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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL R. DULBERG, Individually, and)
THE PAUL R. DULBERG REVOCABLE)
TRUST,)
)
Plaintiffs,)

v.)

No. 2022 L 10905

KELLY N. BAUDIN A/K/A BAUDIN &)
BAUDIN, BAUDIN & BAUDIN AN)
ASSOCIATION OF ATTORNEYS, LAW)
OFFICES OF BAUDIN & BAUDIN,)
BAUDIN & BAUDIN LAW OFFICES,)
WILLIAM RANDAL BAUDIN II A/K/A)
BAUDIN & BAUDIN, BAUDIN & BAUDIN)
AN ASSOCIATION OF ATTORNEYS, LAW)
OFFICES OF BAUDIN & BAUDIN,)
BAUDIN & BAUDIN LAW OFFICES,)
KELRAN, INC A/K/A THE BAUDIN LAW)
GROUP, Ltd., JOSEPH DAVID OLSEN,)
A/K/A YALDEN, OLSEN & WILLETTE)
LAW OFFICES, CRAIG A WILLETTE,)
A/K/A YALDEN, OLSEN & WILLETTE)
LAW OFFICES, RAPHAEL E YALDEN II,)
A/K/A YALDEN, OLSEN & WILLETTE)
LAW OFFICES, ADR SYSTEMS OF)
AMERICA, LLC., ASSUMED NAME ADR)
COMMERCIAL SERVICES, ALLSTATE)
PROPERTY AND CASUALTY INSURANCE)
COMPANY,)
)
Defendants.)

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**ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY’S
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Plaintiffs, Paul R. Dulberg, individually, and the Paul R. Dulberg Revocable Trust (collectively, “Dulberg”) cannot survive summary judgment on Count V (Breach of Contract) of the Complaint against Allstate Property and Casualty Insurance Company (“Allstate”) as Dulberg has failed to present sufficient facts or documentation establishing issues of material fact as to the

enforceability, or lack thereof, of an *unsigned* agreement; Allstate's full performance of the *executed* binding mediation agreement ("Binding Mediation Agreement"); and the validity and enforceability of the release executed by Dulberg as part of the consideration received from Allstate in connection with the Binding Mediation Agreement ("Release").

INTRODUCTION

Allstate moved for summary judgment ("Motion") on the sole claim against it in Count V of the Complaint for breach of contract. The breach of contract claim against Allstate, in its entirety, is based on Allstate's purported breach of an *unsigned* agreement ("unsigned agreement") that Allstate was not bound by and, therefore, cannot stand. Additionally, as to the Binding Mediation Agreement, there is no genuine issue of material fact precluding the determination that Allstate performed its obligations under the same. In connection with Allstate's performance of its obligations under the Binding Mediation Agreement—namely, payment of \$300,000.00 to Dulberg's bankruptcy estate ("Bankruptcy Estate") pursuant to the high/low agreement—Paul R. Dulberg, individually, executed a full release of Allstate that undisputedly includes any claim alleged in the Complaint.

In his response to Allstate's Motion ("Response"), Dulberg fails to address any of the legal arguments or undisputed *genuine* issues of material fact pertaining to the breach of contract claim as alleged against Allstate. Instead, Dulberg spends fifteen pages addressing immaterial issues and facts irrelevant to the sole claim against Allstate and contradicts his own allegations in the Complaint. Nothing in the Response serves to dispute the legal arguments advanced by Allstate or to create a *genuine* issue of material fact as to the breach of contract claim against Allstate. Tellingly, every other Defendant has filed a dispositive motion and each such motion to date has been granted resulting in dismissal of Dulberg's claims against all other parties. This includes

ADR Systems of America, L.L.C.’s Section 2-615 Motion to Dismiss Count IV (Breach of Contract) of the Complaint for failure to state a cause of action for which relief can be granted that is based on the same reasoning as Allstate’s Motion with respect to reliance upon the unsigned agreement. For all of the reasons set forth in Allstate’s Motion and below, summary judgment should be granted in its favor and against Dulberg on Count V of the Complaint.

REPLY

I. There is no genuine issue of material fact precluding the entry of summary judgment on Count V (Breach of Contract) of the Complaint

In order to defeat a motion for summary judgment, “the opponent must show, through affidavits or other proper materials, that a material issue of evidentiary fact exists.” *Extel Corp. v. Cermetek Microelectronics, Inc.*, 183 Ill. App. 3d 688, 691 (1st Dist. 1989). In other words, a motion for summary judgment “requires the responding party to come forward with the evidence that it has—it is the put up or shut up moment in a lawsuit.” *Arteaga as next friend of Arteaga v. New Lee Wing Wah, Inc.*, 2019 IL App (1st) 191214-U, ¶ 15.

Dulberg has failed to meet his burden in establishing that a genuine issue of material fact exists to preclude the entry of summary judgment in Allstate’s favor on Count V of the Complaint. Allstate’s Motion is based on three straightforward arguments: (1) that it cannot be bound to the unsigned agreement; (2) that it did not breach the Binding Mediation Agreement; and (3) that Dulberg released Allstate from all claims. Noticeably, Dulberg fails to pointedly respond to any of these arguments. Dulberg also fails to cite legal authority in support of any substantive argument Dulberg attempts to make in his Response. “The failure to cite authority to support . . . legal argument[s] results in waiver of the argument.” *In re Marriage of Howell*, 2013 IL App (5th) 120454-U, ¶ 18 (citing *In re Dontrale E.*, 358 Ill. App. 3d 136, 139 (2nd Dist. 2005)). On this basis

alone, Allstate's Motion should be granted.¹

The position Dulberg has undertaken—that a party is bound by, and therefore can breach, an unsigned/undated agreement—is a legally flawed position. A contract is valid under Illinois law where there is an offer, acceptance, and consideration. *Mulvey v. Carl Sandburg High School*, 2016 IL App (1st) 151615, ¶ 29. *See also Brogan v. AT&T Corp.*, 1996 WL 563548, at *8 (N.D. Ill. Sept. 30, 1996) (an enforceable contract exists where the traditional elements for contract formation are present). Before an argument can be made that a party is in breach of a contract or agreement, a valid and enforceable contract must exist. There is no dispute that the Binding Mediation Agreement is the only valid and enforceable contract here. Yet, the entire claim against Allstate is based upon the premise that Allstate breached the unsigned agreement. *See Allstate's Mot. Summ. J., Ex. A, ¶¶ 102-07*. As the unsigned agreement is not valid or enforceable, Allstate cannot be found to have breached it.² Moreover, it is wholly undisputed by Dulberg that the Binding Mediation Agreement, again the only valid and enforceable agreement, was not subsequently amended after it was executed or otherwise breached. *See Allstate's Mot. Summ. J., Ex. A, ¶¶ 102-07; see generally Pls.' Resp.* The alleged amendments Dulberg claims were made in violation of the “Amendments to this Agreement” provision occurred before the Binding Mediation Agreement was executed. *See Allstate's Mot. Summ. J., Ex. A, ¶¶ 102-04*.

Pointedly, Dulberg has also not raised a genuine issue of material fact as to the existence of a valid and enforceable contract and a breach thereof. “An allegation that a genuine issue of fact exists, without presentation of supporting documentation, does not create a genuine issue of

¹ The arguments made by Allstate herein are made without prejudice to Allstate's position regarding Dulberg's waiver.

² In ADR's Section 2-615 Motion to Dismiss Count IV (Breach of Contract) of the Complaint for failure to state a cause of action, which this Court previously granted, the same argument was made by ADR. Namely, ADR argued that an unsigned and undated *draft* of the Binding Mediation Agreement was submitted to the judge presiding over Dulberg's bankruptcy proceedings, that Dulberg did not allege that the unsigned agreement constituted a “valid and enforceable contract,” and that, “by his own allegations, [Dulberg] admit[ted] that the only enforceable contract to which ADR was a party [was] the one the parties signed”—the Binding Mediation Agreement.

material fact.” *Extel Corp.*, 183 Ill. App. 3d at 691. “In responding to a summary judgment motion, the nonmoving party may not simply rest upon the allegations contained in the pleadings but must present specific facts to show that a genuine issue of material fact exists.” *First Bank v. Abraham*, 2013 WL 12107715, at *1 (S.D. Ill. May 31, 2013). A genuine issue of material fact “is not demonstrated by the mere existence of ‘some alleged factual dispute between the parties, [citation omitted], or by ‘some metaphysical doubt as to the material facts,’” [citation omitted]. *Id.* Rather, “a genuine issue of material fact exists only if ‘a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented.’” *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

Dulberg fails to present specific facts or attach evidence that sufficiently illustrates that there is a genuine issue of material fact. For example, allegations in the Complaint that relate to agreements between Dulberg and the Baudin Defendants or written and oral communication between Dulberg and the Baudin Defendants, *i.e.*, communications between an attorney and his or her client, and Allstate’s lack of knowledge or information as to these matters, does not, as a matter of law, create a genuine issue of material fact as Dulberg merely concludes in his Response, without any factual or legal support. *See* Pls.’ Resp., pp. 1-4.

Further, Dulberg has no response to Allstate’s argument that it performed and did not breach the only valid and enforceable contract—the Binding Mediation Agreement. Dulberg does not dispute, but rather admits, that the mediation proceeded, that Allstate paid the mediation fee, and that Allstate paid Dulberg the sum of \$300,000.00 following the mediation pursuant to the high/low agreement—which was included in both the unsigned agreement and Binding Mediation Agreement. *See* Allstate’s Mot. Summ. J., Ex. A, Exs. 6B and 11. Thus, there are no set of facts upon which Dulberg can maintain a cause of action for breach of contract against Allstate. Dulberg

has failed to meet his burden in establishing that a genuine issue of material fact exists to preclude the entry of summary judgment in Allstate's favor on Count V of the Complaint.

II. There is no genuine issue of material fact concerning the validity and enforceability of the Release

“Where the party moving for summary judgment files supporting affidavits containing well-pleaded facts and the opposing party files no counter-affidavits, the material facts set forth in the affidavits stand as admitted.” *LaMonte v. City of Belleville*, 41 Ill. App. 3d 697, 702 (5th Dist. 1976) (citing *Glen View Club v. Becker*, 113 Ill. App. 2d 127, 136-37 (1st Dist. 1969)). The party opposing the motion for summary judgment “cannot rely solely on his complaint to rebut the allegations of fact in a supporting affidavit, and even ‘the allegations of the verified complaint of plaintiffs cannot prevail over the contradicted facts set forth in the affidavits presented by defendants in support of their motion for summary judgment.’” *Id.* at 702-03. (Citations omitted.)

Dulberg's claim that the Release is void is not only contrary to his reply to Allstate's affirmative defenses in which Dulberg states that the Release “speaks for itself,” but it is also contrary to the plain and unambiguous language contained in the Release itself. *See* Allstate's Mot. Summ. J., Ex. C. In interpreting a contract, clear and unambiguous terms will be applied as written. *Nicor, Inc. v. Associated Elec. & Gas Ins. Servs. Ltd.*, 223 Ill. 2d 407, 416 (2006); *see also William Blair and Co., LLC v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 335 (1st Dist. 2005) (“In the absence of ambiguity, a court must construe a contract according to its own language, not according to the parties' subjective constructions”); *L&J Mattson's Co. v. Cincinnati Ins. Co., Inc.*, 536 F. Supp. 3d 307, 313 (N.D. April 29, 2021) (quoting *McWane, Inc. v. Crow Chicago Indus., Inc.*, 224 F.3d 582, 584 (7th Cir. 2000)) (“An ‘unambiguous contract controls over contrary allegations in the plaintiff's complaint’”).

Here, it is undisputed that Dulberg accepted and benefited from the monetary sum which

formed the consideration for the Release, \$300,000.00, and Allstate, as a released party thereunder, relied upon the representations made as part of the consideration of the settlement of Dulberg's personal injury claim. Specifically, the Release clearly provided that Allstate had relied upon the "material representations" contained in the Release "as part of the consideration and inducement for [the] settlement." *See* Allstate's Mot. Summ. J., Ex. D-1. Not only do the unambiguous terms of the Release bar the current breach of contract claim against Allstate, but Dulberg clearly was aware of the monetary amount awarded by the mediator in connection with the mediation, triggering the high/low agreement and resulting in Allstate's payment of \$300,000 to the Bankruptcy Estate. "Illinois courts read general releases to include claims of which the parties were aware at the time of the release's execution." *SADA 2400 Ogden, LLC v. 2400 Ogden Ave.—10041667 LLC*, 2021 WL 795011, at *4 (N.D. Ill. Mar. 2, 2021), appeal dismissed, 2021 WL 5576346 (7th Cir. Aug. 26, 2021) (quoting *Capocy v. Kirtadze*, 183 F.3d 629, 632 (7th Cir. 1999)). Moreover, as the Response contains no counter-affidavit, the material facts set forth in the Affidavit of Karen O'Neil are deemed admitted. *See* Allstate's Mot. Summ. J., Ex. D. Therefore, Allstate is entitled to summary judgment in its favor on Count V of the Complaint.

III. The additional facts Dulberg alleges in, and the exhibits attached to, the Response have no bearing on Dulberg's cause of action for breach of contract against Allstate

In his Response, Dulberg purports to essentially amend the Complaint by setting forth approximately thirty-seven additional "facts" that Dulberg maintains are relevant to the Complaint and attaches thirty exhibits comprised of report of proceedings from Dulberg's bankruptcy proceedings, along with discovery deposition transcripts, certificates of court reporters, a cross-claim for contribution against Allstate's insured, David Gagnon, and handwritten drawings. *See* Pls.' Resp., pp. 10-15 and Exs. 1-30. These additional facts and documents should be stricken as the inclusion of such in a response to a motion for summary judgment is procedurally improper,

especially where a plaintiff is essentially arguing against his own allegations. Any exhibits attached to the Response which are not properly authenticated, and thus not admissible, should be disregarded, specifically the “Report of Findings” attached as Exhibit 28 to the Response and the handwritten drawings attached as Exhibit 30 the Response. The remaining exhibits—report of proceedings, discovery deposition transcripts, and the cross-claim for contribution filed in Dulberg’s personal injury case—are not at all relevant to Dulberg’s claim for breach of contract against Allstate.

Nonetheless, even if the Court were to grant Dulberg leave to file an amended complaint as to Allstate, and Dulberg could prove every factual allegation set forth in his Response, which Allstate disputes, such facts still do not support a claim against Allstate for breach of the unsigned agreement and/or Binding Mediation Agreement. Neither the new facts alleged nor the exhibits attached to the Response support a finding—or present any genuine issue of disputed fact—that Allstate breached the unsigned agreement, which is not a valid agreement that could be breached, or the Binding Mediation Agreement, which it cannot be disputed Allstate complied with, or that the Release is not a valid and enforceable contract that Dulberg is bound by and which bars the current claim against Allstate. As such, summary judgment should be entered in Allstate’s favor.

CONCLUSION

For the foregoing reasons, Allstate prays that this Court grant summary judgment in Allstate’s favor on Count V of the Complaint and for all such further relief that the Court deems just and proper.

Respectfully submitted,

ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY

By: /s/ Michelle E. Tinajero
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