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

TREVOR SEARLES,

Plaintiff,

v.

BRYDEN MOTORS, INC.,

Defendant.

OPINION AND ORDER

19-cv-028-wmc

Plaintiff Trevor Searles claims that defendant Bryden Motors, Inc., retaliated against him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), by terminating his employment for complaining about the sexual harassment of another employee. After denying defendant's motion for summary judgment, the parties held a mediation with Clerk of Court and Magistrate Judge Peter Oppeneer, which resulted in an apparent settlement and prompted the court to dismiss this case without prejudice. (Dkt. #25.) However, that settlement hit a snag when the parties could not agree on the language of a non-disparagement clause as part of the release. As a result, the court reopened this case, but invited defendant to file a motion for enforcement of the settlement, which is now before the court. (Dkt. #40.) Unfortunately, for the reasons that follow, the court must now deny that motion and the parties are directed to submit final pretrial submissions on or before this Friday, October 23, 2020.

BACKGROUND

On February 6, 2020, after negotiations, the parties reached a settlement agreement, which was initialed by Judge Oppeneer and signed by counsel for both parties, comprising verbatim the following, four terms:

1. [Defendant] to pay [plaintiff] [a specific amount of money].

2. No reapply, no rehire.

3. Confidentiality, non disparagement.

4. 1099 to atty / W2 to plaintiff as specified by [plaintiff].

(Dkt. #32.)

As previously set forth in plaintiff's motion to reopen the case, defendant then drafted a release that contained a unilateral, non-disparagement clause in its favor, in other words, the clause provided:

> TREVOR SEARES agrees not to make disparaging, harmful and/or negative remarks or comments about BRYDEN MOTORS, INC. and OOPS, L.L.C. DBA 815 Custom Auto and/or Release Party, including but not limited to the following: its services; products; practices; policies (including but not limited to employment practices and policies); and/or its officers/employees/representatives/agents. Nothing in this release shall be construed to prevent TREVOR SEARLES from communicating with any government agency regarding matters that are within the agency's jurisdiction.

(Dkt. #33 at ¶ 7.) Plaintiff refused to sign this release on the basis that the non-disparagement clause was not mutual and, after reaching an impasse, the parties returned to Judge Oppeneer for guidance. He then proposed that the parties agree to a mutual non-disparagement clause, but defendant would not agree to a mutual clause as a corporate entity with multiple employees who might unwittingly violate that provision. (Dkt. #34.) In fairness, defendant did offer to add language that Searles' former boss Christine Lawver would not engage in disparaging remarks or comments (dkt. #35 at ¶ 7), but at that point

further negotiations failed.[1] In light of the parties' continued disagreement, the court granted plaintiff's motion to reopen, set this case for a conference with Magistrate Crocker to reset trial dates, and invited defendant to file a motion to enforce the settlement, which it has now done. (7/1/20 Order (dkt. #38).) This case is set for trial commencing November 30, 2020.

OPINION

A settlement agreement is a contract governed by state contract law -- here, Wisconsin common law. *See Beverly v. Abbott Laboratories*, 817 F.3d 328, 333 (7th Cir. 2016) ("State contract law governs issues concerning the formation, construction, and enforcement of settlement agreements."). An enforceable contract under Wisconsin law has three elements: offer, acceptance, and consideration. *Runzheimer Int'l, Ltd. v. Friedlen*, 862 N.W.2d 879, 885 (Wis. 2015). "These three elements must result from a 'meeting of the minds.'" *HSBC Mortg. Servs., Inc. v. Daya*, No. 16-CV-80-JPS, 2016 WL 7156551, at *8 (E.D. Wis. Dec. 7, 2016) (citing *Am. Nat'l Prop. & Cas. Co. v. Nersesian*, 689 N.W.2d 922, 927 (Wis. Ct. App. 2004)). "Although 'settlement agreements are favored in the law, to create an enforceable settlement agreement' all the traditional elements must be met." *HSBC Mortg. Servs.*, 2016 WL 7156551, at 8* (quoting *Nersesian*, 689 N.W.2d at 927).

In its brief in support of the motion to enforce settlement, defendant represents that: (1) each of the three, non-monetary terms -- no reapply/rehire, confidentiality and

[1] Why this compromise was not acceptable to plaintiff is not entirely clear, except that he apparently wanted assurances that other of defendants' employees would not be free to disparage him. Of course, that begs the question why the names of other employees of concern to plaintiff could not have been added, but the court has already spent too much of its time and resources trying to get the two sides of this dispute to arrive at a reasonable resolution.

non-disparagement -- were required by defendant during the negotiations; and (2) plaintiff never asked for these conditions to be mutual. (Raynor Decl. (dkt. #42) ¶ 2.b, 2.d.) In response, plaintiff contends that "the writing at issue reads only 'non disparagement' in the term sheet," and "[n]o mention is made whether the term 'non disparagement' is unilateral or mutual." (Pl.'s Opp'n (dkt. #45) 3.) At bottom, defendant acknowledges never expressly asking for a unilateral clause, and plaintiff never insisted that it be mutual. Regardless of the parties' intent that the non-disparagement provision to be unilateral (that is, for defendant's sole benefit) or mutual (that is, for both sides' benefit), "intent to be bound by contract does not invite a tour through [the parties'] cranium." *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 814 (7th Cir. 1987). Instead, "[t]he status of a document as a contract depends on what the parties express to each other and to the world, not on what they keep to themselves." *Id.*

Here, the simple reference to "non disparagement" in the parties' written settlement agreement does not provide enough information for the court to find the parties' mutual intent, as defendant maintains in bringing this motion. Moreover, the fact that defendant required this provision as a settlement term and that plaintiff did not expressly ask that the provision be mutual falls short of demonstrating that there was a meeting of the minds as to its reach.[2]

[2] Defendant argues in its brief that it would be "impractical for a corporation to agree to [a] blanket mutual non-disparagement" provision, and it is "common for non-disparagement provisions to be unilateral in employment discrimination cases," but cites nothing to support these arguments. Moreover, whatever "best practice" may be, a cursory review of cases in our circuit readily produce several examples of corporate entities signing onto non-disparagement provisions. *See, e.g., Bonzani v. Goshen Health Sys., Inc.*, No. 319CV00586DRLMGG, 2020 WL 2324598, at *9 (N.D. Ind. May 11, 2020); *Tujetsch v. Bradley Dental, L.L.C.*, No. 09 C 5568, 2010 WL 5099981, at *1 (N.D. Ill. Dec. 8, 2010); *Calibre CPA Grp., PLLC v. Novak & Francella, LLC*, No. 03 C 1287, 2003 WL 22118937, at *1 (N.D. Ill. Sept. 12, 2003).

In the alternative, defendant contends that the court should equitably estop plaintiff from pursuing this lawsuit, citing to *Affordable Erecting, Inc. v. Neosho Trompler, Inc.*, 2006 WI 67, 291 Wis. 2d 259, 715 N.W.2d 620. In *Affordable Erecting, Inc.*, however, the Wisconsin Supreme Court was considering whether equitable estoppel "can be applied to settlement agreements that fail to meet the requirement of § 807.05," requiring that the settlement of a pending action be in writing. 2006 WI 67, at ¶ 32. There is no dispute that the parties entered into a written agreement and, therefore, § 807.05 does not provide a barrier for enforcement. Instead, as explained above, defendant has failed to demonstrate that the parties reached a meeting of the minds as to whether the non-disparagement provision was unilateral (only for defendant's benefit) or mutual. Since this difference is plainly material to both parties, defendant fails to explain why the court should apply estoppel given this defect in the written agreement, and the court sees no reason to do so. As such, this case will advance to trial on November 30, 2020.

ORDER

IT IS ORDERED that defendant Bryden Motors, Inc.'s motion for enforcement of the settlement agreement (dkt. #40) is DENIED.

Entered this 20th day of October, 2020.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge