

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION**

ASIA MARSHALL, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

ALLEN COUNTY COUNCIL, ALLEN
COUNTY BOARD OF
COMMISSIONERS, and ALLEN
COUNTY PUBLIC DEFENDER BOARD,

Defendants.

Case No.: 1:15-CV-402-TLS

OPINION AND ORDER

This matter is before the Court on Defendants' Motion to Enforce Settlement Agreement [ECF No. 104], associated documents [ECF Nos. 112 and 114], and Plaintiff Asia Marshall's Petition for Relief [ECF No. 116] and associated briefing [ECF Nos. 119, 121, and 122].

PROCEDURAL BACKGROUND

On December 31, 2015, Plaintiff Calvin Wilson commenced this suit by filing the first Complaint [ECF No. 1]. On August 19, 2016, Plaintiff Calvin Wilson, now joined by Asia Marshall and David Blume¹, finalized the Complaint by filing the Third Amended Class Action Complaint [ECF No. 45]. The Third Amended Class Action Complaint alleges a class arising under Fed. R. Civ. P. 23(b)(2) and seeks injunctive relief from alleged violations of the Sixth and Fourteenth Amendments, arising from the Defendants' failure to adequately provision public

¹ David Blume was dismissed as a party on August 29, 2017 [ECF Nos. 77 and 78].

defense services to misdemeanor cases. The Third Amended Class Action Complaint does not make any requests for relief in the form of money damages.

On August 14, 2017, the Court denied, with leave to refile, the Plaintiffs' First Amended Motion for Class Certification [ECF No. 76]. On September 15, 2017, the Defendants filed a Motion to Dismiss the Third Amended Complaint [ECF No. 82]. That Motion was never fully briefed; instead, on June 18, 2018, the Defendants filed an Unopposed Motion to Vacate the Deadline for their Reply Brief, representing that the parties had reached an agreement in principal to settle the action. *See* Defs.' Unopposed Mot., ECF No. 99, ¶ 2. The Motion was granted [ECF No. 100]; and the Court terminated the pending Motion to Dismiss [ECF No. 103].

On September 18, 2018, the Defendants filed the pending Motion to Enforce Settlement Agreement [ECF No. 104]. Plaintiff Asia Marshall indicated she did not wish to continue to have Plaintiffs' counsel, Christopher C. Myers & Associates, represent her; and the firm filed a Motion to Withdraw as Attorney [ECF Nos. 105–07]. The firm also filed two Reports regarding the settlement agreement [ECF Nos. 112 and 114]. The Court held a telephonic conference [ECF No. 115], at which point the Court granted the Motion to Withdraw and granted Plaintiff Asia Marshall additional time in which to either find new counsel or file a written document advising the Court as to why the Settlement Agreement should not be enforced. Plaintiff Asia Marshall subsequently filed her Petition for Relief [ECF No. 116]. The Petition for Relief, among other requests, asks that the Court deny the Defendants' Motion to Enforce. Plaintiffs' counsel filed a response [ECF No. 119] as did the Defendants [ECF No. 121]. Plaintiff Asia Marshall filed a reply [ECF No. 122].

FACTUAL BACKGROUND

On May 23, 2018, counsel for the Defendant Allen County Council, attorney James Posey, called then-Plaintiffs' counsel, attorney Christopher Myers, to discuss settlement of the lawsuit. *See* Defs.' Mot. to Enforce Settlement Agreement, ECF No. 104, ¶ 2. During that discussion, the attorneys agreed that Defendants Allen County Council and Allen County Public Defender Board's actions after the lawsuit satisfied the Plaintiffs' request for prospective injunctive relief. *Id.* Given that fact, the Defendants offered a number of terms of settlement, which included among others: (1) payment to the then-Plaintiffs' counsel of \$90,000; (2) release by the Plaintiffs of all claims they had against any of the Defendants for "anything relating to the public defender services provided by the Allen County Public Defender's Office" to the Plaintiffs; (3) dismissal of the lawsuit; and (4) execution of an agreement reflecting these terms by the Plaintiffs, the Defendants, and the Plaintiffs' counsel. *Id.* at ¶¶ 2.a, 2.c, 2.f, and 2.h. At the end of the discussion, attorney Myers told attorney Posey that he would need to discuss the offer with his associate and that any settlement would have to allow Plaintiff Asia Marshall to retain the right to sue her former Public Defender, Ryan Lackey, for alleged malpractice. Later that day, attorney Myers called attorney Posey and told him that if the requisite carve-out regarding Public Defender Lackey were included, then the Plaintiffs and the Myers law firm would accept the settlement offer. *Id.* at ¶ 3.

On June 15, 2018, attorney Posey called attorney Myers and told him that the Defendants agreed to the requisite carve-out. *Id.* at ¶ 4. Thus, in the Defendants' view, the lawsuit was settled on June 15, 2018, and the Defendants sent an initial draft settlement agreement. *Id.* However, the negotiations continued.

On June 19, 2018, attorney Myers emailed counsel for the Defendants asking for certain modifications: specifically, a second carve-out to allow Plaintiff Asia Marshall to sue her other former Public Defender, David Joley, for alleged malpractice. *Id.* at ¶ 6. The Defendants agreed to the new demand and sent a red-lined draft reflecting the modification. *Id.* at ¶ 7.

On July 18, 2018, attorney Posey called attorney Myers about finalizing the settlement agreement. *Id.* at ¶ 8. Attorney Myers told attorney Posey that Plaintiff Asia Marshall was not happy with the settlement because she was not receiving any money as part of the settlement and that he was not sure Plaintiff Asia Marshall would sign the settlement agreement. *Id.*

On August 2, 2018, attorney Myers sent attorney Posey an email asking for the final version so that Plaintiff Calvin Wilson could sign it. *Id.* at ¶ 9. The email also made clear that attorney Myers did not necessarily expect Plaintiff Asia Marshall to sign the agreement. Over the next week or so, further negotiations took place, and further additional language was added to the agreement at the request of Plaintiff Asia Marshall. *Id.* at ¶¶ 11–16.

On August 16, 2018, Defendant Allen County Council voted on, approved, and executed the settlement agreement with the further additional language; attorney Posey forwarded that executed version to the other parties to the lawsuit. *Id.* at ¶ 16. On August 17, 2018, the Defendant Allen County Board of Commissioners voted on, approved, and executed the settlement agreement. *Id.* at ¶ 17.

On August 28, 2018, attorney Myers left attorney Posey a voicemail message stating that Plaintiff Calvin Wilson had executed the settlement agreement and that Plaintiff Asia Marshall had a meeting on August 30, 2018, to do the same. *Id.* at ¶ 19. On August 30, 2018, attorney Myers left another voicemail for attorney Posey, informing him that Plaintiff Asia Marshall had refused to sign. *Id.* at ¶ 20. The two attorneys met later that day and discussed Plaintiff Asia

Marshall's refusal; during that meeting, attorney Myers passed on a demand for \$300,000 made by Asia Marshall. *Id.* at ¶ 21.

ANALYSIS

“A settlement agreement is essentially interpreted as a contract.” *United States v. Rand Motors*, 305 F.3d 770, 774 (7th Cir. 2002); *Herrnreiter v. Chicago Hous. Auth.*, 281 F.3d 634, 636 (7th Cir. 2002). In this case, the issues regarding the formation, construction, and enforcement of the settlement agreement are governed by state contract law. *Sims-Madison v. Inland Paperboard and Packaging, Inc.*, 379 F.3d 445, 448 (7th Cir. 2004).

Under Indiana law, the elements of a binding contract include an offer, acceptance of the offer, consideration, and a meeting of the minds between the parties. *See Bennett v. Broderick*, 858 N.E.2d 1044, 1048 (Ind. Ct. App. 2006). For an offer and an acceptance to constitute a contract, the acceptance must meet and correspond with the offer in every respect. *See I.C.C. Protective Coatings, Inc. v. A.E. Staley Mfg. Co.*, 695 N.E.2d 1030, 1034 (Ind. Ct. App. 1998). “An acceptance which varies the terms of the offer is considered a rejection and operates as a counteroffer, which may be then accepted by the original offeror.” *Id.* at 1035. Thus, a counteroffer terminates a previous offer or previous counteroffer. All parties must have a meeting of the minds on all essential terms in order for a contract to be binding. *Bennett*, 858 N.E.2d at 1048.

The facts presented by the Defendants show that a contract was never formed, because Plaintiff Asia Marshall never agreed to the terms of the settlement. No party argues that Plaintiff Asia Marshall ever evinced agreement to the Defendants directly. Thus, any agreement from Plaintiff Asia Marshall would have had to come through her attorney. However, the facts also do

not support that Plaintiff Asia Marshall granted her attorney the authority, either actual or apparent, to enter this settlement agreement on her behalf.

The Defendants, although not attorney Myers, cite attorney Myers' assertion that he had "actual authority to resolve this case for the injunctive relief/declaratory relief obtained . . . and their attorney's fees," and that "only after doing so did the clients raise objections." *See* Defs.' Resp. to Pl. Asia Marshall's "Petition for Relief," ECF No. 121, ¶ 12 (citing Supp. Report to the Court by Plaintiff's Counsel, ECF No. 114, ¶ 12). The Court, as the Defendants' request, takes note of this assertion: However, it is not dispositive on the evidence presented. Aside from the bare statement that Plaintiff's counsel had "actual authority," no evidence demonstrates Plaintiff Asia Marshall granting that authority. Indeed, the Court reads the paragraph the Defendants reference as concerning only the nature of the suit and the fee agreement, rather than a separate, affirmative grant. Thus, it appears Plaintiff Asia Marshall did not grant actual authority to attorney Myers to accept the available offer on her behalf.

The Defendants also argue that attorney Myers had apparent authority; that is, that they reasonably believed attorney Myers had the authority to settle the lawsuit on behalf of Plaintiff Asia Marshall. *See* Defs.' Resp. to Pl. Asia Marshall's "Petition for Relief," ECF No. 121, ¶ 13. To support their conclusion of apparent authority, the Defendants rely primarily on (i) attorney Myers' status as counsel of record for Plaintiff Asia Marshall and (ii) attorney Myers' request for the carve-out regarding Public Defender Lackey as evidence that attorney Myers was communicating with Plaintiff Asia Marshall.

An attorney may not settle a claim without the client's consent. *Bay v. Pulliam*, 872 N.E.2d 666, 668 (Ind. Ct. App. 2007) (citing *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299,

1301 (Ind. 1998); *Gravens v. Auto-Owners Ins. Co.*, 666 N.E.2d 964 (Ind. Ct. App. 1996)).²

When settlement occurs in an out-of-court proceeding, an Indiana attorney does not have implied or apparent authority simply because he has been retained. *Koval*, 693 N.E.2d at 1301.

Therefore, the mere fact of attorney Myers' status as Plaintiff Asia Marshall's attorney is not enough evidence to support the Defendants' claim that attorney Myers' had apparent authority.

For an attorney to have apparent authority, a third person must reasonably believe the agent possesses authority due to some act by the principal. *Scott v. Randle*, 697 N.E.2d 60, 67 (Ind. Ct. App. 1998) (citing *Pollas v. Hardware Wholesalers, Inc.*, 663 N.E.2d 1188, 1191 (Ind. Ct. App. 1996)). The existence of apparent authority must be communicated by the principal to the opposing party; communication by the agent does not create an apparent agency relationship. *Koval*, 693 N.E.2d at 1304. Other than the mere fact of attorney Myers' retained status, the only support the Defendants cite for their conclusion of apparent authority are communications made by attorney Myers. But under Indiana law, these statements by attorney Myers are not enough to establish that he had the apparent authority to settle for Plaintiff Asia Marshall.

In fact, the Defendants had plenty of notice that attorney Myers did not have such authority. The Defendants describe the multiple rounds of edits to the settlement agreement, particularly to the key term of release of all claims, and the several times that attorney Myers expressed the difficulty he believed he would have in getting Plaintiff Asia Marshall to sign the document. Such difficulty should have alerted the Defendants to the problem with their

² The Indiana Court of Appeals has held that an agreement into which an attorney enters without his client's consent is enforceable against that client, *see Red Arrow Ventures, Ltd. v. Miller*, 692 N.E.2d 939 (Ind. Ct. App. 1998), but not without consent or apparent or actual authority. To the extent *Red Arrow* could be interpreted otherwise, such a holding would have been overruled by *Koval*, which held explicitly that "the sole act of retaining an attorney does not give the attorney the implied or the apparent authority to settle or compromise a claim in an out of court proceeding." *Koval*, 693 N.E.2d at 1301; *accord Scott v. Randle*, 697 N.E.2d 60, 68–69 (Ind. Ct. App. 1998).

conclusion that attorney Myers had apparent authority to settle on behalf of Asia Marshall. *See Oak Street Mortg., LLC v. Sheneman*, Case No. 3:06-CV-491, 2010 WL 3070459, at *3 (N.D. Ind. Aug. 3, 2010).

CONCLUSION

Therefore, for the foregoing reasons, the Defendants' Motion to Enforce Settlement Agreement [ECF No. 104] is DENIED. Plaintiff Asia Marshall's Petition for Relief [ECF No. 116] is GRANTED IN PART and DENIED IN PART; to the extent it asks the Court to decline to enforce the settlement agreement, it is GRANTED; all other relief is DENIED.

Finally, the Defendants' Motion to Dismiss the Plaintiffs' Third Amended Complaint [ECF No. 82] was terminated only because the parties reported they had reached a settlement. Therefore, the Defendants are granted until August 26, 2019, to re-file their Motion to Dismiss.

SO ORDERED on July 25, 2019.

s/ Theresa L. Springmann
CHIEF JUDGE THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT