement, and there was no oral or written record

made of all the material terms during the conference. As the repeated exchange of drafts show, the parties did not contemplate an agreement other than one in writing and executed by both parties. Subsequent to the September 23rd conference with Magistrate Judge Levin, neither party agreed to the other's drafts and proposed language on several key matters. Defendant's drafts included no enforcement mechanism. Additionally, defendant's drafts included one-sided terms to which plaintiff did not agree, release language that was much broader than language to which plaintiff could agree, and a broad confidentiality provision that plaintiff believed would prevent her from her from hiring nurses. Settlement was not finalized after it became clear that there was no meeting of the minds on these terms of the settlement.

The main glitch, as reported to the Court at the status dates on November 3, 2005 and December 6, 2005, concerns enforcement of the proposed agreement. Plaintiff's son cannot live without the services he is to receive under the agreement. If plaintiff cannot enforce the agreement to keep those services going, her son risks death. Defendant, by contrast, takes no added risk by agreeing to an effective enforcement mechanism. Defendant says that he cannot agree to continuing jurisdiction in this Court for enforcement purposes.¹ Defendant agrees that neither the administrative processes nor the Circuit Court for the 18th Judicial Circuit² would be a

¹ Defendant says he *cannot* agree to continuing jurisdiction for enforcement purposes, but it is more accurate to say that defendant *will not* agree to such limited continuing jurisdiction. Defendant does not contend that he lacks the authority to agree to such enforcement. Plaintiff notes that defendant has not been reluctant to ask this Court to enforce his draft of the purported settlement agreement. He is in essence seeking specific performance from this Court, an enforcement remedy he would deny plaintiff.

² Defendant on page 3 of his memorandum confuses two distinct concepts: (1) the authority of the Circuit Court of DuPage County to enforce any settlement agreement of this federal lawsuit and (2) using the existing state lawsuit which concerns state law issues instead of this suit as the vehicle for settling all of the issues, both state and federal, between the parties.

proper forum by which to require defendant to cover the services under the agreement that plaintiff's son needs in order to survive. Rather, he asserts that the Illinois Court of Claims is an adequate forum to provide enforcement by virtue of a monetary award for any missed payments to nurses if the defendant does not live up to his commitment to provide the otherwise agreed to level of medical services. As discussed more fully below, an award of money for missed reimbursements is not an adequate remedy. Plaintiff cannot meet her fiduciary obligations as guardian to her very disabled son if she agrees to settle on terms that are not enforceable.

II. Plaintiff disagrees with defendant's version of the facts

Plaintiff disagrees with defendant's version of the facts regarding the settlement process. A main sticking point prior to the settlement conference with Magistrate Judge Levin on September 23, 2005 was a clause limiting the number of additional hours of nursing services plaintiff could seek for her son in the event his health or the health of herself and her husband reduced their ability to care for him. Agreement regarding enforcement and confidentiality also continued to be sticking points, but it was plaintiff's understanding that defendant agreed to enforcement in Illinois courts. When the parties agreed on the substantive provisions about the services, it appeared to plaintiff that the parties could work together to come to agreement on the remaining terms. The parties reported to Magistrate Judge Levin on September 23, 2005, that they had agreed in principle to resolve the case, but had to work out the details and language of specific terms, which would be recorded in a written settlement agreement. These terms included the language of any release, enforcement, and confidentiality. Judge Levin suggested the parties

Defendant agrees with plaintiff that the State circuit court does not have authority under Illinois law to enforce an agreement in this federal lawsuit. Separately, defendant has rejected using the state lawsuit as the basis for a settlement of both cases.

seek a postponement of the status hearing before Judge Darrah so as to allow sufficient time to finalize the terms of the agreement. The parties contemplated that their eventual agreement would be reduced to a written agreement to be executed by the parties and their counsel.

As the parties' subsequent correspondence from October 4, 18 and 28th makes clear, negotiation over many of the terms of the agreement, including the language of the release, enforcement, and confidentiality continued.³ The settlement, however, stalemated over the actual language, and that stalemate revealed that there had not been an actual meeting of the minds on enforcement, the release, or confidentiality.

Plaintiff believed that the defendant had agreed to enforcement in State court, including the Circuit Court of Illinois for the Eighteenth Judicial Circuit. Defendant's October 4, 2005, draft submitted to plaintiff shortly after the September 23 settlement conference included no enforcement scheme, and included a general release that would prevent plaintiff from seeking to enforce the agreement in State court. Additionally, defendant continued to include a statement that both parties agreed that there was no waiver of sovereign immunity, and the language included no exception to allow plaintiff to enforce the agreement. This clause therefore also presented a problem for future enforcement purposes.

On October 18, 2005, plaintiff responded to many aspects of defendant's October 4, 2005, draft, including what she thought were clarifications on enforcement, the release and the sovereign immunity clause. Plaintiff proposed language to spell out enforcement and clarify in

³ Since confidentiality is an aspect of settlement that is important to defendant, plaintiff has honored that concern by filing a motion with this Court pursuant to Local Rules 5.8 and 26.2(b) to submit the relevant correspondence and proposed agreements between the parties to this Court as restricted documents. Plaintiff will only generally make reference where appropriate to the proposed terms in this Memorandum without disclosing specific details.

the release and sovereign immunity clauses of the agreement that enforcement could be had in Circuit Court of Illinois for the Eighteenth Judicial Circuit. On October 28, 2005, Defendant rejected that language, revealing that defendant did not actually agree to such enforcement. Defendant took the position that it could not agree to enforcement of the agreement in the Circuit Court of Illinois, and refused to include any language about how the agreement would be enforced in its proposed settlement agreement drafts. Faced with this position, and the case law defendant cited, plaintiff had to review the enforcement options, and concluded that only continuing jurisdiction in this Court could afford plaintiff enforcement of the agreement.

Defendant also responded to plaintiff's October 18th proposed language by taking the position that defendant would not change his proposed language related to the release, sovereign immunity and confidentiality. Defendant's October 28th letter stated that certain language was mandated by the Attorney General of Illinois and could not be altered. Defendant had never previously informed plaintiff that the language of these terms absolutely could not be negotiated. Plaintiff at no time agreed to the purported mandatory language and never indicated to defendant on September 23, 2005 or otherwise that she would agree to settlement under the one-sided, take-it-or-leave-it terms.⁴ While she was and is very willing to try to meet defendant's concerns, she cannot agree to boilerplate language that really applies to a case where the State is paying a sum certain to a party and seeks a general release in exchange. That is not the case here, where the settlement calls for the State defendant to perform month after month for the indefinite future.

⁴ Plaintiff has never before seen Exhibit A "Settlement Agreement and General Release," appended to defendant's brief, but it clearly relates to a standard settlement for a sum certain in exchange for a general release. By its terms it is not applicable where the state's performance is all prospective and ongoing, like the settlement contemplated in this case.

What is key to plaintiff is that she can enforce the agreement so that her son can continue to receive services and that no language of the agreement in the release clause or otherwise bars such enforcement. With respect to confidentiality, she needs to be sure that no confidentiality agreement prevents her from discussing with other persons the services her son is to receive, since she must have the flexibility to discuss the nature and amount of services with service providers, friends and family to make arrangements to staff the services. Defendant's positions in the drafting of the final language made clear that there was no meeting of the minds on the enforcement of the agreement, the release or on confidentiality.

III. Illinois Law Does Not Support Enforcement of an Alleged Oral Settlement Agreement Where There Has Not Been a Meeting of the Minds.

Federal courts have jurisdiction to enforce settlement agreements; state law applies to determine whether a settlement agreement is enforceable. *Lynch v. SamataMason, Inc.*, 279 F.3d 487, 490 (7th Cir. 2002). Under Illinois law, an oral settlement agreement is valid only in so far as there is an offer, acceptance, and a meeting of the minds on all material terms. *Wilson, v. Wilson*, 46 F.3d 660, 666 (7th Cir. 1998), *citing*, *Brewer v. National R.R. Corp.*, 256 Ill.App.3d 1083 (1st Dist. 1993) *reversed on other grounds*, 165 Ill.2d 100 (1995), *Zagone v. Bosques*, 2004 WL 170329 (N.D. Ill. 2004). As described above, the parties here had no meeting of the minds.

Moreover, where, as here, the parties always contemplated that any agreement would be reduced to writing "and its formal execution is objectively intended as a condition precedent to its completion, there can be no contract until then, even if the actual terms have been agreed on." *Trendmasters v. Walgreen Co.*, 1996 WL 422273 (N.D. Ill 1996), *citing*, *Estate of Glassman*, 257 Ill.App.3d 102,108 (1st Dist. 1993). The *Trendmasters* court listed several objective indicia

reflecting on the parties' intent, including "sudden contentiousness" and the parties' difficulties in arriving at language with respect to the materials terms as negating that there was any meeting of the minds. The parties in *Trendmasters* agreed in principle on mutual releases, but had not agreed on the exact terms of the releases or the legal consequences of such releases. Relying on *U.S. v. Orr Construction Co.*, 560 F.2d 765, 770 (7th Cir. 1977), the court found both that there had been no meeting of the minds and that the agreement was too indefinite to enforce. This case is similar—the parties did not reach agreement on a release, enforcement or confidentiality prior to or after September 23, 2005. Plaintiff remains hopeful, however, that given the parties' agreement on the substantive terms, these terms too can be resolved in a way that is mutually agreeable to the parties.

IV. The Court of Claims is Not a Viable Enforcement Mechanism

Apart from his contentions regarding the agreement, defendant does not dispute much of plaintiff's opening brief with respect to the enforcement options. Defendant apparently agrees with Ms. Radaszewski's argument that the Illinois Court of Claims will not grant injunctive relief or require specific performance of a contractual provision. Instead, defendant argues on pages 8 and 9 of his Memorandum that because provision of medical services to Eric Radaszewski is effected by the act of defendant making reimbursements to medical providers and because reimbursements are necessarily monetary, that any subsequent breach of the agreement by the defendant in making such reimbursements is remedied by an award of damages, an adequate remedy at law which the Court of Claims will consider. If defendant breaches the agreement and Medicaid does not reimburse the medical service providers, plaintiff has no way to pay for the services. Eric will stop getting the services he needs to survive. A claim for damages is not a

meaningful enforcement scheme in this instance. Illinois law recognizes that a claim for damages in such circumstances is an inadequate remedy.

Illinois courts have consistently recognized that the mere presence of monetary amounts in an agreement does not automatically result in the finding that an adequate remedy exists as defendant suggests. In *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540, 370 N.E.2d 223 (1977), the Illinois Supreme Court considered the adequacy of a monetary award as a remedy. There, the Illinois Department of Public Aid had suspended the plaintiff's participation as a provider in the Medicaid program and its right to receive reimbursement from the State for medical services provided. The court concluded that under the circumstances of that case, an award of damages would not provide an adequate remedy. It explained that for a remedy at law to be adequate, it "must be clear, complete, and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy." 370 N.E.2d at 227. The court further explained that since suspension from the Medicaid program for any length of time would cause damage of an uncertain magnitude, damages would not afford an adequate remedy. *Id.*

In an earlier decision, the Illinois Supreme Court had stated that if amounts recoverable at law "would be so small and disproportionate to the vexation and expense of the actions" such an award would not constitute an adequate remedy at law. *Abel v. Flesher*, 296 Ill. 604, 609, 130 N.E. 353 (1921). See, *Chicago Title & Trust Co. v. Weiss*, 605 N.E.2d 1092, 1097 (1992) (citing the decision in *Abel v. Flesher*). In *Lucas v. Peters*, 318 Ill. App.3d 1, 16, 313 N.E.2d 313, 325 (1st Dist. 2000), the court found a monetary award to be inadequate when a violation by its nature is continuous and that only nominal damages could be awarded. The court concluded that such circumstances provide the "best reason why a court of equity should become involved." *Id.*

Contrary to defendant's characterization of the settlement of this case as an agreement to simply pay an amount certain for services, the purpose of any settlement for the violations of the Americans with Disabilities Act and the Rehabilitation Act which Ms. Radaszewski has alleged would be a commitment on the part of the defendant to provide a certain agreed-upon level of services to Eric that Ms. Radaszewski believes he would need to survive. The proposed agreement does not specify dollar amounts but rather hours of service, as acknowledged by defendant on page 5 of his brief. Defendant would have Ms. Radaszewski bringing an action in the Illinois Court of Claims each month to seek recovery for any missed reimbursement. Defendant doesn't contest that Ms. Radaszewski could not bring an action generally to enforce the payment for services prospectively under Court of Claims decisions as argued by plaintiff in her Memorandum Concerning Enforcement of the Settlement Agreement.

Under Illinois case law, as discussed above, this continuing scenario of bringing monthly lawsuits would not provide Ms. Radaszewski or Eric a remedy that is clear, complete, and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy as required by the Illinois Supreme Court in *Bio-Medical Laboratories*. Rather it would award only the amount of one monthly reimbursement - when the actual injury to Eric from the failure to pay for the necessary medical services would be significantly greater and of the "uncertain magnitude" that the Illinois Supreme Court found to be present in that case. See also, *Lucas v. Peters*, 741 N.E. 2d at 325 (Inability to determine damages is basis for finding that damages are inadequate remedy). Defendant's proposed remedy would offer Eric no relief for missed future payments and the accompanying loss of life-sustaining medical services he requires.

Defendant cites two Illinois Court of Claims cases, *A-Reliable Auto Parts & Wreckers*,

Inc. v. State of Illinois, 2001 W.L. 34677738 (Ill. Ct. Cl. 2001) and *Ace Coffee Bar, Inc. v. University of Illinois*, 1999 W.L. 33246477 (Ill. Ct. Cl. 1999) in support of its argument that Ms. Radaszewski would have an adequate remedy from a suit for past due reimbursements. Neither of these cases dealt with the issue of whether a monetary award would provide an adequate remedy. *A-Reliable Auto Parts & Wreckers* was a replevin claim against the Illinois Secretary of State for the return of the claimant's confiscated motor vehicle. There the Court of Claims concluded that it did not have authority to issue orders of replevin, similar to its findings with respect to its authority to issue injunctions or order specific performance. In *Ace Coffee Bar*, a suit brought by an unsuccessful bidder to provide vending food services for declaratory and injunctive relief to undo the bidding process, the Court of Claims reiterated its prior decisions that it did not have authority to provide injunctive relief, but found that it could issue declaratory relief in certain circumstances. A monetary award was not an issue in the case.

In sum, an award of damages for a missed reimbursement would fall far short of providing Ms. Radaszewski and Eric the enforcement relief Eric needs. Eric could die while Ms. Radaszewski was pursuing her missed reimbursement claim in the Illinois Court of Claims. The Illinois Court of Claims is not a viable source of enforcement for a future breach of any settlement agreement.

Plaintiff reiterates what she stated in her opening brief concerning this dispute. The parties agree on the substantive aspects of the settlement - the level of medical services that Eric would receive. It would seem a shame that defendant's "office policy" on inapplicable boiler plate language would frustrate this agreement. Nevertheless, Ms. Radaszewski cannot and has never agreed to a settlement that would provide her with no meaningful method of enforcing the

agreed-to obligations of the defendant, a broad release clause that could be construed to be inconsistent with her right to enforce, and a confidentiality clause that could be interpreted to prevent Ms. Radaszewski from discussing the amount of services Eric receives when she seeks to make care arrangements for him.

Respectfully submitted,

s/Sarah Megan

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Certificate of Service

I hereby certify that on February 24, 2006, I presented the foregoing Plaintiff's Reply Memorandum Concerning Enforcement of the Settlement Agreement with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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