|  |  |  |
| --- | --- | --- |
| DISTRICT COURT, DENVER COUNTY, COLORADO |  |  |
| Court Address: |  |  |
| Denver District Court |  |  |
| 1437 Bannock St., Room 256 |  |  |
| Denver, CO 80202 | DAT | E FILED: April 6, 2016 3:19 PM |
|  | FILI | G ID: EA2C78AFED11A |
| **In The Matter of:** | CAS | E NUMBER: 2015CV31709**COURT USE ONLY** |
| **ROBERT ABRAMS,** |  |  |
| **Plaintiff** |  |  |
| **Vs.** |  |  |
| **SHAWN BEESON,** |  |  |
| **Respondent** |  |  |
| Law Office of Michael P. Boyce, PC Michael Boyce3773 Cherry Creek Drive North, Suite 575 Denver, CO 80209Phone Number: 303.565.0360 E-mail: mike@boycelawoffice.com FAX Number: 303.648.4849 Atty. Reg. #: 35729 | Case Number: 15CV31709Division 409 |
| **DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION TO ENFORCE SETTLEMENT AGREEMENT** |

SHAWN BEESON, through his attorney, Michael Boyce, of the Law Office of Michael Boyce, P.C., hereby requests this Court deny Plaintiff’s Motion to Enforce Settlement Agreement and states the following:

# INTRODUCTION

1. In paragraph one of Plaintiff’s Motion to Enforce Settlement Agreement, Plaintiff states “the parties’ counsel met for a settlement negotiation at plaintiff’s counsel’s office.” Plaintiff’s statement mischaracterizes defense counsel’s reason for going to Plaintiff’s office in an attempt to mislead the Court into believing substantial settlement negotiations have occurred in this matter.
2. On Friday, March 18, 2016, defense counsel travelled to Plaintiff’s office to review discovery materials Plaintiff cited in his Rule 26(a)(1) disclosures. There was no intent on the part of defense counsel to engage in settlement discussions. The purpose of going to Plaintiff’s office was to review discovery, not meet with Plaintiff for any purpose.
3. After it became clear the discovery materials were not ready and available for review, Plaintiff stated he would be willing to settle the matter for $15,000. Plaintiff proceeded to lecture defense counsel as to why this was a good offer, why the offer made sense from a business standpoint for defense counsel’s law office, and the reasons he would not accept an offer that was higher than

$15,000.

1. At no time during the conversation was there a discussion as to any material terms and conditions any settlement agreement would entail.
2. On Monday, March 21, 2016, defense counsel sent an email to Plaintiff stating, “I have spoken to my client and he does not want to settle for anything less than the amount he was originally entitled to pursuant to the contingency fee agreement. The potential settlement we discussed on Friday is rejected.” (See Defendant’s Exhibit 1). Contrary to Plaintiff’s assertion, this response did not constitute a counter-offer.
3. On Sunday, March 27, 2016, Plaintiff sent an email to defense counsel stating defendant’s offer was accepted. (See Defendant’s Exhibit 2). That same day, six hours and sixteen minutes later, defense counsel sent an email to Plaintiff stating, “To be clear, my last email to you was not an offer. The end of the email specifically states that the settlement discussions from last Friday where we talked about a $15k settlement was rejected. My purpose in citing the amount he would be entitled to in the contingency fee agreement was to state where negotiations needed to start. It was not a counter-offer. If you recall, when we met at your office you specifically stated that you would not consider anything over the $15K settlement offer you had extended. I apologize for the confusion.” (See Defendant’s Exhibit 3).

# LAW

1. A settlement and compromise is, in effect, a contract to end judicial proceedings. See Goltl v. Cummings, 152 Colo. 57, 380 P.2d 556 (1963). In order for a settlement to be binding and enforceable, there must be a “meeting of the minds” as to the terms and conditions of the compromise and settlement. Pring v. Udall, 95 Colo. 23, 31 P.2d 1113 (1934); 6 Corbin on Contracts s 1278 (1962). *H. W. Houston Const. Co. v. Dist. Court of Tenth Judicial Dist*., 632 P.2d 563, 565 (Colo. 1981).
2. The essential elements of a settlement agreement are “a definitive offer and acceptance, consideration, and parties who have the capacity and authority to agree ” 15A Am.Jur.2d

*Compromise and Settlements* §§ 7, 32–33 (1976). In Colorado, settlements result from “a meeting of the minds and an exchange of sufficient consideration.” *Van Schaack Holdings, Ltd.*

*v. Fulenwider,* 798 P.2d 424, 431 (Colo.1990). To establish the existence of a contract, the parties thereto must agree upon all essential elements. *Federal Lumber Co. v. Wheeler,* 643 P.2d 31 (Colo.1981). Unless there is a meeting of the minds, there is no contract. *Lincoln Liberty Life Ins. Co. v. Martinez,* 134 Colo. 75, 299 P.2d 507 (Colo.1956). The existence of a contract is a question of fact to be determined by consideration of all facts and circumstances. *I.M.A., Inc. v. Rocky Mountain Airways, Inc.,* 713 P.2d 882 (Colo.1986). *Citywide Bank of Denver v. Herman*, 978 F. Supp. 966, 977 (D. Colo. 1997).

1. In addition, as we have stated on numerous occasions, an attorney does not have the authority to compromise and settle the claim of his client without the knowledge or consent of his client. Radosevich v. Pegues, 133 Colo. 148, 292 P.2d 741 (1956); Lewis v. Vache, 92 Colo. 358, 20 P.2d 554 (1933) (an attorney may not compromise his client's cause without express authority); Hallack v. Loft, 19 Colo. 74, 34 P. 568 (1893); Coon v. Ginsberg, 32 Colo.App. 206, 509 P.2d 1293 (1973). See also Annot., 66 A.L.R. 107 (1930); Annot., 30 A.L.R.2d 944 (1953); 7A C.J.S., Attorney and Client s 214 (1980). It is also well established that an attorney who is clothed with no other authority than that arising from his employment as attorney has no implied authority by virtue of his general retainer to compromise and settle a claim of his client. Annot., 30 A.L.R.2d 944 at s 2; 7 Am.Jur.2d Attorneys at Law s 156 (1980). *Cross v. Dist. Court In & For First Judicial Dist*., 643 P.2d 39, 41 (Colo. 1982).

# ARGUMENT

1. In order to find that there was an enforceable and binding settlement agreement, the Court must first determine whether a definitive offer to settle the case was made. The Plaintiff contends that defense counsel’s statement that the defendant “does not want to settle for anything less than the amount he was originally entitled to pursuant to the contingency fee agreement” constituted a definitive offer to settle the case for $23, 177.93. This is clearly a statement of what the Defendant won’t do, which is entertain any settlement discussions under the amount he was owed under the terms of the contingency fee agreement. It is not an affirmative statement that he would in fact settle for that amount. While it is clear what he does not want to do from the language, there is no indication of what he wants to do in terms of settlement or what amount he wants to settle for. The Plaintiff is reading an offer into the statement where there is none.
2. What if it was worded in this manner: “The defendant does not want to settle for anything less than $23, 177.93.” That does not mean that he *will* settle for $23,177.93. It plainly means that he won’t settle for less than that. It means that he may be willing to settle for an amount somewhere between $23,177.93 and infinity. The statement is a far cry from “The Defendant is willing to settle for $23,177.93.” Stating that the defendant does not want to settle for anything less than that amount is not a definitive statement constituting an offer.
3. If the court finds defense counsel made an offer to settle, and nothing in this Response to Plaintiff’s Motion to Enforce Settlement is meant in any way to be construed as conceding an offer was made, the court must also determine whether there has been a meeting of the minds as to the terms and conditions of the contract. Parties must agree on all material terms to create a valid settlement agreement. *Fed. Lumber Co. v. Wheeler,* 643 P.2d 31 (Colo.1981). An agreement cannot be enforced unless the terms are sufficiently definite to allow a court to determine whether the parties have complied with them. *Stice v. Peterson,* 144 Colo. 219, 355 P.2d 948 (1960); *Mestas v. Martini,* 113 Colo. 108, 155 P.2d 161 (1944). While parties may definitely agree on some issues, the absence of agreement on other material issues prevents the formation of a binding contract. *Am. Mining Co. v. Himrod–Kimball Mines Co., supra DiFrancesco v. Particle Interconnect Corp.,* 39 P.3d 1243, 1248 (Colo. App. 2001)
4. There has been no discussion whatsoever as to the material terms and conditions of any settlement. For example, is the settlement amount in consideration for dismissal of all charges against Plaintiff? Will a settlement be confidential? Will a settlement contain a non- disparagement clause? What is the penalty if there is a breach of any settlement clauses? Will there be an admission of liability on the part of either party? Will the settlement include pre- judgment interest on any monies owed? Will there be an agreement or stipulation concerning attorney’s fees and/or costs? These are just a few of the essential elements that must be determined before the Defendant will agree to a settlement amount.
5. In *H. W. Houston Const. Co. v. Dist. Court of Tenth Judicial Dist.*, 632 P.2d 563 (Colo. 1981), The Court found there was no meeting of the minds where the attorneys were mistaken as to the terms of the settlement agreement. “The attorneys for Pueblo and Houston indicate that they believed the $2,500 payments were in settlement of all claims arising from the accident with Fountain's cement truck, and, for this reason, they submitted a general release form to Fountain. However, Fountain's attorney indicates that he understood the compromise and settlement was limited only to the claim for property damages and did not necessarily involve all claims arising out of the incident. Since there was no meeting of the minds with regard to the scope of the proposed compromise and settlement, it was not an enforceable contract. *H. W. Houston Const.*

*Co. v. Dist. Court of Tenth Judicial Dist.,* 632 P.2d 563, 565 (Colo. 1981). Here, as in the aforementioned case, there has been no meeting of the minds with regard to the scope of the proposed compromise and settlement.

1. Plaintiff asserts in paragraph four of his motion that the email from defense counsel to Plaintiff dated March 27, 2016, where defense counsel advised that there was no counter offer to Plaintiff’s settlement offer of $15,000, is an excuse that “qualifies other terms not included in his offer and then backs out after receiving what he wants from plaintiffs.” The email does not qualify any terms of any offer whatsoever. Defense counsel made no offer and no terms were discussed or have ever been discussed. The email advises Plaintiff that he is misconstruing the email as an offer. Defense counsel specifically states that no counter-offer has been made in the same correspondence.
2. If the court finds that defense counsel made an offer to settle, that there exists a meeting of the minds as to the material terms, conditions, and essential elements of the agreement, the court must also find defense counsel had express authority to act on behalf of the Defendant when extending the alleged offer. At no time did the Defendant give defense counsel the express authority to extend an offer to settle the matter for the amount Defendant is owed from Plaintiff. As stated previously, defense counsel’s email was a statement of settlement amounts he would not entertain, not what he would affirmatively settle for.
3. In paragraph 6 of Plaintiff’s motion, Plaintiff states that he accepted a counter-offer by “mirror image.” Defense counsel is unaware and has been unable to find any theory of contract law discussing “mirror image” acceptance. The Plaintiff seems to think that the “mirror image” of a negative statement is a positive one that contractually binds the statement maker. However, stating that the Defendant in this case “will not settle for anything less that what he was entitled to pursuant to the contingency fee agreement” is not the same as stating the Defendant will settle for the amount he is entitled to pursuant to the contingency fee agreement. Furthermore, when it became apparent that the Plaintiff was confusing what the Defendant was not willing to do with what he was willing to do, defense counsel notified the Plaintiff within hours that Plaintiff misunderstood the email rejecting Plaintiff’s $15,000 settlement offer.
4. In his conclusion, the Plaintiff states “[t]he plain language of the e-mails confirm the minimum amount that defendant ‘would settle.’ (original quotations). Nowhere in any email correspondence does defense counsel state the amount Defendant “would settle” for. This is a false statement by Plaintiff.

# CONCLUSION

1. Defense counsel rejected Plaintiff’s offer of $15,000 and advised Plaintiff that the Defendant would not settle for less than the amount owed to him pursuant to the contingency fee agreement. This did not constitute an offer. It was not a definitive offer to settle the case for a specific amount. There was no meeting of the minds as to the material terms and conditions nor was there any exchange of consideration. In short, there exists no settlement agreement under any interpretation of contract principles.
2. Furthermore, defense counsel had no express authority to extend such an offer. The Defendant would not be bound by any settlement agreement in the event the Court finds a settlement exists.

WHEREFORE, Shawn Beeson, through counsel, respectfully requests this Honorable Court grant the relief requested in Defendant’s Response to Plaintiff’s Motion to Enforce Settlement Agreement.

Respectfully submitted this 6th day of April, 2016.

THE LAW OFFICE OF MICHAEL P. BOYCE, PC.

Date: 4/6/2016

/s/ Michael Boyce #35729

Attorney for Defendant

*(Original signature on file at The Law Office of Michael*

*P. Boyce, P.C.)*

# CERTIFICATE OF SERVICE

I hereby certify that I have delivered a true and correct copy of the Defendant’s Response to Plaintiff’s Motion to Enforce Settlement Agreement to the following on April 6, 2016:

*Email/Electronic Filing* Abrams & Associates, LLC Robert Abrams

700 17th Street, Suite 650

Denver, CO 80202 Robert@AbramsLaw.net

 /s/ Michael Boyce #35729

*(Original signature on file at The Law Office of Michael P. Boyce, P.C.)*