STATE OF MICHIGAN
CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
OAKLAND COUNTY

SUSAN BISIO,

Plaintiff,

Case No. 2015-150462-CZ

v

Hon. Leo Bowman

THE CITY OF THE
VILLAGE OF CLARKSTON,

Defendant.
_____/

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PLAINTIFF'S RESPONSE OPPOSING CITY'S MOTION TO ENFORCE PURPORTED SETTLEMENT

There is no settlement. The Court should not only deny the defendant city's motion to try to impose a settlement that plaintiff never agreed to, but it should also sanction the city and its lawyers for bringing an unsupported motion. The motion is defective in several ways:

- Plaintiff never signed and never agreed to the terms of the settlement agreement the city wants the Court to impose. Other than the dollar amount, there was no meeting of the minds on any material terms of a settlement.

- The city's motion does not present the terms of the supposed settlement it wants the Court to impose. It does not state the amount or the terms of the supposed settlement.

- The city offers no evidence satisfying the requirement of MCR 2.507(G) that a settlement must be evidenced by a settlement on the record in open court or a written

agreement signed by the party to be bound or by that party's attorney.

- The city offers no verified facts to support its motion. It offers only the unsworn hearsay representations of a lawyer who has no personal knowledge of the facts.

- Even if there were a settlement agreement among counsel, that is not enforceable against the city without approval of the city council, which has not occurred.

In response to the specific allegations in the city's motion, plaintiff states:

1. Admits this case involves plaintiff's June 7, 2015 Freedom of Information Act request to the city.

2. Admits the city finally disclosed the requested records in October 2020, after almost five years of litigation and a decision by the Michigan Supreme Court, upheld on reconsideration, that the requested records are public records subject to the Freedom of Information Act. Admits the parties agreed to facilitation with retired Judge Edward Sosnick, limited to facilitation of plaintiff's request for an award of fees, costs, and disbursements as the prevailing party under the provisions of FOIA that mandate a fee award to a successful plaintiff.

3. Admit that the facilitator recommended a settlement number for plaintiff's fee request and asked the parties to respond.

4. Plaintiff has no knowledge of what the city communicated to the facilitator. Plaintiff's counsel sent an email to the facilitator, which was untimely under the deadline the facilitator set. The email stated plaintiff would accept the facilitator's recommended amount, but only if the city would agree to entry of a judgment against the city.

5. The city does not provide the Court with the facilitator's email that supposedly declared a settlement. The quoted language in the city's motion is not in the facilitator's email.

Rather, the city procured an affidavit from the facilitator that purports to revise the language in the facilitator's actual email by twice changing the words "counsel" to "city council." The distinction between the two is significant. It is not credible that the facilitator, a former judge with decades of experience, did not know and mean the words he originally used rather than the revision the city asked him to make in the affidavit the city drafted for him.

6. Admits plaintiff's counsel sent the city's lawyers a proposed settlement agreement that included agreement to entry of a judgment against the city. This was sent before receiving any proposed settlement agreement from the city. This was not "inconsistent with the settlement" because no terms of the purported settlement were agreed on at that time—or at any other time—other than the amount of the fees. It was necessary, as even the facilitator stated, that the parties "will have to agree on a settlement agreement." A settlement agreement would, of necessity, need to include specifics about disposition of the pending fee motion and other pending motions. So, at the time plaintiff sent her proposed agreement to the city's lawyers, there was no binding settlement agreement. There was only agreement on an amount, with additional terms to be negotiated by the parties. Plaintiff's request for entry of a judgment was consistent with plaintiff's proposed draft settlement agreement sent to the city before the facilitation, plaintiff's facilitation summary provided to the facilitator, plaintiff's statements during the facilitation, and plaintiff's counsel's email to the facilitator accepting the facilitator's recommended amount contingent on agreement to entry of a judgment against the city.

7. There is no public record of what the city council approved. The council approved an unidentified "settlement" and payment to an unidentified payee of $35,000, only a small part

of the facilitator's recommended amount. The city council did not approve a particular settlement agreement or any settlement terms.

8. The city does not provide the Court with its proposed settlement agreement—an agreement that, by this motion, the city asks the Court to order plaintiff to "execute and comply with." The city's proposed settlement agreement did not include "standard terms and conditions." There are no such things. The city offers no proof of "standard terms and conditions" that are included in every settlement agreement, let alone settlement agreements that address only mandatory statutory fees after remand from the Michigan Supreme Court. By asking for a release of injury and damages claims, for example, the city tries to treat this as a typical personal injury case, where payment is made in exchange for dismissal of the case. Here, the case has been litigated for more than five years, resulting in a Supreme Court decision in plaintiff's favor. The terms of the city's proposed settlement agreement would erase all of that, including the impact of the Supreme Court decision.

In any event, the city's proposed settlement agreement is not a "standard" settlement agreement, whatever that is. It was tailored to this case and included terms specific to this case that were never discussed or agreed to, including providing releases and indemnifications to the city, to the city attorney (not a party to the case, as the city has repeatedly argued), to the city's attorney's law firm (also not a party to the case), to city officers, to city employees, and to other city personnel; agreeing plaintiff was not the prevailing party in the lawsuit, despite having won a decision in the Michigan Supreme Court; and agreeing to dismiss her complaint with prejudice, rendering her victory in the Supreme Court a nullity. A dismissal with prejudice is a decision on the merits.

Grimmer v Lee, 310 Mich App 95, 102; 872 NW2d 725 (2015). That would mean plaintiff's claim that the contested records here were public records subject to FOIA would be decided *against* her (contrary to the law of the case in the Supreme Court decision) and the city would be free to continue to conceal public records of its officials and employees in off-site files.

In addition, the city's proposed settlement agreement provided for signature by plaintiff and her counsel but not by the city. The city was not offering a reciprocal release to plaintiff. This would allow the city to continue to prosecute its unsupported claims of fraud and unethical conduct against plaintiff and her counsel and its pending motion for a fee award of $93,210, which the city repeatedly refused to withdraw after it lost in the Michigan Supreme Court, even though the motion was premised on the city's success in circuit court, which the Supreme Court reversed. Indeed, given the city's demand that plaintiff admit she was not the prevailing party, the city could expand that motion to try to recover all its fees for these five-plus years of litigation. The city did not offer a release of those claims. None of this was anything that was discussed in facilitation, let alone agreed to.

9. Admits that city lawyer Mark Peyser misrepresented to the Court's staff attorney that there was a "binding settlement" and admits that plaintiff's counsel corrected that misrepresentation.

10. Plaintiff properly refused to execute the city's unilaterally drafted one-sided proposed settlement agreement because plaintiff did not agree to the terms in that draft except for the amount of the fees. This is not "[d]espite [plaintiff's counsel's] email to Judge Sosnick" because that email did not mention let alone accept the additional terms in the city's proposed settlement

agreement and plaintiff did not state an open-ended intent to agree to any terms the city might demand. Plaintiff refused to execute the city's proposed agreement because the parties did not agree on the terms of that "agreement."

11. There is no signed agreement by plaintiff or her counsel that satisfies the requirement of MCR 2.507(G) that "evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney." The city offers no such evidence in its motion, relying only on mischaracterization of what happened by a lawyer without any personal knowledge and without any admissible evidentiary support. There is nothing that satisfies MCR 2.507(G) and thus no binding settlement.

12. The city correctly sets out the law but offers no facts that satisfy the requirements of the law. Plaintiff's counsel did not "confirm[] acceptance of the settlement." The only thing plaintiff's counsel confirmed was acceptance of the facilitator's proposed amount, contingent on entry of a judgment against the city. The city provided no written acceptance of the additional terms it wants the Court to impose. There is none.

13. Plaintiff's counsel did not send an email "agreeing to the settlement" because there was no "settlement" containing the additional unacceptable terms the city now demands and the email plaintiff's counsel sent did not agree to them. The argument that plaintiff may not "demand unilateral amendments" is risible, since it is the city that unilaterally drafted unacceptable terms to impose after receiving plaintiff's proposed agreement.

Simply said, there was no agreement on the material terms of a settlement. There is no settlement, certainly not the one-sided settlement the city drafted. The Court should deny the city's

motion and sanction the city and its attorneys for filing an unfounded motion.

Brief

The city asks the Court to impose a supposed settlement of plaintiff's fee motion. It wants the Court to force plaintiff "to execute and comply with" an onerous "Release and Settlement Agreement" the city unilaterally drafted, filled with provisions the parties never discussed or agreed on. See exhibit 12 to the affidavit supporting this response. It wants plaintiff to agree she didn't win the case, despite the Michigan Supreme Court decision in her favor. It wants the Court to dismiss plaintiff's complaint with prejudice, thus ruling on the merits that plaintiff's claim that the contested records are public records was not true—contrary to the law of the case in which the Supreme Court ruled they were public records.

There is no factual or legal basis for forcing plaintiff into this "settlement." The parties never agreed on the material terms of a settlement. There is no writing complying with MCR 2.507(G) that agreed to these terms. At best, plaintiff's agreement to a proposed amount in settlement of her fee claim was an offer, contingent on additional terms that have not been fulfilled. The offer has been withdrawn. There is no settlement.

The apparent motive of the city's motion is to try to keep secret the fact it was willing to pay plaintiff $160,000 in fees. Concealing that fact is why the city refuses to agree to entry of a judgment against the city. That is also why the supposed city council approval of the "settlement" does not specify any actual terms, does not state the city would be settling for $160,000, and authorizes payment to an unidentified payee (not plaintiff) of only $35,000. The city is also trying to conceal the fact that the city attorney Ryan's malpractice carrier is involved. Ryan brought an

attorney who specializes in professional liability matters to represent him at facilitation.[1]

In addition to representing the city at facilitation, lawyer Peyser's additional role was to apparently to act as a sort of clearinghouse for payment. Other than the $35,000 the city council authorized to be paid to an unnamed payee, this set-up was designed to keep the source and amount of other contributions to a settlement a secret from Clarkston residents, even though they pay the insurer's premiums and the legal services bills for lawyers Peyser and Ryan.

Plaintiff has always made clear she would not agree to a secret settlement. The city's refusal to agree to entry of a judgment means there is no agreed settlement. The city does not want to face plaintiff's fee motion on the merits—a motion that seeks an award of over $320,000 in fees incurred over the past five-plus years—fees incurred in opposing unsupported motions such as this. And the city's reluctance to agree to entry of a judgment is contrary to its settlement in a previous case in this very court where the city agreed to entry of a consent judgment stating the city held an illegal closed meeting and ordering the city to pay legal fees. *Bisio v City of the Village of Clarkston*, case no. 2015-147354-CZ (Oakland Circuit Court, 3/14/16). Exhibit 4 to the affidavit supporting this response. The Court should deny the city's motion to enforce a non-existent settlement. The case should proceed to determination of plaintiff's fee motion, which plaintiff will be renewing shortly.

[1] Although lawyer Ryan and his firm were not parties and there is no consideration from them to plaintiff in the purported "settlement," the city attempts to insulate them from potentially sanctionable conduct relating to the lawsuit. The release and indemnification are broad enough to punish plaintiff if she filed professional grievances at the conclusion of the litigation.

I. The Court Should Deny the Motion Because the City Has Not Presented Specific Terms That It Wants the Court to Enforce

As a threshold issue, the city's motion does not specify any terms of the purported settlement. It does not state the amount of the fees the parties supposedly agreed on or provide the "Release and Settlement Agreement" it asks the Court to "order Plaintiff to execute and comply with."[2] It does not include either party's communications to the facilitator responding to the facilitator's recommended settlement number.

The Court should reject such a vague, unspecified request to enforce a settlement without specifying the terms of the settlement and without offering either party's statement about what they were supposedly agreeing to. If the facts supporting a motion are not already in the record, an affidavit or other admissible evidence is required. MCR 2.119(E)(2). A motion must "state the

[2] The city's failure to clearly state the relief it wants could possibly be prompted by a misplaced notion of mediation confidentiality. There is no such requirement here. MCR 2.412, Mediation Communications; Confidentiality and Disclosure, only "applies to cases that the court refers to mediation as defined and conducted under MCR 2.411 …." MCR 2.412(A). MCR 2.411 in turn only "applies to cases that the court refers to mediation as provided in MCR 2.410." MCR 2.411(A)(1). MCR 2.410(C)(1) permits, but does not require, a court to order mediation or other alternative dispute resolution. There was no order to mediate or facilitate here. Thus MCR 2.412 does not apply. Even if it did, the city waived confidentiality by selectively disclosing communications in its motion. By giving an incomplete, misleading recitation of what happened, the city "opened the door" to evidence showing the details of what really happened. *Bishop v St John Hosp*, 140 Mich App 720, 726; 364 NW2d 290 (1984).

Nor does MRE 408 apply to plaintiff's disclosure of the parties' email communications. These are not offered "to prove liability for or invalidity of" plaintiff's fee claim. The issue here is not whether plaintiff is entitled to fees. It is whether there was an enforceable contract to settle the fee claim. The communications are offered to show there was no settlement agreement. And, even if the rule applied, the city waived it by selectively disclosing communications in its motion. *Bishop, supra.*

relief or order sought." MCR 2.119(A)(1)(c). The city has not presented any concrete request to the Court for what the city actually wants the Court to order. This motion does not state the amount of the fees the city wants the Court to order or the content of the "Release and Settlement Agreement" it wants the Court to impose. A motion that does not clearly specify the relief requested should be denied. That alone is reason for denying the motion. The remainder of this brief shows that, even if the Court were to overlook the failure to clearly specify the relief requested, there is no settlement to enforce.

II. A Settlement Agreement Is a Contract That Requires a Meeting of the Minds on the Material Terms

Hornbook contract law principles apply here:

> An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts. Before a contract can be completed, there must be an offer and acceptance. Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed. Further, a contract requires mutual assent or a meeting of the minds on all the essential terms.

Kloian v Domino's Pizza LLC, 273 Mich App 449, 452-453; 733 NW2d 766 (2006) (internal citations and quotes omitted). "A meeting of the minds is judged by an objective standard, looking to the express words of the parties and their visible acts …." *Id.* at 454.

The law of offer and acceptance is also clear: "Any material departure from the terms of an offer invalidates the offer as made, and results in a counter proposition, which, unless accepted, cannot be enforced. … The acceptance must be absolute and unconditional, and, if conditions are attached or if it differs from the offer, the transaction amounts only to a proposal and a counter

proposal." *Harper Bldg Co v Kaplan*, 332 Mich 651, 655; 52 NW2d 536 (1952). The counterproposal "is a rejection of the offer, and puts an end to the negotiation …." *Id.* at 656.

There is an additional requirement for settlement of a lawsuit: "A contract for the settlement of pending litigation that fulfills the requirements of contract principles will not be enforced unless the agreement also satisfies the requirements of MCR 2.507(H)."[3] *Kloian*, 273 Mich App at 456. The rule requires that the settlement either be placed on the record in open court or signed by the party to be bound or by that party's attorney. See the further discussion of this rule in section III.G below.

III. There Was No Agreement

The facts set out here are supported by the Affidavit Opposing City's Motion to Enforce Purported Settlement, filed with this response. The city filed no affidavits except for a cursory affidavit improperly solicited from the facilitator, which we discuss in section III.I below. The city offered no other admissible evidence.

The Court should not consider the factual representations in the city's motion. If the facts supporting a motion are not already in the record, an affidavit or other admissible evidence is required. MCR 2.119(E)(2). Representations in a brief are not facts. This is particularly so when the lawyer making the representations was not involved in the proceedings and has no personal knowledge. Affidavit ¶ 16.

The following sections show what actually happened.

[3] The provision now appears in MCR 2.507(G) without any change in language.

A. The Parties Agreed to Non-Binding Facilitation

Plaintiff filed a Motion for Fees, Costs, and Disbursements on October 26, 2020. The Court set the motion for hearing on January 13, 2021. Affidavit Opposing City's Motion to Enforce Purported Settlement (filed with this response), ¶ 3; hearing notice 11/6/20. The city asked to facilitate the fee claim. Affidavit ¶ 3. The parties agreed to facilitate the fee claim. *Id.*; affidavit exhibit 2. As is usual with facilitative mediation, this was a nonbinding process, which is how the city's mayor characterized it when explaining what the city agreed to. Affidavit ¶ 3. The facilitator did not present a facilitation agreement to plaintiff and neither she nor her counsel signed a facilitation agreement. *Id.* ¶ 5.

Nothing conferred authority on the facilitator to settle or force the parties to agree. A facilitator is supposed to be "a neutral third party." MCR 2.411(A)(2).[4] His role is only to "help[] explore solutions." *Id.* "A mediator has no authoritative decision-making power." *Id.*

Plaintiff agreed to adjourn her pending fee motion pending facilitation. Affidavit ¶ 4.

B. Plaintiff Made Clear That a Condition of Settling Her Fee Claim Was Entry of a Judgment Against the City

Before the facilitation, plaintiff's counsel circulated a proposed settlement agreement, which included agreement to entry of a judgment against the city, with the amount left blank, to be determined at the facilitation if the parties could agree. Affidavit ¶ 6; affidavit exhibit 3. This was an important aspect for plaintiff of any potential settlement. Affidavit ¶ 8. Plaintiff had a

[4] Although not applicable here because there was no court order for facilitation, MCR 2.411(A)(2) sets out the common understanding of the role of a facilitator.

motion for fees pending. If the motion went to hearing and decision, it would have resulted in entry of an order determining the amount of the fees. Plaintiff insisted on the same result in settlement, given the city's abusive litigation tactics and dragging out the case for more than five years in a matter that should have been decided early on but for the city's intransigent approach to the case. *Id.* This was also consistent with the city's agreement to entry of a consent judgment against the city in a previous case in this Court where the city agreed to a judgment stating it had held an illegal closed meeting and ordering the city pay attorney fees. Affidavit exhibit 4.

C. The Facilitator Only Proposed a Settlement Amount.

The parties participated in facilitation on February 1, 2021 and did not reach agreement. Affidavit ¶ 9. In discussions with the facilitator, plaintiff made it clear that entry of a judgment against the city was a condition of settlement. *Id.* After the facilitator held further discussions with the parties, he suggested that he value plaintiff's fee claim and present that figure to the parties for their consideration. *Id.* He did so on February 8, 2021 and suggested that the parties respond within two days, by February 10 at 5:00 p.m. *Id.*; affidavit exhibit 5.

D. Plaintiff's Acceptance of the Proposed Settlement Amount Was Contingent on Entry of a Judgment Against the City

Plaintiff's counsel sent an untimely acceptance of the facilitator's valuation in an email. Affidavit exhibit 6 (sent at 5:03 p.m.). The untimeliness of the email alone is enough to conclude that there was no agreement, since the purported acceptance did not comply with the terms the facilitator set.

Even if the untimely email from plaintiff's counsel is considered, acceptance of the facili-

tator's valuation was expressly conditioned on entry of a judgment in the form previously circulated to the parties. *Id.* The email said:

> I previously circulated a form of settlement agreement before the facilitation started and want to see a signed agreement in that form, including agreement to entry of a judgment for $160,000 plus judgment interest, all contingent on approval of the settlement by the city council at or before its next scheduled meeting on February 22.

In response, apparently having also received a response from the city, the facilitator told the parties that both sides accepted his proposed amount. Affidavit ¶ 11; affidavit exhibit 7. He said: "I am pleased to inform you that we have a settlement subject to counsel approval. If counsel approves, then you will have to agree on a settlement agreement." Affidavit exhibit 7.

E. The Parties Exchanged Conflicting, Mutually Exclusive Proposed Settlement Agreements

Immediately after the emails at the end of the day on February 10, on February 11 plaintiff's counsel sent a proposed settlement agreement, including a proposed judgment against the city, to both city lawyers who participated in the facilitation. Affidavit ¶ 12 and exhibits 8 and 9 to the affidavit. That proposed agreement was substantially the same as the one plaintiff's counsel sent before the facilitation. Neither of the city's lawyers responded substantively, although one said he would respond later on February 12 but ultimately did not. Affidavit ¶ 12.

Several days later, city lawyer Peyser sent a proposed settlement agreement and proposed stipulated order for dismissal of the complaint with prejudice. Affidavit ¶ 14 and affidavit exhibits 11 to 13. The proposed agreement included several terms plaintiff did not agree to: Releases and indemnities (including to the city attorney and his law firm, whom the city repeatedly argued is not a party and not bound by the Supreme Court's decision); a statement that plaintiff was not the

prevailing party (even though she won in the Supreme Court); and a dismissal of the complaint with prejudice (thus ruling, on the merits, that the contested records are not public records, contrary to the Supreme Court's decision).

There followed an exchange of emails in which the lawyers reiterated their conflicting positions. Affidavit ¶ 14; affidavit exhibits 14 and 15. They did not resolve their differences. Likewise, there were emails with the Court's staff attorney in which the city's lawyer claimed there was a "binding settlement" and plaintiff's counsel stated there was no agreed settlement. Affidavit ¶ 15 and affidavit exhibits 17 to 20.

F. There Was No Meeting of the Minds on Material Terms and Thus No Settlement

To have a settlement agreement, or any contract, there must be a meeting of the minds on material terms. *Kloian,* 273 Mich App at 453. There was none here. Each party proposed a settlement agreement. The disagreement was stark. The city wanted releases and indemnifications, an admission that plaintiff did not win the case, and a dismissal of all her claims with prejudice. Plaintiff refused. Plaintiff wanted entry of a judgment against the city. The city refused. The dueling settlement agreements conflicted on material terms. Neither side accepted the other's proposed agreement. There was no meeting of the minds on the material terms. Absent agreement on these material terms, there was no settlement.

A case right on point confirms this result. *Kendzierski v Macomb County*, unpublished opinion of the Court of Appeals, issued September 23, 2014 (docket no 316508), 2014 WL

4723163 (attached as exhibit 1).[5] There the parties participated in a facilitation. The court ordered the facilitator to set a settlement figure and said the case was settled if the parties accepted that number. The parties accepted the facilitator's number but disagreed on the terms of a settlement agreement. The Court of Appeals held there was no binding settlement agreement because there was no meeting of the minds on all material terms. It said: "There is no evidence of an offer, an acceptance of the offer, or of mutual agreement on all of the purported contract's essential terms." Slip opin at 5.

The same is true here. The parties did not agree on the terms on which the case would be disposed of. No agreement. No settlement. Even the Clarkston city manager doesn't think there is a settlement. He says: "[T]he settlement agreement is still in process and we are not at liberty to discuss it. We anticipate issuing a brief statement once the agreement is finalized." Mackinder, *Resident calls out Clarkston government for apparent financial snafus,* Clarkston News (February 24, 2021), p 3.

The city cites no case where a court imposed a unilateral settlement agreement on a party who did not agree to the terms. "Mere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992).

G. There Is No Writing Complying With MCR 2.507(G)

Even if there were an agreement, it must be evidenced by a writing. MCR 2.507(G). The

[5] We cite this unpublished case because it is precisely on point and there is no similar published case. MCR 7.215(C)(1).

city offers no such written agreement signed by plaintiff or her attorney. MCR 2.507(G) says:

> **Agreements to Be in Writing.** An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

There was no agreement in open court. The city has not offered a writing signed by plaintiff or her attorney agreeing to the terms the city wants to impose. The fact that the city offers no evidence complying with MCR 2.507(G) is enough to deny its motion. Even if the Court considered plaintiff's counsel's email to the facilitator (affidavit exhibit 6), that does not evidence agreement to the terms the city wants to impose. It shows only agreement to the facilitator's recommended number *if (and only if)* the city *also* agrees to a judgment against the city.

H. The City Council Did Not Approve a Settlement at a Public Meeting, as Required by the Open Meetings Act.

The city tries to bolster its argument by saying the city council approved the supposed settlement. But it didn't. Even if there were an agreement between the lawyers (there wasn't), it would not be enforceable because the city's lawyers had no authority to bind the city. A person purportedly acting for a municipality cannot make an agreement binding on the municipality unless his action is explicitly authorized. *Droste v Highland Park*, 258 Mich 1, 3; 241 NW 823 (1932) (agent negotiating land purchase could not bind village to a term limiting use of the land); *Manning v Hazel Park*, 202 Mich App 685, 691; 509 NW2d 874 (1993) (only city council can bind city). To our knowledge there is nothing authorizing the lawyers to bind the city to a contract. (That is apparently the reason the city's lawyer presented some kind of "settlement" to the city council in a closed meeting on February 12. Affidavit ¶ 13.)

Absent such authority, the Clarkston city council had to formally approve the settlement "agreement." But it never held an open meeting that approved the settlement "agreement." It held a closed meeting on February 12, 2021. Affidavit ¶ 13. After the closed meeting, it approved a resolution that stated the city "agrees to accept the facilitated settlement" and authorized issuance of a $35,000 check to an unidentified payee. Affidavit exhibit 10. The resolution does not include a settlement agreement or terms of a settlement. The $35,000 payment is not what the facilitator recommended. Plaintiff's counsel informed city lawyer Peyser before the meeting that this resolution was not sufficient to settle the case. Affidavit exhibit 9. The council voted in the open meeting by referring to something discussed in the closed session. This is a nullity because it violates the Open Meetings Act. MCL 15.263(2) ("All decisions of a public body must be made at a meeting open to the public."); MCL 15.270(2) (decision in violation of the statute may be invalidated). There was no city council approval of the settlement "agreement" the city now wants the enforce.

I. The Facilitator's Affidavit Does Not Prove There Was a Settlement

The facilitator's affidavit does not show an enforceable settlement agreement. First, the city claims a settlement agreement—a contract—between *plaintiff* and the *city*. The facilitator is not a party to the supposed contract. His statements don't bind plaintiff. It is *plaintiff's* assent to the settlement that the city must prove—with a writing signed by *plaintiff* or her counsel. The city has not offered any signed agreement to the settlement terms the city claims.

Second, this is an improper intervention by a facilitator who is supposed to be neutral. The fact that he chose to intervene on one side, without communicating with the other side, casts suspicion on what he says, since he is no longer acting as a neutral. He kept secret the communications

he had with the city about the affidavit while disclosing communications of plaintiff's counsel to the city. When requested to do so, he refused to provide a clarifying affidavit to plaintiff and refused to provide copies of his communications with the city's lawyer. Should the Court place any reliance on the affidavit, his deposition would be warranted.

Third, it is unclear these are the facilitator's own words. Both the motion and the affidavit have the same format of document identification numbers in the lower left corner of each page. They were created on the same word processing system—the city lawyer's system. The city's lawyer drafted the affidavit, not Judge Sosnick. One wonders what the city's lawyer told Judge Sosnick about the purpose of the affidavit and whether he revealed he would be filing a motion to impose a "settlement" with terms that neither the plaintiff nor the facilitator ever discussed.

Fourth, the facilitator has no authority to impose a settlement. There is no facilitation or other agreement that gives him that authority.

Fifth, the affidavit says nothing about any terms of the purported "settlement" other than the "recommended number." The only purported "acceptance" it mentions is "acceptance of my recommended number." It doesn't contain the actual statements of counsel for plaintiff about what was discussed and accepted. Just agreeing on a number did not determine any other terms of a settlement, including how the pending litigation and other motions would be disposed of.

Sixth, the affidavit attempts to change what the facilitator actually said. He said: "If counsel approves, then you will have to agree on a settlement agreement." Affidavit opposing motion, exhibit 7. This says clearly that *counsel* for each of the parties must approve. They didn't.

Seventh, even if one accepts the revisionist history in the facilitator's affidavit, that is of

no moment. City council approval was required regardless of the facilitator's statement. See section III.H above. There was none. *Id.*

Finally, the affidavit merely says it is the facilitator's "understanding" the city approved a small contribution toward the "recommended number." ¶ 8. The facilitator was not at the council meeting and has no knowledge of what the council approved.

IV. The Court Should Sanction the City and Its Lawyers

The discussion above shows there was no legal or factual basis for this motion. The city's lawyers knew the facts and the law and knew there was no agreement to the onerous terms it asks the Court to impose. Yet they ask this Court to force plaintiff into an "agreement" she never consented to. And they misrepresented to the Court that there was a "binding settlement."[6]

Sanctions are required when a filing is not "well grounded in fact" or "warranted by existing law." MCR 1.109(E)(5)(b), (6). Plaintiff requests the Court impose on the city and its lawyers the expenses incurred in responding to this motion, including attorney fees. MCR 1.109(E)(6).

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Dated: March 8, 2021

[6] Although that misrepresentation was not made in a "filing" with the court under MCR 1.109, "trial courts possess the inherent authority to sanction litigants and their counsel …." *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006).

STATE OF MICHIGAN

COURT OF APPEALS

RITA KENDZIERSKI, BONNIE HAINES, GREG DENNIS, LOUISE BERTOLINI, JOHN BARKER, JAMES COWAN, VINCENT POWIERSKI, ROBERT STANLEY, ALAN MOROSCHAN, and GAER GUERBER, Plaintiffs-Appellees,	UNPUBLISHED September 23, 2014
v	No. 316508 Macomb Circuit Court
COUNTY OF MACOMB, Defendant-Appellant.	LC No. 10-001380-CK

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right a judgment entered in favor of the class action plaintiffs following the trial court's order granting their motion to enforce an alleged settlement agreement. We reverse and remand for further proceedings.

In March 2010, this class action lawsuit was filed on behalf of approximately 2000 retired employees of defendant, Macomb County. Plaintiffs alleged that defendant had unilaterally changed and reduced their retirement health care benefits in violation of a series of collective bargaining agreements. Plaintiffs sought to permanently enjoin defendant from implementing those changes, and future changes, to their health care benefits. Plaintiffs also sought reimbursement of out-of-pocket expenses incurred because of defendant's allegedly improper actions.

In June 2011, the parties agreed to facilitation and, on September 21, 2011, plaintiffs submitted a settlement proposal to assist the facilitation. Several facilitation meetings were held. On May 14, 2012, the trial court entered an order directing the facilitator to set a settlement figure by May 21, 2012, and directing the parties to indicate in writing whether the settlement figure was acceptable by May 29, 2012. The order also stated that: "If both parties accept the number, the case is settled. If both parties do not accept the settlement number, the matter will be scheduled for a status conference to address remaining discovery issues and to set a trial date."

On July 16, 2012, a telephone conference was conducted between the court and the parties and, according to the docket entry, a proposed consent judgment was to be exchanged by July 27, 2012. On August 13, 2012, a notice of hearing was filed by the parties for a "joint motion to preliminarily approve class action settlement, approve class notice and set date for fairness hearing." The referenced motion was not filed with the notice of hearing. According to the docket entry of August 17, 2012, the trial court dismissed the joint "motion" following a conference which included the facilitator. The trial court also entered an order for continued facilitation and directed the parties to report to the court by September 28, 2012. On November 13, 2012, an order directed that a settlement conference was scheduled for November 30, 2012, and people with settlement authority were to be present. The docket entry for November 30, 2012, indicates that the settlement conference was conducted, and the facilitator was present, but no resolution was achieved and the court was to set a pretrial scheduling order. On December 3, 2012, a scheduling order was entered setting forth dates for discovery, witness lists, case evaluation, and summary disposition motions. On December 10, 2012, plaintiffs filed a motion to compel discovery and, on January 14, 2013, the motion was granted.

On January 18, 2013, plaintiffs filed a motion to enforce an alleged class settlement agreement reached by the parties. Plaintiffs argued that the parties settled this matter by facilitation and then defendant renounced the settlement agreement. In their motion, plaintiffs set forth a chronology of events in support of their claim which we will briefly discuss here. On September 21, 2011, plaintiff submitted a settlement proposal, which was the basis of the facilitation negotiations, and defendant did not submit a proposal or counter-proposal. According to plaintiffs, on May 14, 2012, the parties met with the facilitator and it was agreed that all substantive issues identified in plaintiffs' settlement proposal were settled except for the reimbursement amount for plaintiffs' out-of-pocket expenses. Consequently, the trial court was notified of the settlement agreement, and then entered an order directing the facilitator to set a proposed settlement figure. The facilitator proposed a settlement figure and each party accepted it. Thereafter, in June 2012, plaintiffs sent defendant a proposed settlement agreement and consent judgment. On August 13, 2012, a joint notice of hearing on the parties' motion regarding the settlement was filed. According to plaintiffs, the next day defendant proposed, in writing and for the first time, fundamental and material changes to the parties' negotiated settlement agreement. In particular, defendant demanded the right to change plaintiffs' health care benefits, coverages, and providers, and also sought to expand the certified class. In October 2012, plaintiffs provided defendant with minimally revised settlement documents, accommodating one of defendant's post-settlement changes, but defendant would not sign the documents and provided no counter-proposals to plaintiffs. On November 30, 2012, defendant advised the trial court that there was no settlement because plaintiffs refused to grant defendant the right to change health care benefits in the future. Thus, on December 3, 2012, the trial court issued a scheduling order for trial.

Plaintiffs argued that the settlement agreement reached by the parties on May 14, 2012 should be enforced because the trial court's order provided that, if the parties accepted the settlement figure proposed by the facilitator, "the case is settled." The parties did, in fact, accept the settlement figure; thus, defendant was bound by the settlement agreement terms. Further, plaintiffs argued, the court was advised by the parties that the matter was settled on August 13, 2012, when the notice of hearing was filed for a joint motion to preliminarily approve the settlement.

Defendant responded to plaintiffs' motion to enforce class settlement, denying that it ever entered into a binding settlement agreement with plaintiffs. Defendant argued that none of plaintiffs' proposed settlement agreements were signed by defendant, and a settlement was not placed on the record. In fact, defendant argued, plaintiffs' proposed settlement agreements were marked "draft" and were significantly incomplete with respect to material terms. Further, the trial court held a settlement conference in November 2012, and ordered that "all parties and representatives with settlement authority must attend the conference;" thus, it was clear that the parties had not reached a "settlement" in May 2012. Moreover, in December 2012, the trial court issued a scheduling order which set forth pretrial dates—another indication that the parties had not reached a settlement agreement in May 2012. Accordingly, defendant argued, because plaintiffs could not prove the essential elements of a legal contract and could not establish that the requirements of MCR 2.507(G) were satisfied, their motion to enforce a purported settlement agreement must be denied.

Plaintiffs responded to defendant's opposition to their motion to enforce class settlement agreement, arguing that defendant advised the trial court that all material terms were settled except for the amount of damages which is what prompted the court to issue the May 14, 2012 order regarding the settlement figure. Further, plaintiffs argued, the multiple drafts of the settlement agreement merely addressed typical settlement language refinements. And the court ordered a settlement conference because, contrary to its May 14, 2012 order, a settlement document had not been submitted to the court. In short, plaintiffs argued, a settlement was reached during facilitation which resulted in the trial court issuing an order directing the parties to resolve the only remaining issue, that of damages.

On March 8, 2013, the trial court entered an opinion and order granting plaintiffs' motion to enforce class settlement agreement. The court held that two separate writings evidenced the parties' settlement and satisfied the requirements of MCR 2.507(G). The first writing was defendant's May 29, 2012 signed written acceptance of the facilitator's proposed settlement figure. Although the court noted that the letter appeared only to resolve the issue of money damages, it held that the letter must be considered in the context that it followed the court's May 14, 2012 order which directed that, "[i]f both parties accept the number, the case is settled." The trial court noted that it only issued the May 14, 2012 order "because the parties agreed – in open court – that all material terms of their dispute had been resolved apart from money damages." Further, the court noted, defendant "gave every indication of agreeing with the Court's statement that the case would be settled so long as the parties could agree on a settlement amount." Accordingly, the court concluded, considered in context, defendant's May 29, 2012 letter constituted clear and unambiguous evidence of the agreement as required by MCR 2.507(G). The court held that the second writing that satisfied the requirements of MCR 2.507(G) was the August 13, 2012 notice of hearing for the parties' joint motion to preliminarily approve the class action settlement. The court concluded that "this document clearly indicates that the parties had reached a settlement and were seeking approval of their settlement by the Court." The trial court also considered the various settlement proposals submitted by plaintiffs and concluded, in part: "The changes which were made between the time of the initial settlement proposal of September 26, 2011 and the final October 26, 2012 draft are minimal." The trial court also held "that the October 26, 2012 draft accurately sets forth both the material terms of the parties' settlement and all ancillary and/or immaterial terms. . . . [and] accurately memorializes the parties' existing

settlement agreement in writing." Accordingly, plaintiffs' motion to enforce class settlement was granted.

Defendant filed a motion for reconsideration of the order, arguing that: (1) there was no written settlement agreement signed by defendant; (2) defendant did not agree to the settlement terms on the record "in open court" as required by MCR 2.507(G); (3) the notice of hearing relied upon by the trial court was subsequently dismissed and the referenced motion was never filed; (4) the actions and statements by the parties, the facilitator, and the trial court conclusively demonstrated that there was never a meeting of the minds on all material terms of a settlement agreement; (5) all of plaintiffs' proposed settlement agreements clearly stated that they were "drafts;" and (6) several letters were exchanged between the parties documenting disagreement on material terms. Defendant also filed a motion to amend, correct, and/or for relief from the May 14, 2012 order, which raised the same or similar arguments set forth in its motion for reconsideration.

On May 13, 2013, the trial court entered an opinion and order denying defendant's motion for reconsideration and motion to amend, correct, and/or grant relief from the May 14, 2012 order. The trial court concluded that defendant did not demonstrate that the court was misled, that a different result would occur from correction of an error, or that there was a mistake or error in the entry of that order. The court held that its May 14, 2012 order "accurately reflects the parties' representations to this Court. To wit, the parties clearly and unambiguously represented to this Court that, if they could agree on a settlement figure, the case would be settled." On May 28, 2013, a judgment was entered which, in part, incorporated "the October 26, 2012 Settlement Agreement (SA) between Plaintiff Class and the County of Macomb . . . ." Defendant's appeal to this Court followed.

Defendant argues that a settlement agreement did not exist because there was no meeting of the minds on all of the material terms and, even if the trial court concluded that there was a valid contract, the agreement could not be enforced because the requirements of MCR 2.507(G) were not satisfied, i.e., it was not made in open court and was not signed by defendant. We agree with both arguments.

Questions of law, including whether a contract exists, as well as the interpretation and application of a court rule, are reviewed de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009); *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

An agreement to settle a lawsuit is a contract governed by the rules of contract construction and interpretation. *Id*. To form a valid contract, there must be an offer, an acceptance, and mutual assent on all the essential terms. *Id*. at 452-453. However, even if a valid contract exists, an agreement to settle a pending litigation must comply with MCR

2.507(G) to be enforceable.[1] *Michigan Mut Ins Co v Indiana Ins Co*, 247 Mich App 480, 484-485; 637 NW2d 232 (2001). MCR 2.507(G) provided:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

This rule has been characterized as "a court rule version of a statute of frauds governing legal proceedings." *Brunet v Decorative Engineering, Inc*, 215 Mich App 430, 435; 546 NW2d 641 (1996), quoting 3 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), p 125.

In this case, neither a valid nor enforceable settlement agreement existed. After the facilitation order was entered, plaintiffs submitted an initial settlement proposal dated September 21, 2011. This proposal addressed numerous material terms including, for example, acceptable insurance providers, prescription drug and health care benefits, as well as deductibles and copays. Plaintiffs' proposal also addressed the issue of damages for past and future out-of-pocket costs as a consequence of prescription drug and health care benefit changes. There is no record evidence of any response by defendant to plaintiffs' initial settlement proposal.

Plaintiffs claimed, however, that at a facilitation hearing held on May 14, 2012, the parties reached a settlement agreement on all of the disputed issues except for the amount of damages. But there is no record evidence to support plaintiffs' claim that the parties reached a settlement agreement. There is no evidence of an offer, an acceptance of the offer, or of mutual agreement on all of the purported contract's essential terms. "A contract is made when both parties have executed or accepted it, and not before." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992). There is neither a written agreement signed by the parties nor evidence of a verbal agreement. In granting plaintiffs' motion to enforce class settlement agreement, the trial court held that it issued the order directing the facilitator to determine the amount of damages "because the parties agreed – in open court – that all material terms of their dispute had been resolved apart from money damages." However, the parties did not agree "in open court" that the dispute was resolved.

In *Groulx v Carlson*, 176 Mich App 484; 440 NW2d 644 (1989), this Court concluded that "the hallmark of a proceeding which may be described as constituting an 'open court' session" is "the formality of recorded court business." *Id*. at 489-490. In that case, although a settlement agreement was reached in chambers, it was enforceable because "the agreement was read aloud by the parties' attorneys in the presence of the trial judge, the court clerk, and the court reporter, all of whom had formally convened for court business." *Id*. at 489. To the contrary, in this case, "the formality of recorded court business" is completely lacking. There was no formal court proceeding, presided over by the judge, at which time the purported agreement was placed on the record. In *Fear v Rogers*, 207 Mich App 642, 644-645; 526 NW2d

[1] MCR 2.507(G) was subsequently amended to MCR 2.507(F), but the language of the rule did not change.

197 (1994), this Court specifically held that an agreement reached in a settlement conference, that was not placed on the record or reduced to writing, was unenforceable. And, while the trial court appears to claim awareness of a settlement agreement, the court never indicated that it knew the precise terms of any such agreement but, in any case, awareness of an agreement is insufficient to satisfy the plain requirements of MCR 2.507(G). See *Jorgensen v Howland*, 325 Mich 440, 446-447; 38 NW2d 906 (1949). Because the settlement offer and acceptance were not made in open court, and there was no writing subscribed by defendant or its attorney, the alleged settlement agreement was not enforceable. See *Metropolitan Life Ins Co v Goolsby*, 165 Mich App 126, 128-129; 418 NW2d 700 (1987).

Further, the fact that defendant's attorney signed a letter accepting the facilitator's proposed settlement amount on the issue of damages, alone, is insufficient to establish that a valid, enforceable settlement agreement existed. Plaintiffs sought to settle all of the numerous issues raised in this class action through a consent judgment, not just their damages claim. But there is no way to determine whether defendant, in fact, consented to settle all of the issues in this dispute or the precise terms of any such agreement. See *Howard v Howard*, 134 Mich App 391, 397; 352 NW2d 280 (1984). There is no evidence of a meeting of the minds on *all* the essential terms of a settlement agreement. See *Kloian*, 273 Mich App at 453.

In support of its conclusion that the parties reached a settlement in May 2012, the trial court also referenced an August 13, 2012 notice of hearing for the parties' joint motion to preliminarily approve the class action settlement. However, a notice of hearing, alone, is neither evidence of an agreement nor "evidence of *the* agreement" to settle the dispute between the parties as required under MCR 2.507(G). The trial court also compared plaintiffs' various settlement proposals and concluded that the parties' reached a settlement that did not differ in material respect from plaintiffs' initial settlement proposal of September 21, 2011. However, even if plaintiffs' settlement proposal of September 21, 2011 may be construed as an "offer," there is no evidence of defendant's acceptance of the offer. For example, defendant did not sign the proposal and there is no letter signed by defendant or its counsel which indicated acceptance of plaintiffs' proposal. See *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). Accordingly, we reject the trial court's analysis and conclusion in this regard.

In summary, it is well-settled that a court cannot force parties to settle lawsuits, *Henry v Prusak*, 229 Mich App 162, 170; 582 NW2d 193 (1998), and a court cannot make a contract for the parties where there is no contract, *Hammel v Foor*, 359 Mich 392, 400; 102 NW2d 196 (1960). In this case, we conclude that plaintiffs failed to establish that a valid contract to settle this dispute existed. See *Kamalnath*, 194 Mich App at 549 (citation omitted). "Mere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract." *Id*. But even if a valid oral contract to settle this dispute resulted during a facilitation hearing on May 14, 2012, it was not enforceable because the agreement was not made in open court and written evidence of the agreement to settle the entire case, subscribed by defendant or its attorney, does not exist. See MCR 2.507(G); *Michigan Mut Ins Co*, 247 Mich App at 484-485.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot