Case and Comment

by Perry S. Itkin

Do The Terms of the Mediation Agreement Mean What Is Written? It Depends. No, Not Necessarily!

In the case of *Marjon v. Lane,* 995 So. 2d 1086 [Fla. 2nd DCA 2008], the former husband filed an amended motion to set aside a mediated settlement agreement after the trial court found that an exculpatory clause in the Agreement barred his claims.

The former husband and the former wife had an infant daughter at the time of the dissolution of their marriage. The child and the former wife continued to live in Florida after the dissolution. The former husband moved out of Florida but ultimately returned and thereafter sought to increase his visitation time because of his new proximity to his daughter and to reduce his child support obligations because of changed circumstances.

The court-ordered mediation resulted in the Agreement, which provided in its final section, that "[e]ach party states that no duress, undue influence, fraud or overreaching has been utilized by any party in the negotiation, and that this [A]greement is fair and reasonable to all parties."

[COMMENT: This is an often used provision in a mediated settlement agreement, but is it something that the parties actually discuss, agree to and understand prior to the signing of the agreement? Remember *Florida Rules for Certified and Court-Appointed Mediators*, **Rule 10.420(c) Conduct of Mediation, Closure**:

> *The mediator shall cause the terms of any agreement reached to be memorialized appropriately and* ***discuss*** *with the parties and counsel the process for formalization and implementation of the agreement.* [Emphasis added.]

Notwithstanding that section of the mediated settlement agreement, the former husband, utilizing *Florida Rule of Civil Procedure* 1.540(b)(3) and *Florida Family Law Rule of Procedure* 12.540, moved to set aside the Agreement due to duress, coercion, and fraud in the inducement. The former wife filed a motion to strike or dismiss, claiming that the final provision of the Agreement barred relief. The trial court agreed with her and dismissed the amended motion **with prejudice**.

The appellate court held "not so fast!" Well, it actually reversed and remanded with directions and held:

> *Mr. Marjon correctly argues that the clause at issue does not bar the trial court's consideration of whether the Agreement was procured by fraud, duress, or coercion.*
>
> *. . . [w]here a party, such as Mr. Marjon, sufficiently pleads duress, coercion, or fraud in the inducement, he or she is entitled to a hearing on the merits of the motion.*

Wait, you're probably wondering about confidentiality of mediation communications, right?!? [Please say yes!]

Florida's Mediation Confidentiality and Privilege Act, F.S. 44.401 – 44.406, includes certain instances where disclosures, albeit for limited purposes, are permitted by law to be made.

44.405 Confidentiality; privilege; exceptions.

(4)(a) . . . . there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication:

1. For which the confidentiality or privilege against disclosure has been waived by all parties;

2. That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;

3. That requires a mandatory report pursuant to chapter 39 or chapter 415 solely for the purpose of making the mandatory report to the entity requiring the report;

4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;

5. **Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation** *[Emphasis added]***;** or

6. Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

[COMMENT: Legally recognized grounds to void a mediated settlement agreement include those where the agreement is proven to have been obtained as a result of fraud, duress or coercion. All to say, you don't want to inform the mediation parties and mediation participants that there is *unequivocal* confidentiality of mediation communications.]

Do The Terms of the Mediation Agreement Mean What Is Written? It Depends. Yes, Necessarily!

You remember the case that keeps on giving – *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094 [Fla. 4th DCA 2001], right?!? Sure you do – that's the case where the Fourth District Court of Appeal remanded the case to the trial court so that it could make factual findings regarding the wife's claims of mediator misconduct resulted in a mediated marital settlement agreement [i.e. whether the mediator substantially violated the *Florida Rules for Certified and Court-Appointed Mediators*]. On remand, the trial court found no mediator misconduct and no duress or coercion [COMMENT: Here are those issues again!] and upheld the settlement agreement which trial court ruling was affirmed in *Valchine v. Valchine*, 923 So. 2d 511 [Fla. 4th DCA 2006].

Fast forward to *Vitakis v. Valchine*, 987 So. 2d 171 [Fla. 4th DCA 2008]. [COMMENT: Actually, not that fast since the mediation occurred in the last century. OK, it was in 1999!]

The parties' mediated settlement agreement included a provision that required the wife to "provide" the couple's frozen embryos to the husband so that he could dispose of them. **The agreement also contained a provision providing that the agreement could not be modified except by written agreement.** [COMMENT: This is another often used provision in mediated settlement agreements and do the parties actually discuss it – do they really?]

After the 2006 opinion upholding the settlement agreement, the husband filed a motion seeking to enforce the provision of the agreement requiring the wife to turn over to him the couple's frozen embryos. The wife insisted that the settlement agreement should not control because, during the pendency of the appeals, the husband had a "change of heart" and indicated he would turn the embryos over to her. However, the wife acknowledged that *there was no writing, signed by the parties, modifying the terms of the settlement agreement.*

The trial court granted the husband's motion, finding that the issue was controlled by the terms of the settlement agreement. Accordingly, there was no error in the trial judge's ruling and the Fourth District Court of Appeal affirmed.

"You Want How Many Bites At The Apple!!!! You're Kidding, Right?!?"

One – okay. Two – not so fast! Three – that's crossing the line. Well, how about *ten or eleven*?!?

In *Ayala v. Gonzalez*, 984 So. 2d 523 [Fla. 5th DCA 2008][Clarification of Opinion and Denial of Motion for Rehearing], sanctions against the former wife and her attorney in a divorce case in the form of an award of appellate attorney fees to former husband were warranted according to the Fifth District Court of Appeal.

This case was on appeal from the third denial of the wife's request for relief from a mediated settlement agreement that was incorporated into the Final Judgment of Dissolution of Marriage which was never appealed and never vacated [actually, the wife had brought ***ten*** prior unsuccessful appeals in this case, one of which involved a request for identical relief] and the wife, through her counsel, had tried, through a variety of unsuccessful means, at various judicial levels on ***nine*** different occasions to invalidate the mediation settlement agreement.

Ms. Ayala first sought to have the agreement declared void in November 2003, complete with what was to become a recurrent theme of "emergency" motions for relief. That case was eventually resolved against her with prejudice, and she appealed. The judgment was affirmed *per curiam.* She then unsuccessfully sought rehearing, rehearing en banc, and certification to the Florida Supreme Court.

Shortly after the affirmance of that judgment in 2004, Ms. Ayala brought yet another case in the trial forum again seeking to have the mediation settlement agreement voided. The trial court again dismissed the case with prejudice on the basis of the doctrine of *res judicata.* Curiously, Ms. Ayala then sought mandamus relief from the appellate division of the circuit court. [COMMENT: *Res judicata* operates as an adjudication on the merits, barring a subsequent action on the same claim when the previous action was on the merits.]

In 2005, she filed an "Amended Complaint and Motion for Declaratory Relief" in the circuit court once again seeking the identical avoidance of the mediated settlement agreement. This proceeding led to the order by the third circuit judge to enter a final order with respect to this particular matter which is the subject of the present appeal. In that order the trial judge pointed out that this matter had, indeed, been dismissed with prejudice previously, and that the final judgment adopting the mediation agreement was valid and enforceable.

[COMMENT: One more thing – do you think it's a good idea to tell the appellate court that is has "made an absolute muddle of several foundation concepts in the law"? I didn't think so! Neither did the Fifth District Court of Appeal!]

> *Appellant's counsel . . . shall within 20 days from the date of this opinion, show cause in writing why monetary or other sanctions should not be imposed upon him for having filed a motion for rehearing and clarification in violation of the Florida Rules of Appellate Procedure.*
>
> *The court reserves jurisdiction to impose such sanctions and to order further response, including the personal appearance of appellant's counsel, should the written response not be deemed sufficient.*

You Don't Just RSVP [Or Not] To A Court Order – You Comply Or . . . !

In *Mojzsik v. Estrada*, 983 So.2d 699 [Fla. 5th DCA 2008], Appellee's attorney sought relief from the Fifth District Court of Appeal's Order to Show Cause for the attorney's failure, without good cause, to appear at a court-ordered appellate mediation.

Apparently, he:

- failed to appear at hearings without notice;
- failed to file the court ordered mediation questionnaire;
- delayed payment of fees awarded by the court; and
- did not appear at the show cause hearing even after his motion to appear by phone was denied.

This cornucopia of failures to comply continued over the period of September 2007 to May 2008 and resulted in:

- Imposition of monetary sanctions against counsel being deemed appropriate but withheld pending the outcome of counsel's bankruptcy proceedings;
- The clerk being directed to provide a copy of the opinion to The Florida Bar for appropriate action; and
- Withdrawal of the court's mediation order so that the case could move forward with the merits of the appeal.

"I Was Ignorant!" "Tough!"

Antar v. Seamiles, LLC, 994 So. 2d 439 [Fla. 3rd DCA 2008] was a case in which one of the parties to a mediated settlement agreement tried to avoid having to make an $800,000.00 accelerated payment due under the terms of the agreement. The trial judge entered a final order relieving Seamiles, LLC, et al., from further performance of the mediated settlement agreement and the Third District Court of Appeal reversed.

The parties executed a settlement agreement which, in pertinent part, required that Antar and others transfer all ownership interest in Seamiles, along with all of Seamiles' intellectual property, to Seamiles in exchange for $1,040,000.00 to be paid in installments of $200,000.00 within thirty days and $70,000.00 annually thereafter. However, these payments were to be accelerated in the event Seamiles was "sold to a third party for cash," or, alternatively, assumed and guaranteed by a non-cash purchaser:

> *If Seamiles is sold to a third party for cash to the members, Antar shall be paid from said cash to satisfy the unpaid balance of the installment payments due hereunder. In any other type of transaction (e.g., sale for equity or merger), the surviving entity shall execute the necessary documents required to assume Seamiles' obligations herein and shall agree to remain under the jurisdiction of the court for the sole purpose of enforcing this Settlement Agreement . . . .*

Antar filed a motion to enforce this portion of the settlement agreement, claiming that Seamiles was being or had been acquired by another entity or entities. Antar asked the court to enforce the settlement agreement by requiring the new owners to assume Seamiles' obligations and by accelerating the settlement payout if a cash buyout had taken place.

One of the signatories to the settlement agreement claimed, in a self-serving affidavit, that he was not bound by the agreement because he had signed without seeing the entire agreement even though he had ***twice*** signed page <u>nine of nine</u> of the settlement agreement (once while in Iceland and once a month later before a notary while in Miami). No explanation was offered as to why, one month later, the signatory did not secure a copy of the entire agreement or why he *again* signed page <u>nine of nine</u> of a document, this time in the presence of a notary, without seeing the entire agreement. [COMMENT: Even if true, is this believable?!? By the way, in drafting the mediation agreement, do you think it would be good practice to number each of the pages as was done in this case, i.e. page *x of y*?]

Incidentally, the notary, in an uncontradicted sworn statement, said that he would not notarize only a signature page without the remainder of the document that it acknowledges.

The appellate court determined that Seamiles could not avoid the payments due under the agreement based on the signatory's assertion that he should not be bound to this agreement because: (1) he saw only the signature page of the agreement (which he signed while in Iceland visiting his son); (2) Antar told the signatory that he needed that signature to continue settlement negotiations; and (3) Antar told the signatory that he would be provided with the entire agreement when he returned to this country.

[COMMENT: A fundamental principle in contract law is that a party to a written contract cannot defend against its enforcement on the ground that he signed it without reading it, unless he avers facts showing circumstances which prevented his reading the paper, or was induced by the statements of the other parties to desist from reading it.]

Case and Comment

by Perry S. Itkin, Esquire
Dispute Resolution, Inc.
2200 NE 33rd Avenue, Suite 8G
Fort Lauderdale, FL 33305-1889
(954) 567-9746
E-mail: *PerryItkin@MediationTrainingCenter.com*

© 2009 Perry S. Itkin All Rights Reserved. [Used with permission of the author.]