

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WISCONSIN LABORERS HEALTH
FUND, and JOHN J. SCHMITT, in
his capacity as trustee,

Plaintiffs,

v.

ARBOR GREEN, INC.,

Defendant.

OPINION AND ORDER

12-cv-820-wmc

Plaintiffs Wisconsin Laborers Health Fund and John J. Schmitt, as trustee of the Fund, accuse defendant Arbor Green, Inc. of failing to submit contributions to the Fund as required by certain labor agreements in violation of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1132 and § 1145. (Compl. (dkt. #1).) Even before Arbor Green filed its answer in this case, the parties reached a settlement agreement. Before the court is defendant Arbor Green, Inc.’s unopposed motion to enforce that settlement (dkt. #8), which the court will grant.

BACKGROUND

On November 14, 2012, plaintiffs filed the present lawsuit seeking unpaid contributions, interest and liquidated damages in the amount of \$51,261.60 for the period May 1, 2010, through April 30, 2012, and some unknown amount to be determined after an audit for the period May 1, 2012, to the present. (Compl. (dkt. #1) ¶ 14.) The parties filed a stipulated motion for extension of time to file an answer (dkt. #4), which the court granted, extending the deadline to January 17, 2013, (dkt. #5).

That date passed without defendant filing an answer. After the court set a date for the preliminary pretrial conference, plaintiff filed a “status report” indicating that

[t]he Parties have reached an informal agreement as to settlement terms and a draft of the written Settlement Agreement has been advance to Defense counsel for consideration and presentation to Arbor Green, Inc. for approval. Barring any objections to explicit terms by the Defendant, the Settlement Agreement shall be executed and the Plaintiffs will file a voluntary Dismissal as soon as all formalities pursuant to the Agreement have been carried out.

(Dkt. #6.)

In its motion to enforce settlement, counsel for Arbor Green, Attorney Lisle W. Blackbourn, submitted an affidavit with attached emails between Attorney Blackbourn and plaintiff’s counsel, Attorney Kate Breitlow. In an email dated January 16, 2013, plaintiff’s counsel responded to questions posed by Attorney Blackbourn. (Affidavit of Lisle W. Blackbourn (“Blackbourn Aff.”), Ex. A (dkt. #9-1). Relevant to this motion, Attorney Breitlow wrote that “the Funds will conditionally agree to waiver of the liquidated damages as a grant of exemption under ERISA section 408(a), according to set procedure.” (*Id.* at 1.) Plaintiff’s counsel also set forth the terms of a counter-offer:

Therefore, my clients would be willing to enter into a settlement agreement for repayment of \$43,722.40, a \$6,026.49 difference from the proposed \$37,696. Over an 18-24 month plan, this would mean monthly payments of between \$1,822 and \$2,429. Arbor Green is also released from the NBU agreement from November 1, 2012 forward, as you know.

Can your client accept this?

(*Id.* at 2.) That same day, Attorney Blackbourn responded, “I am authorized to accept your settlement proposal, with the 24 month payment schedule. Please forward the

appropriate paperwork. Based on this, I will not be filing an answer to the complaint.”
(*Id.* at 1.)

After a significant delay, plaintiff’s counsel forwarded a draft Settlement Agreement and Confession to Judgment on March 6, 2013, representing it was “based on previous settlement negotiations and informal agreement on terms.” (Blackbourn Aff., Ex. B (dkt. #9-2).) In defendant’s motion to enforce the settlement, defendant points to two significant differences between the settlement terms to which the parties agreed in the January 16, 2013, email exchange and the March 6, 2013, formal agreement.¹ First, the draft settlement agreement increased the amount to be paid the Fund by requiring Arbor Green to submit to an audit to pay additional premiums for the time period after April 30, 2012. (Def.’s Mot. (dkt. #8) 3 (citing Blackbourn Aff., Ex. C (dkt. #9-3) ¶ 4.) Second, the draft agreement simply states that “Arbor Green shall be eligible to request a waiver of liquidated damages . . . at the sole discretion of the Fund’s Trustees,” without accounting for the January 6, 2013, email term stating that the trustees had already approved Arbor Green’s waiver request as part of the settlement. (Def.’s Mot. (dkt. #8) 3 (citing Blackbourn Aff., Ex. C (dkt. #9-3) ¶ 5.)

Pursuant to this court’s Preliminary Pretrial Conference Order of March 25, 2013, defendant Arbor Green filed a timely Motion to Enforce Settlement Agreement on April 15, 2013. Plaintiffs failed to respond to that motion by the court-established April 22nd

¹ Defendant also takes issue with the confession to judgment attached to the March 6, 2013, email from plaintiff’s counsel’s email and the draft agreement conditioning the parties’ mutual releases on Arbor Green’s performing of the settlement agreement, as both new terms were not contemplated by the January 16, 2013 settlement.

deadline and also failed to respond to defendant's supplemental filing (dkt. #10) noting that its motion should, therefore, be deemed unopposed.

OPINION

As part of the court's "role as supervisor of the litigation," the court has the inherent authority "to implement a settlement agreement between the parties." *Carr v. Runyan*, 89 F.3d 327, 331 (7th Cir. 1996); *see also United States v. Hardage*, 982 F.2d 1491, 1496 (10th Cir. 1993) (noting that the trial court "has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it"). An agreement to settle claims in federal court is enforceable "just like any other contract" pursuant to the applicable state law. *Dillard v. Starcon Int'l, Inc.*, 483 F.3d 502, 506 (7th Cir. 2007). Both the parties here are Wisconsin entities and defendant points to Wisconsin contract law in its motion to enforce the settlement.

Under Wisconsin law, a valid settlement requires an offer, an acceptance and consideration all resulting from a meeting of the minds. *Am. Nat'l Prop. & Cas. Co. v. Nersesian*, 2004 WI App 215, ¶ 14, 277 Wis. 2d 430, 689 N.W.2d 922.² Here, the January 16, 2013, email exchange includes all three. The email from plaintiff's counsel Attorney Breitlow to defendant's counsel Attorney Blackbourn constitutes an offer (or,

² Wisconsin also requires that an agreement to settle a pending lawsuit be in writing sufficient to qualify as a stipulation. Wis. Stat. § 807.05. To the extent this civil procedure rule applies to federal court, the parties' email exchange would appear to satisfy this requirement. *Cf. Williams v. Embridge Pipelines (Lakehead), LLC*, 2011 WL 4596153, 2011 WI App 155, ¶ 24, 337 Wis. 2d 734, 807 N.W.2d 32 (unpublished) (holding that "email meets the writing and signature standards of the statute of frauds") (citing *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 295-96 (7th Cir. 2002)).

from the context of the email, a counter-offer), which Attorney Blackburn accepted that same day. Moreover, there was consideration -- plaintiff was to receive payments from Arbor Green in exchange for the release of liability in this suit.

Admittedly, the further exchanges between the parties after January 16, 2013, might be deemed to have muddied the terms of the settlement and, arguably, whether there was a “meeting of the minds,” as does the parties’ apparent failure to proceed consistent with the terms of that agreement, but plaintiffs make no such argument and the court is not inclined to make it for them. Instead, the court deems plaintiff’s repeated failure to respond to defendant’s motion to enforce settlement (even after the failure was pointed out by defendant) as an acknowledgement that the January 16, 2013, email exchange constituted an enforceable contract. Accordingly, the court will grant defendant’s motion to enforce it, without the additional terms plaintiff attempted to insert in its March 6, 2013, draft settlement agreement.

ORDER

IT IS ORDERED that:

- 1) defendant Arbor Green’s motion to enforce settlement (dkt. #8) is GRANTED;
- 2) the clerk is directed to enter judgment in plaintiff’s favor, but without fees *or* costs to either party, in the amount of \$43,722.40 to be paid by defendant Arbor Green to the Wisconsin Laborers Health Fund in 24 monthly installments beginning February 1, 2013, (making 4 monthly payments in the amount of \$7,287.20 due immediately and \$1,821.80 due on the first of the month for 20 months beginning June 1, 2013); and

3) the clerk is then directed to dismiss the remainder of this case with prejudice and without costs.

Entered this 17th day of May, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge