Her v. Davis, No. 07-cvs-14306 (Mecklenburg Co. Apr. 16, 2008).

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF MECKLENBURG	07 CVS 14306
YENG HER, Plaintiff, v. TAMARA NYCOLE DAVIS, Defendant.	ORDER AND OPINION

Campbell & Associates by Christine Latona and Payton D. Hoover for Plaintiff Yeng Her.

McAngus Goudlock & Courie by Jeffrey D. Keister and Jennifer M. Arna for Defendant Tamara Nycole Davis.

Diaz, Judge.

{1} Before the Court is Defendant's Motion for Summary Judgment/Motion to Enforce Settlement (the "Motion"). After considering the Court file, the affidavit submitted by Defendant, and the arguments of counsel presented on 8 April 2008, the Court **GRANTS** the Motion.

I.

SUMMARY OF THE FACTS

{2} On 18 July 2007, Plaintiff sued Defendant, seeking damages for personal injuries allegedly suffered as a result of a 23 January 2007 automobile accident.

{3} Plaintiff is represented by the law firm of Campbell & Associates.

{4} Defendant's insurance carrier for purposes of the claim is Progressive Northeastern Insurance Company ("Progressive").

{5} In her answer filed on 15 November 2007, Defendant alleged as an affirmative defense that "a settlement was reached between the parties and that the Defendant was willing, able and ready to carry forward the terms and

conditions of said settlement, including payment to the Plaintiff." (Def.'s Mot. Dismiss and Answer 3.)

{6} On 19 March 2008, Defendant filed the Motion.

{7} On 4 April 2008 (without objection from Plaintiff) Defendant filed an affidavit of Karen Samuels ("Samuels") in support of the Motion.

{8} Samuels is the Progressive representative who handled Plaintiff's claim. She asserts that on 1 June 2007, Plaintiff's counsel called and tendered a "settlement demand in the amount of $10,000.00, representing full and complete settlement of Plaintiff's bodily injury claim." (Samuels Aff. ¶ 3.) [1] According to Samuels, Plaintiff's settlement demand was made without condition and was never revoked or withdrawn. (Samuels Aff. ¶ 4.)

{9} Samuels further alleges that on 4 June 2007, she called Plaintiff's counsel and accepted Plaintiff's settlement offer. (Samuels Aff. ¶¶ 6–7.) That same day, Samuels forwarded a confirming letter to Clair Campbell, Attorney at Law,[2] along with Progressive's $10,000.00 settlement check and a release. (Samuels Aff. ¶ 8.)

{10} On 18 June 2007, James A. White, Esq. wrote Samuels to advise her that "[o]ur client has declined your offer, and has opted to litigate her case." (Samuels Aff. Ex. D.)

{11} At the hearing of this matter, Plaintiff's counsel (not Mr. White) stated that White (1) was a lawyer, although he was not licensed to practice law in North Carolina while working for the firm,[3] and (2) was no longer with the firm.

{12} At the hearing on the Motion, Plaintiff's counsel was unclear as to White's status while employed by the firm. Counsel first told the Court that White was not

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[1] Samuels' affidavit does not identify the attorney who made the demand.

[2] Ms. Campbell appears to be the sole principal of Campbell & Associates.

[3] White signed the 18 June 2007 letter to Samuels on Campbell & Associates firm stationary, without any indication that he was not licensed to practice law in North Carolina. Among other things, the North Carolina Rules of Professional Conduct (the "Rules") prohibit lawyers who are not licensed in this state from holding themselves out to the public or otherwise representing that they are admitted to practice in this jurisdiction. North Carolina Rules of Professional Conduct R. 5.5(b)(2) (2003). In a post-hearing letter to the Court, Ms. Campbell states that, after becoming aware that White was "sending out letters on firm stationery with this suffix," she consulted with representatives of the North Carolina State Bar and thereafter directed White to stop using the honorific in his correspondence. (Letter from Campbell to the Honorable Albert Diaz (Apr. 9, 2008).)

a lawyer, but later stated that he was a lawyer, albeit not licensed in North Carolina. As for White's duties, counsel stated that White worked as a paralegal and handled other administrative matters.

{13} According to Ms. Campbell, White was involved in negotiating settlements on behalf of the firm's clients, but he did so under her direct supervision. (Letter from Campbell to the Honorable Albert Diaz (Apr. 9, 2008).)[4]

{14} In response to Samuels' affidavit, Plaintiff relies on her responses to Defendant's First Set of Request for Admissions filed on 10 December 2007.

{15} In that un-sworn filing, Plaintiff denies that she or any individuals acting on her behalf made a settlement demand to resolve the litigation. Instead, Plaintiff asserts that,

> Representatives for the Plaintiff tried to negotiate a settlement on June 1, 2007 with the Defendant's liability carrier. Those negotiations resulted in an offer of $10,000.00 by Defendant's liability carrier. That offer was subject to plaintiff's approval per our letter of representation attached as Exhibit "B." The North Carolina Rules of Professional Conduct require all offers to be presented to the client for approval.

(Pl.'s Resp. Def.'s First Set Req. Admis. 1.)

[4] The Court recognizes that a lawyer not admitted to practice in North Carolina may represent clients in this state if he "is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation." North Carolina Rules of Professional Conduct R. 5.5 (c)(2)(D) (2003). Moreover, the State Bar has opined that a legal assistant may communicate and negotiate with a claims adjuster if directly supervised by the attorney for whom he or she works. North Carolina State Bar, RPC 70 (Oct. 20, 1989). On this record, however, the Court cannot say with confidence what White was doing while employed with the firm and, if he was actually representing clients, whether he was doing so consistent with the Rules. Accordingly, the Court will refer this matter to the North Carolina State Bar for its review.

II.

LEGAL PRINCIPLES

{16} Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c).

{17} "A defendant who moves for summary judgment assumes the burden of positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law." *James v. Clark*, 118 N.C. App. 178, 180, 454 S.E.2d 826, 828 (1995). When a motion for summary judgment is based on an affirmative defense, a defendant meets this burden by "showing that the plaintiff cannot surmount an affirmative defense which would bar the claim." *Id.* at 181, 454 S.E.2d at 828.

{18} "A compromise and settlement agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts." *Harris v. Ray Johnson Constr. Co.,* 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000) (citation omitted). Where the facts are undisputed, "the issue is a matter of contract interpretation, and hence, a question of law." *Id.* (citation omitted).

{19} In this state, there is a presumption in favor of an attorney's authority to act for the client he professes to represent. *Gillikin v. Pierce*, 98 N.C. App. 484, 488, 391 S.E.2d 198, 200 (1990). And while "[s]pecial authorization from the client is required before an attorney may enter into an agreement discharging or terminating a cause of action on the client's behalf," *Harris,* 139 N.C. App. at 829, 534 S.E.2d at 655, the law also presumes that "the attorney acted under and pursuant to such authorization." *Greenhill v. Crabtree*, 45 N.C. App. 49, 52, 262 S.E.2d 315, 317 (1980) (citation omitted).

{20} "One who challenges the actions of an attorney as being unauthorized has the burden of rebutting this presumption and proving lack of authority to the

satisfaction of the court." *Harris,* 139 N.C. App. at 829, 534 S.E.2d at 655 (citation omitted).

III.

ANALYSIS

{21} Defendant has met her burden to show the absence of a triable issue of fact as to the affirmative defense of a prior settlement.

{22} Samuels' affidavit states unequivocally that (1) someone representing himself to be Plaintiff's counsel offered (in the form of a demand) to settle the litigation for $10,000.00; and (2) Samuels accepted that offer on behalf of Defendant and her insurance carrier.

{23} Absent competent evidence to the contrary, the Court presumes Plaintiff's counsel was authorized to tender the settlement offer on Plaintiff's behalf. *See id.*

{24} Plaintiff's rebuttal consists of her un-sworn responses to Defendant's First Set of Request for Admissions, wherein she asserts that it was Defendant's carrier who made a $10,000.00 offer of settlement, which Plaintiff rejected.

{25} Our courts have held, however, that evidence that would not be admissible at trial may not be considered on a motion for summary judgment. *Strickland v. Doe,* 156 N.C. App. 292, 299, 577 S.E.2d 124, 131 (2003) (holding hearsay is not admissible on a motion for summary judgment).

{26} Applying that rule here, while admissions of a party-opponent are not hearsay, "a party may not utilize his own admissions at trial." *Thorp Sales Corp. v. Dolese Bros. Co.,* 453 F. Supp. 196, 202 (W.D. Okla. 1978); *see also Walsh v. McCain Foods Ltd.,* 81 F.3d 722, 726 (7th Cir. 1996) (stating that Rule 36 admissions "are still subject to the limitation on hearsay evidence and must fit within an exception to the rule to be properly admitted").

{27} Accordingly, Plaintiff's responses to Defendant's request for admissions are not competent to rebut (1) Samuels' affidavit that it was Plaintiff's counsel (and not Defendant's carrier) who made the $10,000.00 settlement offer; and (2) the presumption that counsel had authority to make the offer on Plaintiff's behalf.

{28} In a post-hearing letter to the Court, Ms. Campbell asserts that "no case was to be settled until an offer was presented, and accepted, by the client [and that] this fact is clearly stated in every letter of representation we send to insurers." (Letter from Campbell to the Honorable Albert Diaz (Apr. 9, 2008).)

{29} Ms. Campbell states further that she "spoke with [Mr. White following the hearing], and although he did not remember the specifics of this particular claim, he assured me that he never deviated from the customs and habits of this firm and the specific guidelines referenced above." (Letter from Campbell to the Honorable Albert Diaz (Apr. 9, 2008).)

{30} Just like Plaintiff's responses to Defendant's request for admissions, however, Ms. Campbell's purported recitation of Mr. White's recollection of the events is un-sworn hearsay, which the Court may not consider on the Motion.

{31} Moreover, Ms. Campbell's letter does nothing to refute the material fact supporting Defendant's Motion for Summary Judgment—that it was Plaintiff's counsel (and not the carrier), who made a $10,000.00 settlement offer (couched as a demand), which Defendant accepted.

{32} The bottom line is that neither Plaintiff nor any member of the firm representing Plaintiff have submitted affidavits rebutting the facts set forth in the Samuels affidavit. *Cf. Thaxton v. Stevens,* No. COA05-1347, 2006 N.C. App. LEXIS 1878, at *14–16 (N.C. Ct. App. Sept. 5, 2006) (reversing the trial court's grant of summary judgment on the question of an attorney's authority to settle a claim where both plaintiffs and counsel submitted competent evidence—in the form of affidavits and deposition testimony—denying the existence of special authorization on the part of counsel to settle the clients' claims).

{33} Thus, on this record, Defendant has met her burden to show that there is no genuine issue as to any material fact and that she is entitled to judgment as a matter of law on the affirmative defense of a prior settlement.

IV.

JUDGMENT

{34} **IT IS THEREFORE ORDERED** that summary judgment is entered for Defendant and Plaintiff's action is dismissed with prejudice. The costs of this action are taxed to Plaintiff.

This _____ day of April, 2008.