

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 145-8-20 Oscv

Buik vs. Tyrell et al

ENTRY REGARDING MOTION

Title: Motion Motion for Costs of Mediation (Motion: 18)
Filer: Steven A. Adler
Filed Date: August 12, 2022

The motion is GRANTED IN PART.

The present dispute arises from a mediation gone wrong.

On July 28, 2022, the parties met at the Caledonia County Superior Courthouse for a scheduled mediation session with a third-party mediator pursuant to V.R.C.P. 16.3. Plaintiff was represented at the mediation by Attorney Steven Adler, and Defendants were represented by Attorney Vince Illuzzi.

Defendants have primary residences in other states, and the parties had worked together to conduct the mediation on a date and time where Defendants could be in-person at the mediation as is preferred under Rule 16.3(b)(3). Notwithstanding some initial issues where Defendant Nolan thought he might not be able to make the hearing, all of the parties arrived at the mediation, on-time at 9:30am, and began the mediation process in what appears to be good faith.

One issue arose immediately at the outset of the mediation. Defendant Tyrell had learned two days prior to the mediation that she needed to be in Washington, D.C. the morning following mediation for her job. Defendant Tyrell stated this situation to the parties and informed them at the outset that she would need to be in Burlington for a 4pm flight. Defendant Tyrell promised to remain in phone contact with Defendant Nolan as long as possible even after her departure. Notwithstanding this issue, the parties agreed to proceed with the mediation, which soon broke into separate rooms between Plaintiff and Defendants with the mediator shuttling between the two.

At approximately 1:40pm, Defendant Tyrell left the mediation to catch her flight. This left Attorney Illuzzi and Defendant Nolan in the room for Defendants. Defendants state that Defendant Tyrell remained in phone contact with Defendant Nolan during this time.

One hour later, at 2:47 pm, the parties came to what Plaintiff and Defendant Tyrell understood to be a settlement. The parties then set about trying to reduce this agreement to writing. While the parties have defined the nature of this settlement differently, Plaintiff and Defendant Tyrell both stated that they understood they had reached settlement. Defendant Nolan, at the January 5, 2023 hearing on this motion, expressed more mixed understandings of the settlement. He indicated both that the settlement was not acceptable to him based on the terms and that he felt the settlement was conditional on working out issues with a non-party successor to Plaintiff's interests.

For reasons that are not entirely clear, Defendant Nolan left the mediation around the time that Plaintiff understood that they had reached settlement, and he went to the St. Johnsbury Dunkin Donuts for a cup of coffee. During this time Plaintiff, Plaintiff's counsel, Defendants' counsel, and the mediator worked on drafting the mediation agreement. Defendant Nolan did not return to the courthouse but went home. Plaintiff was not aware of Mr. Nolan's departure from the courthouse until after he left, and even then, Plaintiff and his counsel were under the impression that Mr. Nolan would be returning. At 4pm, the parties were obligated to leave the Courthouse as it was closing for the day. Attorney Adler took the hand-written settlement agreement to his office across the street from the courthouse, typed up the agreement, and circulated to the parties and the mediator at 4:45pm. At that point, Plaintiff had signed the agreement as had both attorneys. The only remaining signatures needed were the Defendants, Ms. Tyrell, because she was at the airport, and Mr. Nolan because he was not present. The parties went as far as to have the mediator set up adobe signature blocks for Defendants.

The following day, Defendant Nolan contacted Attorney Illuzzi and indicated that he would not sign the agreement. Defendant Tyrell did not state an objection the settlement agreement and, in fact, indicated at the January 5, 2023 hearing that she was still willing to sign the agreement, but she has not, to date, signed the settlement agreement.

As of the present hearing, Attorney Illuzzi has withdrawn from the matter and Attorney Adler has retired and Attorney Brice Simon has taken over as Plaintiff's successor counsel. The

settlement agreement by Defendant Nolan's statements at the January 5th hearing, appears to be a non-started, and the parties have been stuck in limbo as Defendants have sought new counsel.

Legal Analysis

It is the nature of mediation that it is a voluntary process. Parties attend mediation with no obligation to settle or accept what offers or counteroffers are made. In the Court's experience mediations can be short if the parties are far enough apart in their positions, but they can also last multiple days or even in some cases over the course of a year as the parties start and stop discussions while the litigation process creates clarity on various issues. The voluntary nature of mediation is modified, slightly, by V.R.C.P. 16.3. This Rule requires mediation as part of any litigation process for certain types of civil and environmental court cases. V.R.C.P. 16.3(a). Under Rule 16.3(f), any party or attorney who is required to participate must "appear at the mediation" and must "comply with any other requirements of [Rule 16.3] or any order made under it" V.R.C.P. 16.3(f). Under V.R.C.P. 16.3(b)(3), "[a]ll parties and their counsel must attend a scheduled mediation in person unless the parties stipulate that the mediation may be conducted remotely by video or by telephone" Failure to appear, comply, or attend, unless good cause is shown, can lead to the imposition of sanctions under Rule 16.3(f).

As other courts have noted, "Case law is thin on the finer points of these [provisions of Rule 16.3]" *Old Lantern Non-Conforming Use*, Dckt No. 154-12-15 Vtec., at *2 (Jul. 7, 2017) (Durkin, J.). There is no definition of what the terms "appear," "comply," or "attend" mean within the Rule, and there is no express requirement in Rule 16.3 about how a mediation must conclude or how long parties must be present. Rule 16.3(f) vests discretion within the trial court to impose sanctions where there have been violations of the general terms and guides the Court's application under the terms and guidance of the rules and the burden, once a violation is established, falls to the defending party to show no good cause exists.

The reason for this flexibility and lack of rigid process is that no two mediations are the same. As indicated above, the Court is aware that some mediations end early, some end late. Some end in settlement. Others do not. Some have partial settlements or frameworks that require additional negotiations, resolutions of motions, or further mediation sessions. Some settlement, while complete, still require the fulfillment of subsequent conditions and events before the settlement ripens.

Once begun, a mediation process may take different forms. But, to paraphrase Don DeLillo, all mediations tend to move to resolution. This is the nature of mediation. What each of these mediations described above have in common is a mutual understanding of where the process is at any given time. Once begun, the mediation process tends toward agreement, even if that agreement is a mutual recognition that the parties cannot settle the matter at this time. Thus, it is an essential quality of mediation that once started, the parties must continue until resolution, impasse, or some other event marking the end arises.

This reasoning is supported by the dictionary definitions of the terms at issue here. The definition of “attend” means to be present during a function or event or course of events. Merriam-Webster, at www.merriam-webster.com/dictionary/attend (last visited Jan. 6, 2023). The definition of “comply” means to conform, submit, adapt as required or requested. *Id.* at www.merriam-webster.com/dictionary/comply. The definition of “appear” means to be or come in sight, particularly in front of an authoritative body or organized meeting. *Id.* at www.merriam-webster.com/dictionary/appear. These terms indicate that once a mediation process has begun, a party’s right to leave or ignore the process is more limited than it was at the outset. A party to mediation is obliged to see it through to a point where there is recognition of some end point. Short of that, and the attendance, appearance, and compliance with the mediation process continues.

While Rule 16.3 does not have specific language concerning how mediations are to conclude, if one or more parties simply depart from the mediation, it raises substantial questions as whether the individual is no longer attending or appearing at the mediation. If there is no conclusion or adjournment—a mutually recognized end point—and if one of the parties and/or the mediator continues to labor under the assumption that the mediation continues, then the mediation has not adjourned, and it continues, and the departure raises an issue of bad faith.

Based on the facts in the present case, the Court is confronted with two departures. Ms. Tyrell’s departure appears to have been unplanned in advance, but it also appears that Plaintiff was aware of the departure and elected to go forward with the understanding that Ms. Tyrell would be present up to a point and would then continue to be available only by cell phone. This was a reasonable resolution, and the Court finds no bad faith in Ms. Tyrell’s departure. She was in a difficult situation and took steps to ensure that her participation and virtual attendance continued. Based on Ms. Tyrell’s statements on January 5, 2023, she never disputed the settlement and

continues to be willing to sign the agreement. To the extent that Plaintiffs seek sanctions for Ms. Tyrell's action, the Motion is **Denied**.

Turning, then to Mr. Nolan, a different narrative appears. It is undisputed that the Plaintiff was unaware that Defendant had departed the mediation. It is also further undisputed that Mr. Nolan believed his departure was not a function of reaching final settlement. Neither Mr. Nolan, nor Attorney Illuzzi—to the extent he was aware of it—made any effort to communicate this departure to Plaintiff. It is also undisputed after being told that he could go to Dunkin Donuts, Mr. Nolan failed to return to the mediation and simply went home. This departure was without notice to Plaintiff, the mediator, and apparently to Defendant's counsel. It also effectively cut off Defendant Tyrell who was using Defendant Nolan as a conduit for her continued participation. It is unclear if Attorney Illuzzi was aware that he lacked the authority to complete the settlement process, but it is undisputed that this lack of authority was not communicated to Plaintiff. The events rendered the mediation process inconclusive. Plaintiff left on the day of the mediation with the belief that mediation had successfully concluded in settlement and had authorized the investment of additional time and resources into completing this settlement. Defendants' unilateral withdrawal occurred without further notice. These actions effectively negated the work of the mediation and violated the mandatory mediation process of V.R.C.P. 16.3 by removing Defendants from their on-going appearance and attendance at the mediation and out of compliance with the process. Moreover, neither in Defendants' arguments, nor in Attorney Illuzzi's filing, is there good cause established for this unilateral departure and lack of on-going attendance and appearance at the mediation.

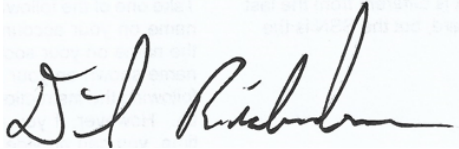
Based on this, the Court finds sanctions against the Defendants for the July 28, 2022 mediation to be appropriate. Plaintiff, through counsel has stated that he seeks \$4,030.00, which represents his attorney's fees and mediator costs for the entire day. The Court finds this amount to be excessive in light of the more limited sources of the bad faith. Instead, the Court looks at three points along the mediation. There was the initiation of the mediation, the middle of the mediation, and the end of the mediation. The bad faith and breakdown of the mediation occurred in the last third of the process, and while this issue thwarted the overall outcome mediation, it did not thwart the entire process. The beginning and middle of the mediation were conducted in good faith. It was the collapse at the end that rendered the process uncertain and gave Plaintiff the belief in a settlement agreement that was chimerical than real. Notwithstanding this frustration, outcomes in

mediation are not guaranteed, and the Court's sanctions will address only the portions of the mediation where bad faith compliance has been established. Based on this, the Court awards 30% of Plaintiff's costs as sanctions.

ORDER

Defendants shall pay to Plaintiff the amount of \$1,343.33 in sanctions for the violations of V.R.C.P. 16.3 and the mediation process. Further the Court orders, as noted at the January 5, 2023 hearing, that all other motions stayed until a period following the notice of appearance of counsel for Defendants or January 31, 2023, whichever occurs first.

Electronically signed on 1/6/2023 4:10 PM pursuant to V.R.E.F. 9(d)

A handwritten signature in black ink, appearing to read "D. Richardson", is written over a light blue rectangular background. The signature is fluid and cursive.

Daniel Richardson
Superior Court Judge