

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

MAMMOTH RESTORATION
AND CLEANING,

Plaintiff,

v.

Case No.: 19-C-289
J. Ferguson

REX DONAHUE,

Defendant and Third-Party Plaintiff,

v.

ALLSTATE INSURANCE COMPANY

Third-Party Defendant.

**ORDER GRANTING MOTION TO ENFORCE SETTLEMENT
and
DENYING MOTION TO AMEND COMPLAINT OR ALLOW A NEW COMPLAINT**

On November 22, 2019, Third-Party Defendant Allstate Insurance Company (“Allstate”) filed its *Motion to Enforce Settlement* seeking to enforce a three-way settlement agreement between Plaintiff Mammoth Restoration and Cleaning (“Mammoth”), Defendant and Third-Party Plaintiff Rex Donahue (“Donahue”), and Third-Party Defendant Allstate Insurance Company (“Allstate.”) On December 26, 2019, Defendant and Third-Party Plaintiff Donahue moved the Court to allow him to amend his Third-Party Complaint against Allstate to expressly seek all damages related to an insurance claim for a water loss that occurred in December 2017, and for insurance “bad faith.” *See, Motion to Amend Complaint or In the Alternative to Allow a New Complaint (“Motion to Amend”).*

Both motions have been fully briefed, and the Court heard oral argument from the parties on February 7, 2020. Having considered the evidence and argument of the parties, and the applicable West Virginia law, the Court holds that an enforceable contract and settlement agreement was reached between all parties to this case. Accordingly, the *Motion to Enforce*

Settlement filed by Allstate Insurance Company must be granted. As a result of this holding, Donahue's *Motion to Amend* would be futile and is moot. In reaching this holding, the Court relies on the following Findings of Fact and Conclusions of Law:

FINDING OF FACT

1. This civil action was commenced in the Magistrate Court of Cabell County, West Virginia with the filing of Mammoth's Complaint against Donahue on July 24, 2018. In the Complaint, Mammoth alleges that it provided mitigation services for Rex Donahue but never received payment. The *Complaint* asks that judgment be had against Donahue for \$6,031.11.
2. On May 10, 2019, Defendant Donahue filed a *Third-Party Complaint* against Allstate alleging that Allstate provided homeowners' insurance for Donahue covering the subject property where Mammoth performed water mitigation services. Donahue alleges that Allstate denied coverage for the water loss claim because the electric was off, causing the pipes to freeze, but that Donahue could show that the electric was on. Donahue alleges that Allstate has a "good faith basis" to cover the claim, asks that Allstate be held responsible for all damages in this action, and seeks his attorneys' fees and costs from Allstate. *See, Third-Party Complaint.*
3. On June 12, 2019, Allstate removed this case from Magistrate Court to this Circuit Court, pursuant to West Virginia Code §50-4-8. On June 14, 2019, Allstate filed its *Answer* to the *Third-Party Complaint* denying the principal allegations in the *Third-Party Complaint*.
4. On June 28, 2019, counsel for Mammoth, Donahue, and Allstate exchanged emails showing that all parties to this civil action had reached "a three-way agreement to settle

all disputes and claims between Plaintiff Mammoth, Defendant/Third-Party Plaintiff Rex Donahue and Third-Party Defendants Allstate Insurance Company.” The agreement, as memorialized in an email from Allstate’s counsel, was as follows:

- a. Rex Donahue will release all claims against Allstate arising out of the subject water loss claim made in January 2018 on the Landlord's Package policy with Allstate covering 105 Iroquois Trail, Ona, WV 25545. Rex Donahue will dismiss all claims against Allstate in the civil action between the parties now pending in the Circuit Court of Cabell County.
- b. In return, Allstate will satisfy the claim of Plaintiff Mammoth Construction Company against Rex Donahue, by paying Mammoth Construction the sum of \$5,000.00.
- c. This will resolve all claims of the parties to the civil litigation referenced above. A jointly endorsed order of dismissal with prejudice of all claims will be submitted to the Court.

Please confirm.

Motion to Enforce Settlement, Ex. 1, Settlement Emails, p. 2-3.

5. On June 28, 2019, counsel for Mammoth responded with the word “Confirm.” The same day, counsel for Donahue responded to say “Confirmed. Please circulate the Order and I will get my client’s signature on the same (Rex Donahue).” *Id.*
6. In further support of the agreement between Allstate and Donahue, Allstate submitted into evidence an email from counsel for Donahue to counsel for Allstate dated June 27, 2019 which stated, in pertinent part:

I spoke with Rex Donahue about All-state [sic] paying the Monmouth [sic] Restoration claim (and/or whatever reduced settlement amount) and Rex Donahue would release All-State [sic] from the 3rd party complaint and bad faith claim surrounding this lawsuit and he AGREED TO THE SAME. I would request the release or other document as soon as possible so that I can get Rex Donahue to sign the same so we can resolve this case. It is my understanding Rex Donhue [sic] will be paying \$0.00 to Monmouth

under the existing suit and will be dismissed in light of All-State's payment of the same.

Reply to Plaintiff's Response in Opposition to Motion to Enforce Settlement, Ex. 1.

7. Allstate circulated two Settlement Agreements on July 25, 2019. By one Settlement Agreement, Plaintiff Mammoth would agree to release all claims against Donahue. By the other, Third-Party Plaintiff Donahue would agree to release all claims against Allstate. Allstate provided the settlement proceeds to Plaintiff Mammoth on July 26, 2019. *See, Motion to Enforce Settlement*, Ex. 1, p. 1; *see also, Motion to Enforce Settlement*, Ex. 2, Letter to O. Molina dated July 26, 2019.
8. On August 20, 2019, Mammoth returned the executed Settlement Agreement releasing its claims against Third-Party Plaintiff Donahue. *See, Motion to Enforce Settlement*, Ex. 3, Email from O. Molina to E. Kime and S. Cook of August 20, 2019.
9. After repeated requests by counsel for Allstate to counsel for Donahue to provide the promised executed Settlement Agreement, on September 25, 2019, counsel for Donahue responded to say that Mr. Donahue had other more pressing matters, but that he would carry out his settlement obligations as soon as possible. *See, Motion to Enforce Settlement*, Ex. 4, Settlement Efforts Emails.
10. Having received no response from Donahue after three months, Allstate filed its *Motion to Enforce Settlement* on November 22, 2019. Four days later, on November 26, 2019, counsel for Donahue filed a *Motion to Withdraw*, seeking to withdraw as counsel for Mr. Donahue, and explaining that “[t]here has been a total break-down in communication between counsel and client in this matter.” *Motion to Withdraw*, p. 1.

11. One month later, on December 26, 2019, counsel for Donahue filed his *Motion to Amend Complaint or in the Alternative to Allow a New Complaint* asking this Court to amend his Complaint to state additional breach of contract and “bad faith” claims against Allstate arising out of the subject water loss claim made in January 2018 on the Landlord's Package policy with Allstate covering 105 Iroquois Trail, Ona, WV 25545. *See generally, Motion to Amend Complaint or in the Alternative to Allow a New Complaint.* Allstate filed its *Response in Opposition to Third-Party Plaintiff's Motion to Amend or Allow a New Complaint* on January 6, 2020, arguing that Donahue has agreed to dismiss his Complaint – not amend it – and that the *Motion to Amend* is futile under West Virginia Rule of Civil Procedure 15(a).

12. The same day, December 26, 2019, counsel for Donahue filed his *Response to Motion to Enforce Settlement* asking the Court to hold that “the settlement [Donahue] agreed to was in relation to the original complaint” filed in Magistrate Court, but that Donahue would like to continue the litigation to seek more damages from Allstate, and also possibly involve “Rex, Inc. who is not currently in the lawsuit.” In other words, rather than settling and dismissing the case, Donahue has moved the Court to continue the matter, allowing Donahue to continue to seek damages from Allstate over the contested water loss claim. *See generally, Response to Motion to Enforce Settlement.*

13. Thus, even though Donahue has received the benefit of his bargain made in consideration for his release of all claims against Allstate and dismissal of his lawsuit against Allstate, Donahue refuses to execute a settlement agreement and dismiss his case against Allstate.

14. On February 7, 2020, the Court heard oral argument from all parties on Allstate's *Motion to Enforce Settlement*. The matter is now ripe for consideration by the Court.

CONCLUSIONS OF LAW

1. West Virginia law governing this matter is settled. The Supreme Court of Appeals of West Virginia “has held that a dispute over whether a settlement has been effectuated is a question of contract.” *EurEnergy Res. Corp. v. S & A Prop. Research, LLC*, 720 S.E.2d 163, 168 (W. Va. 2011) (citing *Floyd v. Watson*, 254 S.E.2d 687 (W. Va. 1979)). “The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.” *Id.* at Syl. Pt. 2 (quoting Syl. Pt. 1, *Sanders v. Roselawn Mem'l Gardens, Inc.*, 159 S.E.2d 784 (W. Va. 1968)). “The fundamentals of a legal contract are competent parties, legal subject-matter, valuable consideration and mutual assent.” *Id.* at 168.
2. Attorney for Third-Party Plaintiff Donahue had clear authority to bind his client to the terms of a settlement. *See, Messer v. Huntington Anesthesia Grp., Inc.*, 222 W. Va. 410, 419, 664 S.E.2d 751, 760 (2008)(holding that there is a “strong presumption of authority” of an attorney to bind a party to litigation to the terms of a negotiated settlement).
3. Allstate's payment of the debt that Donahue owed to Mammoth was valuable consideration for the return promise to “release all claims against Allstate arising out of the subject water loss claim made in January 2018 on the Landlord's Package policy

with Allstate covering 105 Iroquois Trail, Ona, WV 25545” and to “dismiss all claims against Allstate in the civil action between the parties now pending in the Circuit Court of Cabell County.” Finding of Fact No. 4, above.

4. Attorney for Donahue was competent to enter into an agreement with attorney for Allstate in this case, and he unequivocally gave his consent, on behalf of his client, to the terms of the agreement proposed by Allstate on June 28, 2019.
5. A motion to amend should be denied if the proffered amendment sets forth unmeritorious claims, rendering the amendment futile. As explained by the Supreme Court of Appeals of West Virginia, “the liberal amendment rules under Rule 15(a) do not require the courts to indulge in futile gestures.” *Pyles v. Mason Cty. Fair, Inc.*, 806 S.E.2d 806, 813 (W. Va. 2017) (internal quotes and alterations omitted). Thus, “leave to amend a complaint is futile when the complaint as amended would still be properly dismissed” Palmer, Louis J., *Litigation Handbook on West Virginia Rules of Civil Procedure*, 480 (5th ed. 2017).
6. Third-Party Plaintiff Donahue’s continued refusal to honor his agreement and execute and return the Settlement Agreement is without justification. Therefore, based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the Court HOLDS that a valid and enforceable settlement contract exists between Allstate and Donahue, the terms of which are as follows:
 - a. Rex Donahue will release all claims against Allstate arising out of the subject water loss claim made in January 2018 on the Landlord's Package policy with Allstate covering 105 Iroquois Trail, Ona, WV 25545, and dismiss, with prejudice, all claims against

Allstate in the civil action between the parties now pending in the Circuit Court of Cabell County.

b. In return, Allstate will satisfy the claim of Plaintiff Mammoth Construction Company against Rex Donahue, by paying Mammoth Construction the sum of \$5,000.00.

7. Accordingly, Third-Party Plaintiff Rex Donahue is ORDERED to immediately execute and notarize a written Settlement Agreement containing the terms set forth above and provide it to counsel for Allstate.
8. Because the Court holds that Donahue must honor the terms of his settlement agreement, release his claims, and dismiss his case, his *Motion to Amend* is both futile and moot.

It is accordingly **ADJUDGED** and **ORDERED** that Allstate's *Motion to Enforce Settlement* is **GRANTED**, and Donahue's *Motion to Amend Complaint or In the Alternative to Allow a New Complaint* is **DENIED**. Upon written notification from the parties that the Settlement Agreement has been signed, notarized, and returned, as set forth above, this matter will be dismissed, *with prejudice*.

The exceptions and objections of any party aggrieved by the entry of this Order are hereby preserved.

The Clerk of the Court is further **ORDERED** to send a copy of this Order to all counsel of record herein.

The Clerk is further ordered that this matter is now concluded and shall retire same from the docket of this Court.

