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'Confidential' Settlement Agreements In NY? Think Again

Law360, New York (March 28, 2013, 9:39 AM ET) -- Settlement agreements almost always provide that the terms are confidential and may include draconian provisions if a signatory to the agreement publicizes its terms. Clients and counsel assume confidentiality of settlement agreements. However, a New York statute turns this assumption on its head in New York state court.

In addition, New York state and federal case law support production of confidential settlement agreements in discovery. Potential disclosure is not the expectation of clients when these documents are signed. We caution practitioners to advise clients that confidential settlement agreements may become public, and contemporaneously documenting that advice.

CPLR 2104

To the amazement of many New York State court practitioners, when a case is dismissed based on a settlement, that settlement is supposed to be filed publicly where it is available to anyone to read.

CPLR 3217(a) provides for voluntary discontinuance of an action without a court order by filing a stipulation with the county clerk signed by all counsel "provided that no party is an infant, … and no person not a party has an interest in the subject matter of the action." However, CPLR 2104, a provision that deals with stipulations, was amended in 2003 and has provided for the last 10 years: "With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk."

This filing requirement was coupled with an amendment to CPLR 8020, which deals exclusively with court clerk fees, and provides for a $35 fee for filing a stipulation of settlement or a voluntary discontinuance. The Practice Commentaries with respect to CPLR 2104 note that "the legislative history of these amendments makes clear that their purpose was to generate revenue."

Under these circumstances, one might expect a plethora of litigation over the last decade under CPLR 2104, either from third parties trying to access settlement agreements (although there is no indication that the statute provides a private right of action or a mechanism to enforce it by a nonparty) or parties to the settlement who have second thoughts about fulfilling their settlement obligations. That is not the situation at all; settling parties seem to just ignore the provision, and county clerks appear to be indifferent, so long as the $35 fee is paid. In fact, there seems to be only one reported decision on point.

Velazquez v. St. Barnabas Hospital, was a 2003 negligence case filed in the Bronx arising from the disclosure of confidential information by a physician. The parties entered into a settlement agreement in open court. Years later, the trial court granted the hospital's motion to enforce the settlement's confidentiality provisions over plaintiff's objection. 901 N.Y.S.2d 911 (Sup. Ct. Bronx Co. 2007). On appeal, the Second Department affirmed in a one paragraph decision. 57 A.D.3d 251 (2d Dep't 2008).

After granting permission to appeal, the New York Court of Appeals modified the decision and denied the hospital's motion to enforce the parties' settlement agreement as "not binding." Citing CPLR 2104 and several cases, it noted that "details regarding conditions of the settlement, including a disputed confidentiality agreement were never recorded or memorialized. No agreement was made in open court or filed with the county clerk." 13 N.Y.3d 894 (2009)[1]

County clerks apparently are accepting stipulations of discontinuance without attached agreements provided the filing fee is paid. However, for parties ignoring the CPLR's requirements, there could be unintended and adverse consequences.

It appears that litigants are not undertaking the extremely cumbersome and public policy disfavored process of moving for orders permitting the filing of settlement agreements under seal.[2] Professor Siegel, in his October 2003 Practice Review, discussed an approach to the problem of confidentiality. The solution he suggests is probably the best available one — although it assumes that counsel is aware of the issue before filing a stipulation of dismissal:

[G]ive the word "terms" in CPLR 2104 a literal construction. This would mean drawing the stipulation so that its "terms" just don't include a reference to the details of the settlement. It would merely recite something to the effect that "this discontinuance is based on a settlement reached by the parties on the issues outstanding between them [maybe include the date], among which is the understanding that the details of the agreement and the consideration furnished for it on each side are to remain confidential."

If the courts keep firmly in mind that the whole and sole purpose of this filing requirement is to add $35 to the public fisc, they can hold that the purpose is implemented in full if a check in that amount accompanies the document just recited, or its like …

Confidentiality is a key part of the "terms" in such a case. Since there is no public policy connected with the CPLR 2104 amendment other than the production of a $35 payment, the court can declare the production a success and move on to more important business.

Public Policy Regarding Disclosure of Settlement Agreements Under the Case Law

Whether confidential settlement agreements are subject to production in discovery is a separate question.

State Law

CPLR 3101 has long provided for "full disclosure of all matter material and necessary in the prosecution or defense of an action." Almost fifty years ago, the New York Court of Appeals held that "material and necessary" should be "interpreted liberally to require disclosure" and that "a broad interpretation of the words 'material and necessary' is proper." Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403 (1968). Courts have required discovery of confidential settlement agreements in appropriate cases, particularly to nonsettling defendants in multidefendant accident cases where insurance and indemnity/contribution issues are at play.[3]

Thus, in Mahoney v. Turner Construction Co., 872 N.Y.2d 433 (1st Dep't 2009), the court reversed a refusal to compel settling defendants to produce their settlement agreement to nonsettling defendants and directed the court to inspect the agreement in camera before reconsidering the motion to compel. After noting that the law on disclosing settlement agreements to nonsettling defendants was "unclear and presents a thorny issue with which the trial courts are required to grapple," the court reviewed the cases to "offer guidance" to the lower courts.

Starting with the mandate of Crowell-Collier, supra, and citing numerous cases, the Mahoney court held that disclosure might be appropriate despite a confidentiality clause. However, where the terms of the settlement have no bearing on the issues, the settlement agreement is not discoverable. If there is any doubt as to relevance, in camera inspection by the court is required, and the settling parties' interest in confidentiality can be protected by an appropriate order limiting disclosure.

Similarly, in Osowski v. AMEC Construction Management Inc., 887 N.Y.S.2d 11 (1st Dep't 2009), the First Department upheld disclosure of a confidential settlement agreement to a nonsettling defendant. See also Masterwear Corp. v. Bernard, 298 A.D.2d 749 (1st Dep't 2002) (reversing denial of motion to compel disclosure of agreement with co-defendant and directing in camera inspection by court; confidential settlement agreement "contains admissions").

But where the settlement agreement is not shown to be "tangentially related" to any material issue in the matters being litigated, disclosure is denied. See, e.g., Hulse v. A.B. Dick Co.(In re: New York County Data Entry Worker Product Liability Litigation),162 Misc.2d 263, 267 (Sup. Ct. N.Y. Co. 1994), aff'd, 222 A.D.2d 381 (1st Dep't 1995) ("while materials would be useful to defendants in assessing their maximum exposure, and thus whether they too should settle, … such strategizing has no bearing on the underlying issues of fault and damages").

Federal Law

The most recent New York federal case is Kings Co., Washington v. IKB Deutsche Industriebank AG, IKB, __ F. Supp.2d __ (S.D.N.Y. 2012), a multidefendant case arising from the financial collapse of a structured investment vehicle. Plaintiffs entered into a settlement agreement and mutual release with two defendants and the nonsettling defendants sought to compel the production of that agreement. After citing to the extensive New York federal and state case law on the topic, Judge Shira Scheindlin stated the law as follows:

While settlement agreements are often excluded at trial out of concern for prejudice and the public interest in fostering compromise, inadmissibility is no bar to discovery. While courts in this Circuit disagree as to the standard that applies to the discovery of settlement agreements, the majority hold that the required showing of relevance is no higher for settlements than it is for the discovery of other kinds of information. Nonetheless, courts routinely refuse to afford defendants access to settlement agreements that they deem irrelevant. (citations omitted)

Judge Scheindlin reviewed the settlement agreement in camera and rejected production until after trial. First, she found defendants failed to make a particularized showing of a likelihood that admissible evidence would be generated by disclosure of the agreement. Second, she found the agreement was not relevant to cross-examining witnesses at trial because it did not require the settling defendants to cooperate with plaintiffs or suggest witness bias.

Teligent v. K&L Gates, 640 F.3d 53 (2d Cir. 2011), also maintained confidentiality of a confidential settlement agreement. Teligent arose out of a voluntary, successful mediation to settle both a bankruptcy court adversary proceeding and a related federal court action between Mandl, Teligent's former CEO, and parties related to him, and Savage, the unsecured claims estate representative. The mediation was subject to the standard protective order employed by the Southern District of New York Bankruptcy Court.

One of the settlement terms required Mandl to sue K&L Gates, which had not participated in the mediation, for legal malpractice. K&L Gates sought documents relating to negotiations leading to the settlement and moved unsuccessfully in the bankruptcy to lift the confidentiality provisions of the protective order. Savage opposed the motion and cross-moved for relief. The Bankruptcy Court denied both parties relief. The district court affirmed the Bankruptcy Court and the Second Circuit also affirmed.

In re Teligent Inc., 417 B.R. 197 (Bankr.S.D.N.Y. 2009).

The Second Circuit stated that "Confidentiality is an important feature of the mediation and other alternative dispute resolution processes." It held that a party seeking disclosure of confidential mediation communications or modification of a protective order must demonstrate each of the following factors: (1) special need; (2) resulting unfairness from a lack of discovery; and (3) that the need for the evidence outweighs the interest in maintaining confidentiality. It stressed the important public policy underlying confidentiality in mediation:

Were courts to cavalierly set aside confidentiality restrictions on disclosure of communications made in the context of mediation, parties might be less frank and forthcoming during the mediation process or might even limit their use of mediation altogether. These concerns counsel in favor of a presumption against modification of the confidentiality provisions of protective orders entered in the context of mediation.

Conclusion

As to the confidentiality to be accorded settlement agreements, this is an area where counsel's instincts clearly are inconsistent with New York State statutory law and probably are inconsistent with state and federal case law. It is important that counsel focus on the potential disclosure of confidential settlement documents when drafting those documents. If not too cumbersome, counsel may want to consider using schedules or side agreements to increase the probability that if a court were to order production at some time in the future, the "jewels" of the deal will remain fully confidential.

A further "takeaway" on the production of confidential settlement agreements in litigation is that the stronger the case one makes for why the settlement agreement is relevant, and the more agreeable counsel is to an appropriate protective order, perhaps even excluding review by the client, the more likely the court is to require production. If the proponent requests that the court review the agreement in camera before deciding whether to order production, the court is even more likely to order production if the agreement is material and relevant beyond the simple dollar value of the settlement.

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[1] In footnote 2 in Mahoney v. Turner Construction Co., 872 N.Y.2d 433 (1st Dep't 2009) (discussed in the text), the First Department noted that it was "not clear" what CPLR 2104 required with respect to disclosure of the terms of a stipulation of settlement.

[2] Under Section 216.1 of Part 216 of the Uniform Rules for the New York State Trial Courts, a court may enter an order sealing a court record only "upon a finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties."

[3] General Obligations Law § 15-108 governs where some but less than all tortfeasors settle with plaintiff and provides for deduction from plaintiff's verdict against a nonsettling defendant to account for settlements plaintiff made with other defendants. In multidefendant tort cases, the amount of a confidential settlement with less than all defendants, although not necessarily the other terms of the

settlement, will need to be disclosed in the event of a plaintiff's verdict for apportionment purposes. Under GOL § 15-108(a), a release or covenant not to sue "reduces the claim of the releaser against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, ..."