



New Jersey Supreme Court Mandates Settlements Reached Through Mediation be Reduced to Writing to be Enforceable

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It is no longer only good practice to reduce the settlement terms of a mediation agreement to writing, but is now required under New Jersey law. The New Jersey Supreme Court recently ruled unanimously in Willingboro Mall, LTD. V. 240/242 Franklin Avenue, LLC, that the failure to reduce an agreement to writing at mediation will now preclude its enforceability.

Prior to the litigation, Willingboro Mall, LTD ("Willingboro") sold the Willingboro Mall property to 240/242 Franklin Avenue, LLC ("Franklin"). Eventually, Willingboro filed a mortgage foreclosure action on the property, and the parties were directed by the Court to participate in mediation. At mediation, Willingboro agreed to discharge the mortgage in exchange for \$100,000. Unfortunately, the parties failed to reduce the settlement to writing and left mediation with only a verbal agreement.

Shortly after the mediation, Willingboro refused to sign the settlement agreement. In response, Franklin filed a motion to enforce the agreement, and in its motion disclosed the otherwise privileged communications from the mediation. Franklin even went so far as to attach a certification of the mediator in support of its motion.

Rather than challenging the motion based upon its violations of the mediation-communication privilege, Willingboro opposed the motion on its merit, and requested a discovery schedule and evidentiary hearing on the enforceability of the agreement. The resulting motion practice between the parties led to the very drawn out protracted litigation that mediation sought to avoid.

Through the course of discovery, the parties on both sides disclosed privileged communications from the mediation. The parties even expressly waived the mediator's privilege, and deposed the mediator as to the terms of the agreement. At the close of discovery, and on the



second day of the Court's four-day evidentiary hearing, Willingboro sought to expunge all previously disclosed mediation privileged communications arguing under the New Jersey Uniform Mediation Act and New Jersey Court Rule 1:40-4.

Under the New Jersey Uniform Mediation Act, communications made during private mediation are privileged. The privilege may be waived by settlement agreement reduced to writing, or expressly waived by the mediation participants. New Jersey Court Rule 1:40-4(d) further codifies the import of confidentiality, as the mediation participants would be otherwise unwilling to reveal relevant information for fear it could compromise their positions later on, should the case not settle at mediation.

In this case, the New Jersey Superior Court ruled that the mediation privilege was waived by Willingboro both impliedly, by Willingboro's own disclosure of communications, and expressly when Willingboro waived the privilege and deposed the mediator. The Court further held that despite the parties' inability to reduce the agreement to writing, that a binding settlement agreement had been reached and was enforceable. The Appellate Division and the New Jersey Supreme Court both affirmed this ruling.

The critical question the New Jersey Supreme Court addressed in its decision, is how a party may prove that a settlement agreement was reached at mediation, without breaching the mediation privilege. The New Jersey Supreme Court held that the only means by which a party may prove a settlement agreement was reached at mediation without violating the privilege, is by the presentation of a signed settlement agreement. From this point forward, absent a signed settlement agreement a party will be unable to enforce a verbal agreement reached at mediation.

The Court found the agreement enforceable in Willingboro solely because the parties were deemed to have impliedly and expressly waived the privilege. If Willingboro had challenged Franklin's motion to enforce the agreement at the onset of the dispute based upon its breach of the mediation privilege, the Court would have ruled differently. Willingboro's failure to timely object to the disclosure of privileged communications severely impacted their position. More importantly, Willingboro serves as a clarification of New Jersey's position as to the lack of enforceability of verbal mediation agreements.



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