

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

UNITED HEALTH ALLIANCE, LLC,	)	
a Delaware limited liability company,	)	
	)	
Plaintiff/	)	C.A. No. 7710-VCP
Counterclaim Defendant,	)	
	)	
v.	)	
	)	
UNITED MEDICAL, LLC,	)	
a Delaware limited liability company,	)	
	)	
Defendant/	)	
Counterclaim Plaintiff.	)	

MEMORANDUM OPINION

Submitted: February 1, 2013

Decided: May 6, 2013

Jeffrey M. Weiner, Esq., LAW OFFICES OF JEFFREY M. WEINER, Wilmington, Delaware; James S. Green, Sr., Esq., SEITZ, VAN OGTROP & GREEN, P.A., Wilmington, Delaware; *Attorneys for Plaintiff/Counterclaim Defendant United Health Alliance, LLC.*

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PARSONS, Vice Chancellor.

The parties in this action mediated their dispute and appeared to reach an oral settlement agreement. Following mediation, however, and during their attempts to formalize their agreement in a written document, the parties disputed the breadth of the release they previously agreed to orally. The defendant emailed the mediator to inquire whether he agreed with the plaintiff's or the defendant's interpretation of the breadth of the release. The mediator responded that he agreed with the defendant. The defendant then filed a motion to enforce the settlement agreement and attached the mediator's email as an exhibit. The plaintiff has moved to strike the mediator's email from the record.

Because the mediator's email constitutes hearsay evidence and the mediator is unavailable as a witness, I grant the plaintiff's motion to strike.

I. BACKGROUND

A. The Parties

Plaintiff, United Health Alliance, LLC ("UHA"), is a Delaware limited liability company that provides administrative, management, and billing services for the medical services industry. Defendant, United Medical, LLC ("UM"), is a Delaware limited liability company and is an authorized distributor of PowerWorks Practice Management, a software application in the healthcare services industry.

B. Facts

1. The mediation

The facts relevant to Plaintiff's motion to strike are uncontested. On June 20, 2012, UHA filed a complaint in this Court. In October 2012, the parties agreed to voluntary mediation and retained Vincent J. Poppiti, Esq., to mediate the claims (the

“Mediator”). During mediation on October 25, the parties appeared to reach an oral agreement to settle the dispute. In the days following the mediation, the parties attempted, through email communications, to reduce their oral agreement to a written settlement agreement. During these communications, however, a disagreement arose concerning the terms of the settlement. In particular, the parties disagreed over the breadth of the claims that the settlement extinguished. UM contends the settlement agreement released all claims, whether known or unknown, between UHA and UM, whereas UHA asserts the settlement released only the nonmonetary claims set forth in UHA’s complaint.

After the parties exchanged several emails regarding the breadth of the agreed upon release, UM’s counsel forwarded the email chain ex parte to the Mediator and inquired as to the Mediator’s recollection. In an email responding to UM counsel’s communication that was copied to counsel for both parties, the Mediator stated that his recollection was “completely consistent” with UM’s (the “Email”).¹

2. The motion to enforce

Equipped with the Email supporting its position, UM returned to this Court and moved to enforce the settlement agreement on December 7, 2012. After the parties fully briefed UM’s motion to enforce, I heard very brief oral argument on the motion on

¹ Mot. to Enforce the Settlement Agreement Ex. D, the Email.

December 19.² At argument, UHA indicated that they sought to depose the Mediator. Doing so, however, was prohibited by the parties' mediation agreement, which states:

[E]ach party agrees that neither [the Mediator] nor any principal and/or employee of Fox Rothschild LLP [(the Mediator's law firm)] will be subpoenaed as a witness, consultant, or expert in any pending or future matter, action, or proceeding relating to the subject matter of this mediation/arbitration. The parties further agree that they will not subpoena any information in [the Mediator's] possession, custody, or control relating to the mediation and arbitration of these matters, and that each will oppose any effort to have [the Mediator] or any records in [the Mediator's] possession, custody, or control subpoenaed.³

Citing this provision, the Mediator declined UHA's request to be deposed voluntarily. Two days later, UHA moved to strike the Email.

C. Parties' Contentions

UHA claims the Email should be stricken for a number of reasons. First, UHA contends that Court of Chancery Rule 174(c) prohibits the admission of mediation communications as evidence in litigation. Second, UHA asserts that there is a strong public policy in support of confidentiality in mediation communications, which requires

² At the time of the December 19 argument, Plaintiff's counsel also had filed a motion to intervene on behalf of two other entities and a motion for leave to file an amended complaint. For the reasons stated at the December 19 argument, I determined essentially to "bifurcat[e] this case and tak[e] up the motion to enforce first and hold in abeyance the motion to intervene and the motion to amend." Tr. 15–16.

³ Pl.'s Mot. to Strike Ex. A, Mediation Agreement, 2.

that the Email be stricken. Finally, UHA argues that the Email should be stricken because it is inadmissible hearsay evidence.

UM counters that Rule 174(c) is inapplicable because Rule 174 only applies where the parties were referred to mediation by the Chancellor or a Vice Chancellor, and there was no such referral in this case. UM further contends that the parties waived any right to confidentiality in the mediation process when both sides introduced evidence, including affidavits, concerning the mediation proceedings in support of their positions on the motion to enforce. In addition, UM argues that UHA cannot inject into this action mediation communications that support its position, while at the same time seeking to exclude unhelpful mediation communications based on confidentiality concerns. Notably, in its answering brief, UM did not address UHA's contention that the Email is inadmissible hearsay.

II. ANALYSIS

A. Court of Chancery Rule 174

UHA argues that Rule 174(c) prohibits the Email from being admitted as evidence. Rule 174(c) provides in relevant part:

Any communication made in or in connection with the mediation that relates to the controversy being mediated, whether made to the mediator or a party, or to any person if made at a mediation conference, is confidential. Such confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding

Rule 174, however, begins by stating:

The Chancellor or Vice Chancellor presiding in a case, with the consent of the parties, may refer any case or issue in a

case to any other judge or master sitting permanently in the Court of Chancery, who has no involvement in the case, or to a designated mediator for voluntary mediation.

The remainder of Rule 174 describes the rules and conditions that govern such mediations. By its terms, therefore, Rule 174 and its conditions, including 174(c), apply only when the mediation results from a referral by the Chancellor or a Vice Chancellor.⁴ Because UHA and UM engaged in voluntary mediation without the assistance of this Court, Rule 174 technically does not apply to this dispute. Accordingly, although Rule 174(c) reflects the policy of the Court of Chancery regarding mediations, the Rule itself does not require that the Email be excluded.

B. Public Policy Favoring Confidentiality in Mediation Proceedings

UHA next argues that policy concerns favor exclusion of the evidence. In Delaware and elsewhere, there is a strong public policy favoring confidentiality in all mediation proceedings.⁵ Indeed, in *Princeton Insurance Co. v. Vergano*, then-Vice Chancellor, now Chancellor Strine stated:

⁴ See *Wilmington Hospitality, L.L.C. v. New Castle Cty.*, 788 A.2d 536, 540–41 (Del. Ch. 2001) (“Rule 174 became fully applicable when I referred the case to mediation with the consent of the parties”); see also Ct. Ch. R. 174(a)(2) (“‘Mediator’ means (i) a judge or master sitting permanently in the Court of Chancery, or (ii) an impartial person appointed by the Court or selected by agreement of the parties to a controversy to assist them in mediation (a ‘designated mediator’).”).

⁵ See *Princeton Ins. Co. v. Vergano*, 883 A.2d 44, 63 (Del. Ch. 2005) (stating that there is a “strong public policy rationale protecting the confidentiality of statements made in mediation”).

Delaware's recognition that confidentiality is vital to the effectiveness of mediation is, of course, hardly novel or path breaking. The federal courts have long utilized mediation as one of the forms of ADR required by congressional enactment, and have invariably provided that communications made to or from a mediator are confidential.⁶

The importance of confidentiality in mediation proceedings is well-understood. Mediation is successful only when the parties work cooperatively with the mediator to reach a voluntary compromise. This process “works best when parties speak with complete candor, acknowledge weaknesses, and seek common ground, without fear that, if a settlement is not achieved, their words will be later used against them in the more traditionally adversarial litigation process.”⁷ The policy favoring confidentiality is not limited, however, to communications made at the mediation, but extends to all communications made “in or *in connection with the mediation that relates to the*

⁶ *Id.* at 62.

⁷ *Id.*; see also *Wilmington Hospitality, L.L.C.*, 788 A.2d at 541 (“Confidentiality of all communications between the parties or among them and the mediator serves the important public policy of promoting a broad discussion of potential resolutions to the matters being mediated. Without the expectation of confidentiality, parties would hesitate to propose compromise solutions out of concern that they would later be prejudiced by their disclosure.”); Uniform Mediation Act Executive Summary, Uniform Law Commission, <http://www.uniformlaws.org/ActSummary.aspx?title=Mediation%20Act> (last visited Apr. 25, 2013) (“The [Uniform Mediation Act’s (“UMA”)] prime concern is keeping mediation communications confidential. Parties engaged in mediation, as well as non-party participants, must be able to speak with full candor for mediation to be successful and for a settlement to be voluntary. For this reason, the central rule of the UMA is that mediation communication is confidential, and if privileged, is not subject to discovery or admission into evidence in a formal proceeding.”).

controversy,”⁸ including statements made by the mediator. Indeed, “[i]t is a challenge to posit a more poisonous means to weaken the promise of confidentiality our public policy regards as critical to the effectiveness of mediation than authorizing the use of a mediator as an opinion witness against a mediating party.”⁹ Thus, in Delaware, there is a general policy that prohibits the introduction into evidence of communications made in connection with mediation.

Even where Delaware law prohibits the introduction of mediation communications into litigation, however, the parties to mediation can waive such confidentiality requirements if they so choose.¹⁰ Similarly, the Uniform Mediation Act (“UMA”), wherein a primary concern is confidentiality in the mediation process, allows the parties to waive confidentiality.¹¹ Section 5(b) of the UMA, for example, provides: “A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a [confidentiality]

⁸ Ct. Ch. R. 174(c) (emphasis added). While not expressly applicable in this case, Rule 174(c) reflects Delaware’s general public policy in favor of confidentiality in mediation proceedings. See *Princeton*, 883 A.2d at 63–64 (using Rule 174(c) to support this proposition).

⁹ *Princeton*, 883 A.2d at 66.

¹⁰ Ct. Ch. R. 174(c)(1) (stating that confidentiality does not apply “[w]here all parties to the mediation agree in writing to waive confidentiality”); Super. Ct. Civ. R. 136(b)(1) (same).

¹¹ UMA § 5. The UMA has been adopted by ten states and Washington, D.C., and has been proposed in three more, including New York. Legislative Fact Sheet – Mediation Act, Uniform Law Commission, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Mediation%20Act> (last visited May 5, 2013).

privilege under Section 4” This makes good sense. A party should not be able to waive confidentiality for certain communications that favor it, but assert confidentiality to preclude the use of communications that support its opponent’s argument. In this case, UM argues that UHA waived confidentiality when it introduced affidavits describing several mediation communications. UM further contends that UHA cannot now assert confidentiality for communications that undermine its position when it already has introduced mediation communications that purportedly support its position.

In Paragraph 8 of its Brief in Opposition to UM’s Motion to Enforce, UHA devoted more than three pages to describing the precise sequence of events that occurred at the mediation. UHA also included the affidavits of three people who attested to its version of the relevant events and provided detailed descriptions of various mediation communications. Disclosure of these confidential communications prejudiced UM’s argument that the mediation proceedings occurred differently.

UHA now seeks to exclude the Email, as proffered by UM, on the basis that mediation proceedings should be kept confidential. By introducing confidential and prejudicial mediation communications, however, UHA has waived the right to assert any confidentiality privilege. In fact, UHA has admitted that “the party representatives and their attorneys [in this case] have waived any confidentiality as to the mediation.”¹² Thus, I find that UHA is not entitled to invoke Delaware’s public policy favoring

¹² UHA’s Reply to UM’s Mot. to Enforce ¶ 17.

confidentiality in mediation proceedings to preclude admission of the Email as evidence, because UHA voluntarily has waived any protection afforded by that policy.

C. Hearsay

UHA's final argument is that the Email should be stricken as impermissible hearsay. The Delaware Rules of Evidence regarding hearsay closely track those at the federal level. Under Rule 802, "[h]earsay is not admissible except as provided by law or by these Rules."¹³ Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."¹⁴ Thus, in order for evidence to constitute hearsay, it must (1) be a statement¹⁵ uttered (2) by a declarant¹⁶ (3) out of court and (4) offered in evidence to prove the truth of the matter asserted.

The Email meets these criteria and, therefore, is hearsay. The Email is a statement made by a declarant, the Mediator. Furthermore, the statement was made out of court, and the matter asserted in the Email is that UM's version of the story is correct. UM offers the Email precisely to prove this proposition. Thus, the Email is offered to prove the truth of the matter asserted.

¹³ D.R.E. 802.

¹⁴ D.R.E. 801(c).

¹⁵ A statement is "an oral or written assertion." D.R.E. 801(a).

¹⁶ A declarant is "a person who makes a statement." D.R.E. 801(b).

Because the evidence is hearsay, it is not admissible unless one of the hearsay exceptions applies.¹⁷ Having carefully reviewed the hearsay exceptions, I conclude that none apply in this case.¹⁸ Moreover, the Mediator has invoked a provision of the parties' mediation agreement that precludes either party from subpoenaing him or "any principal and/or employee . . . as a witness . . . in any pending or future . . . proceeding relating to the subject matter of this mediation/arbitration." He also refused to be deposed or to testify in connection with this dispute. Thus, if I were to allow the Email to be introduced as evidence, UHA would be unable to cross-examine the Mediator regarding it. Such circumstances are precisely those against which the hearsay rule is designed to protect.¹⁹

Therefore, I hold that the Email is hearsay evidence to which no exception applies. Accordingly, the Email is inadmissible and must be stricken.

III. CONCLUSION

For the foregoing reasons, I grant UHA's motion to strike the Email from the record. The next step in this litigation is to consider UM's motion to enforce the settlement agreement. The parties disagree as to whether there should be an evidentiary

¹⁷ *Morris v. State*, 795 A.2d 653, 663 (Del. 2002) ("The statements are therefore inadmissible unless they fall within a recognized exception to the hearsay rule.").

¹⁸ UM did not argue in its brief that the Email fits within any recognized exception to the hearsay rule.

¹⁹ *Anderson v. U.S.*, 417 U.S. 211, 220 (1974) ("The primary justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence.").

hearing on that motion or whether the matter may be submitted on a paper record. This ruling conceivably could cause one or both parties to change their position in that regard. Accordingly, I hereby direct the parties to confer and advise the Court in writing by Friday, May 10, 2013, whether they wish to have an evidentiary hearing on the motion to enforce or to submit that motion on a paper record. If the parties both prefer an evidentiary hearing, they should contact my chambers to schedule the hearing.

IT IS SO ORDERED.