No. 21-CV-0639

DISTRICT OF COLUMBIA
COURT OF APPEALS

THOMAS HART,

Plaintiff-Appellant,

v.

KAVOOS RAD, ET AL.,

Defendant-Appellees.

On Appeal from the Superior Court
of the District of Columbia – Civil Division

Case No. 2020 CA 002492 B
(The Hon. Fern Flanagan Saddler)

BRIEF OF APPELLEES

Dated: June 10, 2022

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LIST OF PARTIES AND COUNSEL PURSUANT TO RULE 28(a)(2)(A)

Plaintiff/Counter-Defendant-Appellant:	Thomas A. Hart, Jr. ("Hart")
Counsel for Plaintiff/Counter-Defendant-Appellant:[1]	Hilary H. LoCicero, Esq. Lloyd Liu, Esq. Bennett LoCicero & Liu LLP 1707 L Street, N.W. Suite 1030 Washington, DC 20036
Defendants/Counter-Plaintiffs-Appellees:	Kavoos Rad, Kalmia Real Estate, LLC, and Capital Carpet, LLC
Counsel for Defendants/Counter-Plaintiffs-Appellees:	Steven K. White, Esq. Brandon Nagy, Esq. Stinson LLP 1775 Pennsylvania Ave., N.W. Suite 800 Washington, DC 20006

[1] Before the Superior Court, Mr. Hart was first represented by Attorney Richard J. Bianco of RJB Law. On June 25, 2021, pursuant to a Notice of Substitution of Counsel, Attorney Danny Onorato of Schertler Onorato Mead & Sears LLP was substituted as counsel for Mr. Hart. On November 5, 2021, Mr. Onorato was granted permission to withdraw as counsel in this appeal. On December 7, 2021, the Superior Court granted Attorney Onorato's Motion to Withdraw as counsel in the case below.

DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 28(a)(2)(B), Appellees Kalmia Real Estate, LLC and Capital Carpet, LLC state as follows:

There are no parent companies of Kalmia Real Estate, LLC or publicly held corporation owning 10% or more of its stock.

There are no parent companies of Capital Carpet, LLC or publicly held corporation owning 10% or more of its stock.

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JURISDICTIONAL STATEMENT

The Superior Court's August 13, 2021 Order is a final order that ordered Appellant to comply with the parties' May 5, 2021 Settlement Agreement which will resolve all claims.

STATEMENT OF THE ISSUES FOR REVIEW

1. Hart sued his business partner for $190,000 over a previous transaction and was countersued. Before his deposition was set to begin, he and his counsel negotiated the terms of a settlement agreement that was then dictated to the Court Reporter and provided that the parties would exchange "complete releases" and "dismiss all the claims and counterclaims in the litigation." Did the Superior Court correctly reject Hart's argument that the agreement was lacking a material term because it did not specifically reference the dollar amount of his claim?

2. A settlement agreement is enforceable where there is an "agreement as to all material terms" and an "intention of the parties to be bound." Where parties conduct hours of negotiations rather than starting a deposition, then jointly go before a Court Reporter to record the terms of their agreement, which includes agreeing promptly to notify the court that they settled, and cancelled the deposition, have they demonstrated an intent to be bound even though later one party no longer wants to settle on the terms to which they agreed?

STATEMENT OF THE CASE

On May 12, 2020, Thomas A. Hart, Jr. ("Hart") sued Kavoos Rad ("Rad"), Kalmia Real Estate, LLC ("KRE") and Capital Carpet, LLC ("Capital Carpet") (collectively, "Defendants" or "Appellees") in the Superior Court of the District of Columbia. Complaint ("Compl."), App'x.[2] at 1a-57a. On September 24, 2020, Defendants answered the suit and filed counterclaims against Hart. Answer and Affirmative Defenses to Complaint and Counterclaims ("Answer" and "Counterclaims"), App'x. at 58a-82a. The parties thereafter engaged in discovery.

On May 5, 2021 (the day set for Hart's deposition), the parties reached a settlement agreement and agreed to dictate the terms of the settlement into the record before the Court Reporter. May 5, 2021 Transcript, App'x. at 146a-152a.[3] Subsequently, Hart refused to abide by the parties' settlement agreement and on June 4, 2021, Appellees filed a motion to enforce the settlement agreement in the

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[2] Appendix cites refer to the Appendix filed with Appellant's Opening Brief and are cited (App'x. --) and indicate the page(s) in the Appendix where the document can be found. Citations to other filings in the record in the Superior Court are followed by a parenthetical indicating the date the document was filed or to a Superior Court case docket itself.

[3] The May 5, 2021 Transcript was not only proffered to the Superior Court by Appellees but was also submitted by Hart himself, confirming that all parties were in agreement as to the transcription's authenticity and accuracy. *See* Exhibit B to Appellees' Motion to Enforce Settlement Agreement (App'x. at 119a-125a) and Exhibit A to Hart's Response in Opposition to Motion to Enforce Settlement Agreement (App'x. at 146-152a). For the sake of consistency, Appellees reference the same appendix cites as those used by Appellant in his brief (*i.e.*, to the copy of the May 5, 2021 Transcript submitted to the Court by Hart).

Superior Court. Motion to Enforce Settlement Agreement ("Motion to Enforce") at ¶ 3, App'x. at 92a-137a. After full briefing, the Superior Court held two hearings, one on August 9, 2021, during which counsel for the parties presented oral arguments, and another on August 13, 2021. App'x. at 165a-204a; 2020 CA 002492 B docket. Hart was offered the opportunity to present evidence but he declined to provide any evidence to support his assertions of a lack of settlement agreement. August 9, 2021 Tr. at p. 190a, App'x. at 190a.

In a written Order issued on August 13, 2021, the Superior Court granted the motion to enforce and required Hart to comply forthwith with the parties' settlement agreement. Order Granting Defendants' Motion to Enforce Settlement Agreement ("Order"), App'x. at 205a-215a.

On September 10, 2021, Hart filed this appeal seeking review of the Court's August 13, 2021 Order. 2020 CA 002492 B docket. On September 23, 2021, Hart filed a Motion to Stay Enforcement of Judgment Pending Appeal but at a December 7, 2021 hearing, the Court denied that motion. *Id.*

STATEMENT OF FACTS

I. The Underlying Claims and Counterclaims.

A. The Parties.

Appellant Hart is an attorney with a long career practicing with major law firms and, more recently, engaging in a solo practice. Motion to Enforce at ¶ 3, App'x. at 93a. Since 2014, and continuing until shortly before the filing of the underlying action from which this appeal was taken, Hart served as legal counsel for Rad personally, for Rad's business Capital Carpet, and for KRE — including serving as attorney of record in litigation before the Superior Court. *Id.* at ¶ 3, n. 1, App'x. at 93a.

Hart is also a real estate investor. And he inserted himself financially into certain business ventures of his clients, including Rad and his businesses, despite the conflict of interest.[4] *See, e.g., id.* at ¶ 3, n. 2, App'x. at 93a. Rad, for whom English is a second language, allowed Hart to handle the financial details and documents in these business ventures due to Hart's presumed expertise and Rad's trust in him as an attorney. Counterclaims at ¶¶ 7-9, App'x. at 68a. The case from which Hart has taken this appeal involves claims and counterclaims relating to two real estate ventures where Hart served as both investor and attorney. Motion to Enforce at ¶ 3, App'x. at 93a.

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[4] *See* D.C. R. Prof. Conduct 1.8.

B. The Two 50/50 LLC Business Ventures: KRE and Cap Hill.

1. KRE and the Loan Secured by the Loan's Cash Proceeds.

The first real estate venture at issue involved KRE, an appellee in this matter. In March 2018, Rad had an opportunity to purchase property located at 1633 Kalmia Road, NW, Washington, DC (the "Kalmia Road Property") for $700,000, with the seller providing a $200,000 take-back loan. Motion to Enforce, ¶ 4, App'x. at 93a; Counterclaims at ¶ 13, App'x. at 69a; Answer to Counterclaims at ¶ 13, App'x. at 84a. Shortly before closing, Hart proposed that he become included as a 50/50 partner with Rad on the real estate venture and be added as a member of KRE. Motion to Enforce, ¶ 4, App'x. at 93a-94a; Counterclaims at ¶ 15, App'x. 70a; Answer to Counterclaims at ¶ 15, App'x. at 84a. Hart prepared an LLC Operating Agreement that called for Rad and Hart each to contribute capital of $250,000. Counterclaims at ¶ 17, App'x. at 70a; Answer to Counterclaims at ¶ 17, App'x. at 84a. Thus, with a $200,000 loan from the seller and $500,000 total cash from KRE's members' capital, KRE was in a position to purchase the property without bank financing. Counterclaims at ¶ 13, App'x. at 69a; Answer to Counterclaims at ¶ 13, App'x. at 84a.

Rad and Hart each deposited $35,000 into the closing escrow for a $70,000 down payment. Counterclaims at ¶ 18, App'x. 70a; Answer to Counterclaims at ¶ 18, App'x. 84a. Then Rad deposited his $215,000 balance into the company

account which Hart opened at Industrial Bank where Hart had other banking relationships. Counterclaims at ¶¶ 19-20, App'x. 70-71a. But Hart was short $25,000 on his contribution and deposited only $190,000. *Id.* at ¶ 21, App'x. at 71a.

To cover his capital contribution shortfall and certain closing costs, Hart — without Rad's prior knowledge — arranged for a peculiar loan from Industrial Bank that increased funds available to KRE by $45,000. Answer at ¶ 10, App'x. at 59a-60a; Counterclaims at ¶¶ 23-28, App'x. at 71a-72a. But the loan was structured as a $450,000 loan that required the company to leave $405,000 of that amount in the company's checking account as cash collateral for the same loan.[5] *Id.* Consequently, following closing on the KRE property in May 2018, KRE's checking account still showed a balance of slightly more than $405,000 after paying for the property, but that $405,000 was not an asset available for use, as it was frozen by Industrial Bank as collateral for the loan. *Id.* And KRE was obligated to pay interest on the principal amount of $450,000 for the life of the loan, even though it had the use of only $45,000. Answer at ¶ 10, App'x. 59a-60a; Counterclaims at ¶ 28, App'x. at 72a.

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[5] Apparently, Hart had previously taken out at least one other similar cash secured loan with Industrial Bank. That loan was discovered by Hart's filing of the Complaint, wherein Hart attached to the Complaint as Exhibit E a bank statement not for the KRE Loan, or any loan related to KRE business, but for a personal loan that Hart had previously taken out individually and that is secured by a savings account unrelated to KRE. *See* Answer at ¶ 10, App'x. at 59a-60a.

Within a few months of acquiring the Kalmia Road Property, Hart wanted to withdraw from that venture (KRE) and was seeking to have Rad help him buy a different property. Counterclaims at ¶¶ 30, 42, App'x. at 73a, 75a. To effectuate his withdrawal from KRE, Hart drafted an Asset Purchase Agreement ("APA"), Compl. at Ex. D, App'x. 36a-45a, to sell "*all* of [his] assets, rights and interests in the LLC" to Rad for $250,000. Compl. at Ex. D, App'x. 37a; Counterclaims at ¶ 34, App'x. at 73a. In August 2018, the parties executed the APA, Hart transferred his interest in KRE to Rad, and Rad paid Hart the agreed $250,000 (which Rad then believed to have been Hart's capital contribution). *Id.* But the debt remained an obligation of KRE and Rad until, in early May 2021, it matured and was paid off with Rad paying the outstanding $45,000 and the bank applying the $405,000 collateral from KRE's account, as it was entitled to do. Reply to Plaintiff's Response in Opposition to Defendants' Motion to Enforce Settlement Agreement at 4-5 ("Reply to Opp. to Motion to Enforce"), Ex. A thereto (showing a May 3, 2021 loan maturity date and describing the collateral for the loan as the $405,000 in the KRE checking account), App'x. at 158a-159a, 163a-164a.

2. Cap Hill and Hart's Assertion of Sole Management Authority.

Also in August 2018, as Hart was withdrawing his investment in KRE, he was recruiting Rad to help him buy, renovate, and resell, a property located at 214 2nd Street, SE, Washington, DC (the "Cap Hill Property"). Counterclaims at ¶ 42,

App'x at 75a. To acquire the Cap Hill Property, Hart organized Cap Hill Properties, LLC ("Cap Hill") and prepared an operating agreement making Rad and Hart the only members, each with a 50% ownership and management control. *Id.* at ¶ 43, App'x. at 75a. But after securing Rad's $315,000 contribution to buy the Cap Hill Property, Hart advised Rad to sign a document purporting to cede virtually all management control for the entity to Hart. *Id.* at ¶ 46, App'x. at 76a.

Rad continued to make further financial contributions to the Cap Hill venture with the expectation that the partners would sell the property for a significant profit. *Id.* at ¶¶ 48-49, App'x. at 76a. But in early 2020, Hart began to pressure Rad to sell his interest in Cap Hill to Hart at a price that Rad considered inadequate and the parties became deadlocked over approaches to renovating the property. *Id.* at ¶¶ 49-51, App'x. at 76a-77a; Motion to Enforce at ¶¶ 7, 8, App'x. at 95a.

C. Hart Sues for $190,000 After Selling his Interest in KRE.

On May 12, 2020, Hart filed a lawsuit against his former clients — Rad, Capital Carpet, and KRE — alleging they owed him $190,000 stemming from Hart's August 2018 exit from KRE. *E.g.* Compl. at ¶¶ 14, 22, 53, prayer for relief, App'x. at 1a-8a. Hart's Complaint freely acknowledges that his withdrawal from KRE had been accomplished through the written APA which provides that, "Rad would acquire [Hart]'s membership interest in KRE for a purchase price of

$250,000." *Id.* at ¶ 19, App'x. 4a. The Complaint also acknowledges that Rad paid the purchase price and Hart delivered, in exchange, a one-page assignment of "all of his interest in the LLC" to Rad for $250,000. *Id.* at ¶¶ 19-20, App'x. 4a; Exhibit A to Ex. D to Compl.: "Authorized Assignment of Limited Liability Company Interest", App'x. 44a.

Nevertheless, the Complaint alleges that the "APA did not address" a sum of $190,000 held, along with other funds, in KRE's bank checking account at Industrial Bank. Compl. at ¶ 22, App'x. at 4a. The Complaint alleges that, "[s]ince the APA did not address the Cash Collateral," the parties made a verbal agreement that would somehow entitle Hart to receive another $190,000. *Id.* As noted above, those funds were not available for use by KRE as Industrial Bank had a lien on them as cash collateral for its loan of a similar amount. Answer at ¶ 10, App'x. at 59a-60a; Counterclaims at ¶ 25, App'x. at 72a.

D. Rad, KRE, and Capital Carpet File Counterclaims.

On September 24, 2020, Rad, KRE, and Capital Carpet timely answered the Complaint, denying the existence of any verbal agreement or any other basis entitling Hart to an extra $190,000 and asserted counterclaims against Hart for breach of fiduciary duty, professional negligence, breach of contract, and unjust enrichment. Answer and Counterclaims, App'x. at 58a-82a. The counterclaims alleged overreaching by Hart as an attorney engaged in business transactions with

clients and damages caused through his failure to pay all of his capital, his dealings with Industrial Bank on behalf of KRE which were contrary to the interests of Rad and KRE, as well his exploitation of Rad in the second real estate venture (Cap Hill). *E.g.* Counterclaims at ¶¶ 42-51, App'x. at 75a-77a.

II. The Settlement Agreement.

A. The Parties Reach and Record a Settlement Agreement Resolving All Claims and Counterclaims on May 5, 2021.

On the morning of May 5, 2021, Hart and his counsel, Attorney Bianco, appeared for Hart's deposition at the offices of Rad's counsel. The parties had met two days earlier for Hart's originally scheduled May 3 deposition, at which time Hart sought to avoid his deposition by requesting to engage in settlement negotiations. May 3, 2021 transcript, App'x. at 110a-115a. Discussions continued throughout the morning but no agreement had been reached by lunchtime. *Id.* The parties therefore agreed to break for lunch and start Hart's deposition at 1:15 pm. But Hart did not return; instead Hart's counsel (at that time Mr. Bianco) returned alone and notified Appellees' counsel that Hart was refusing to return for his May 3 deposition. *Id.* Following discussion among counsel, Hart's counsel represented that Hart would return two days later, on May 5, 2021, to have his deposition taken. *Id.*

When Hart returned on May 5, he again sought to avoid being deposed, proposing instead to resume settlement negotiations. Throughout the morning, with

counsel for Hart spending a significant amount of time speaking with his client in private during the back-and-forth negotiations, the parties engaged in negotiations. May 5, 2021 Transcript, App'x. at 146a-152a. Following several hours of negotiations, the parties finally agreed on specific terms for settlement. *Id.* Having reached an agreement to settle the parties' dispute, Hart's deposition was no longer necessary. After counsel went over all the material settlement terms together, they agreed to place the parties' agreement on the record and, in the presence of Hart, went on the record before the Court Reporter that had been retained for the deposition to make a written record of their settlement, explaining:

> We're here for the deposition of Mr. Hart, but the parties have been working very diligently over the last few hours to try to come to some terms *to settle all this litigation and the disputes between the parties here*. And *we have reached an agreement*, and we would like to put that on the record and *make sure everybody is in agreement* with that so we have a record of that. There will be some terms here to be implemented over a reasonably short period of time. So here are the terms that I'm going to discuss with opposing counsel, and I'll go through those. And then opposing counsel can comment as appropriate.

May 5, 2021 Tr. at 3:2-15, App'x. at 148a (emphasis added).

As stated on the record on May 5, terms of the settlement are straight-forward including the amount and timing of payments, withdrawal of Rad from the remaining LLC with Hart (*i.e.*, Cap Hill), releases of liability, and dismissal of all claims and counterclaims among the parties. Specifically:

- The parties agreed to conduct a closing of the settlement on June 14, 2021 (the "Closing").
- "Hart is agreeing to pay the sum of $569,000 by June 14, 2021" (the "Payment"), with the Payment to "have been deposited into the trust account of his lawyer, Richard Bianco, and disbursed from that account to my client, Kavoos Rad, on June 14th," *i.e.* at Closing
- Upon the transfer of the Payment from Hart's counsel's trust account to Rad, the parties will "execut[e] documents then to complete a transfer of Mr. Rad's . . . 50 percent interest in the Cap Hill property" to Hart, and "Hart will be assuming all obligations of the Cap Hill entity . . . going forward from that point [a]nd Mr. Rad will be out of the entity and any further obligations"
- Rad will pay into Hart's counsel's trust account $4,300 which represents Rad's portion of the outstanding mortgage payments and taxes on the Cap Hill Property
- All the parties and Cap Hill will "exchange mutual and complete releases"
- The parties agreed to "dismiss all the claims and counterclaims in this litigation" within seven days after Closing

- The parties also agreed that, within seven days of the agreement that was being recorded that day, to "file a consent motion with the court informing the court of this settlement and asking that the court proceedings be held in abeyance."

Id. at 3:16-5:12, App'x. at 148a-150a.

After recounting the terms of the settlement agreement, counsel for Appellees asked if counsel for Hart had "anything to add," to which counsel for Hart responded: "No, I don't." *Id.* at 5:13-15, App'x. at 150a. Counsel for Appellees concluded by stating:

> I think that's it. *So that's our agreement*. We will, as the lawyers, proceed with completing the documentation described, and [ ] then parties will move toward completing their obligations as well.

Id. at 6:13-17, App'x. at 151a (emphasis added). And as the parties reached an agreement to settle the case, they cancelled Hart's deposition as well as Rad's deposition which had been noticed by Hart for later that week.

B. Hart Breaches the Settlement Agreement.

As noted, a specific term of the settlement agreement was that the parties would report the settlement to the Court, on or before May 12, 2021. As stated on the record on May 5: "Within seven days of today, *the agreement being reached today*, the parties will file a consent motion with the court informing the court of this settlement and asking that the court proceedings be held in abeyance." *Id.* at

5:8-12, App'x. at 150a (emphasis added). Appellees' counsel prepared a draft motion and sent it to Hart's counsel for review and followed up with Hart's counsel, including on May 11, 14, and 18, 2021. Hart's counsel replied that "[i]t looks fine to me and under normal circumstances I would just give the go ahead," but that he had asked his client to approve the motion and also stated, "I cannot share any additional information at this time per the Client." May 10 to June 2, 2021 email chain among counsel, App'x. at 127a-135a; p. 6 (May 14, 2021 email) App'x. at 132a.

On May 19, 2021, in a telephone conversation, Hart's counsel conveyed that Hart was contending that the settlement was "incomplete" because it did not address Hart's claim for $190,000. Appellees' counsel asked that Hart's counsel provide his client's position in writing. *Id.* at 1-2, App'x. at 127a-128a. On June 2, 2021, Hart's counsel responded: "Mr. Hart's position is that there is not, at this point, an enforceable settlement agreement" and that "[h]e is interested in settling, but not on the terms set forth in the transcript." *Id.* at 1, App'x. at 127a.

On the same day that Hart's attorney (Attorney Bianco) asserted that Hart was interested in settling this case — just not on the already agreed-upon terms memorialized in the May 5th transcript — Hart, acting through a different attorney (Attorney Carpenter-Lourie) and relying on the management authority he had previously advised Rad to cede to him, filed, on behalf of Cap Hill, a new lawsuit

against his former client Capital Carpet. Superior Court Case No. 2021 CA 001945 B. That new lawsuit, like Hart's claim in the KRE matter, also alleges breach of an oral contract. And while also lacking in merit, the new lawsuit is also barred by the terms of the parties' transcribed settlement agreement. The settlement agreement here specifically included "mutual and complete releases" by Cap Hill of Capital Carpet, as specified in the transcript:

> The parties have also agreed that they will, of course, exchange mutual and complete releases among all the parties to this matter in the settlement documentation. *Those parties include* Mr. Rad; his entity, *Capital Carpet, LLC;* and his entity, Kalmia Real Estate, LLC; and Mr. Hart, personally, *as well as Cap[]Hill, LLC. . . . The entity is Cap Hill Properties, LLC.*

May 5, 2021 Tr. at 4:14-5:1, App'x. at 149a-150a (emphasis added). The new lawsuit is still pending.

C. The Superior Court Orders Hart to Comply with the Settlement Agreement.

With Hart refusing to abide by the parties' settlement agreement, on June 4, 2021, Appellees filed the Motion to Enforce Settlement Agreement, App'x. at 93a-137a. Hart's counsel, Mr. Bianco, then withdrew and yet another attorney (Attorney Onorato) entered his appearance to respond to the Motion to Enforce. 2020 CA 002492 B Docket. After full briefing, the Superior Court held two hearings, one on August 9, 2021, during which counsel for the parties presented oral arguments, and another on August 13, 2021. *Id.*; App'x. 165a-204a. Hart was

offered the opportunity to present evidence but he declined to provide any to support an assertion that the settlement agreement was somehow "incomplete." August 9, 2021 Tr. at p. 190a, lines 20-24, App'x. at 190a ("The Court: I can swear him in now. Should I or should I not? Mr. Onorato: Your Honor, I don't think it's necessary. I don't plan to put on any testimony from Mr. Hart at this point.").

In a written Order issued on August 13, 2021, the Superior Court granted the motion to enforce and required Hart to comply forthwith with the parties' settlement agreement. Order, App'x. at 205a-215a. The Superior Court first found that "the parties demonstrated an intent to be bound by the May 5, 2021 Agreement," having "deliberately chose to memorialize their agreement before a Court Reporter." *Id.* at 7, App'x. at 211a. The "parties stated on the record that they had 'reached an agreement,'" and consistent with that statement, further "stated that '[w]ithin seven days of today, **the agreement being reached today,** the parties will file a consent motion with the court informing the court of this settlement.'" *Id.* (emphasis in original). The Superior Court concluded that "[t]his language clearly evidences an intent to be bound as of the date of the May 5, 2021 agreement, not at a later date when the settlement was to be finalized," and "[t]he fact that the parties agreed to move forward with completing the terms of the settlement weighs heavily in favor of finding that all parties intended to be bound by this agreement." *Id.* Indeed, the parties did not proceed with Hart's scheduled

deposition, further evidencing their mutual understanding of having reached a settlement.

The Superior Court also found that "the May 5, 2021 Agreement contained all material terms." *Id.* "Specifically, the respective actions and obligations of the parties were explicitly detailed, such that each party was clear how each party was to perform." *Id.* As to Hart's argument of a term "allegedly missing from the agreement" regarding "the determination of Plaintiff Thomas Hart's $190,000 claim," the Court found "that Plaintiff's claim was encompassed in the language of the Transcript, '**[t]hen the parties agree to dismiss <u>all the claims and counterclaims</u> in this litigation**,'" explaining:

> This Court finds that this language clearly demonstrates that the parties intended for the terms described in the agreement, namely, the payment of funds by Mr. Hart, and the transfer of interest by Mr. Rad, to resolve all outstanding claims, including Mr. Hart's claim for $190,000. This is bolstered by the fact that neither Plaintiff nor Plaintiff's counsel made any comment regarding Plaintiff's claim for $190,000 during the recitation of the agreement before the Court Reporter.

Id. at 7-8, App'x. 211a-212a (emphasis in original). The Court specifically found that "the statement that '**the parties agree to dismiss <u>all the claims and counterclaims</u> in this litigation**,' is clear and unambiguous." *Id.* at 8-9, App'x. at 212a-213a (emphasis in original). The Court also found that as to the "other terms of the Agreement," they were "specifically definite," and that there was "mutuality

of obligation" and "no allegations of fraud, duress, or mutual mistake." *Id.* at 9, App'x. at 213a.

Additionally, the Court found that the May 5, 2021 Agreement was enforceable, "even if the parties intended to further memorialize the agreement in a subsequent writing." *Id.* As the Court explained:

> [E]ven if the Parties' May 5, 2021 Agreement is considered to be preliminary, in that it calls for the completion of additional documentation, it is a fully binding Type I preliminary agreement. Although the parties here indicated that subsequent documentation would be completed by the lawyers, and that the parties would be completing a 'final agreement,' the parties clearly expressed their intent to be bound by the May 5, 2021 Agreement. Further, there was no indication in the May 5, 2021 agreement that there were any material terms remaining to be resolved, nor any indication that the parties anticipated any further negotiations.

Id. at 10, App'x. at 214a.

The Court therefore ordered Hart to comply forthwith with Settlement Agreement. *Id.* at 11, App'x. at 215a. Despite the Court's Order, and the Court's further December 7, 2021 Order denying Hart's Motion to Stay Judgment Pending Appeal, Hart continues to refuse to comply with the May 5, 2021 Settlement Agreement.

By Order issued on November 5, 2021, Attorney Onorato was granted permission to withdraw as counsel in this appeal. On December 7, 2021, the Superior Court granted Attorney Onorato's Motion to Withdraw as counsel. 2020 CA 002492 B docket.

SUMMARY OF ARGUMENT

The Superior Court properly exercised its authority to order enforcement of a straightforward and unambiguous settlement agreement in which the parties agreed "*to dismiss all the claims and counterclaims in this litigation*" when the Appellant, himself an attorney, and who was also represented by counsel, later refused to go forward with the agreement.

The Superior Court correctly rejected Appellant's argument that the agreement was "incomplete" and that there was no "meeting of the minds" as he did not think that the agreement to dismiss "*all* the claims" covered *his* claim. As the agreement had been dictated to a Court Reporter and transcribed, there is no dispute about what was said. And the words themselves do not permit any ambiguity as to whether Appellant's $190,000 claim was to be dismissed as part of the settlement. The Appellant offered no testimony as to any confusion about the meaning of the language in the agreement.

The context of the agreement also reveals that agreement to specific terms of the settlement agreement were reached only after hours of continuous negotiation over the course of two days while Appellant sought to avoid the start of his deposition by continuing negotiations to settle the case and that, upon reaching and recording the agreement, the parties agreed to cancel Appellant's deposition.

On appeal, Appellant adds nothing to support his naked assertion that he did not believe "all the claims" covered his claim and, instead, offers a list of other purported "collateral" issues which he claims were not worked out. None of these issues were raised as arguments below, including the new statute of frauds argument which, in any event, is not an impediment to the settlement as there is no transfer of real estate. And none of these issues are actually material to the agreement.

STANDARD OF REVIEW

Settlement agreements are construed under "general principals of contract law." *Dyer v. Bilaal*, 983 A.2d 349, 354 (D.C. 2009) (quoting *Goozh v. Capitol Souvenir Co.*, 462 A.2d 1140, 1142 (D.C. 1983)). Enforcement of a valid and binding settlement agreement is done "just like any other contract." *Dyer*, 983 A.2d at 354 (citing *Rommel v. West Am. Ins. Co.*, 158 A.2d 683, 68-85 (D.C. 1960)). In reviewing whether written documents or oral statements constitute a valid settlement agreement, the trial court's legal determination that an enforceable contract existed is reviewed *de novo*, "but the trial court's subsidiary factual findings are treated as 'presumptively correct unless they are clearly erroneous or unsupported by the record.'" *See Duffy v. Duffy*, 881 A.2d 630, 634 (D.C. 2005) (quoting *Lawlor v. District of Columbia*, 758 A.2d 964, 974 (D.C. 1983)); *see also* D.C. Code § 17-305(a). Specifically, "the determination of what the parties consider to be the material terms of their agreement is a question of fact" and the Court "may reject that determination and any of the trial court's other findings of fact only if they are clearly and manifestly wrong or without evidence to support them." *United House of Prayer for All People v. Therrien Waddell, Inc.*, 112 A.3d 330, 338 (D.C. 2015) (citing *Strauss v. NewMarket Global Consulting Grp.*, LLC, 5 A.3d 1027, 1033 (D.C. 2010)).

ARGUMENT

I. The Settlement Agreement is an Enforceable Contract with All Material Terms Unambiguously Expressed in a Written Record.

"It is settled law in the District of Columbia -- and everywhere else, for that matter -- that trial courts have the power to enforce settlement agreements in cases pending before them." *Confederate Memorial Ass'n, Inc. v. United Daughters of Confederacy*, 629 A.2d 37, 39 (D.C. 1993) (citing cases). "Settlement agreements are construed under 'general principles of contract law.'" *Dyer,* 983 A.2d at 354 (quoting *Goozh*, 462 A.2d at 1142). Thus, a settlement agreement is enforceable where, as here, there is an "agreement to all material terms" and an "intention of the parties to be bound." *See, e.g., Eastbanc, Inc. v. Georgetown Park Assocs. II, L.P.*, 940 A.2d 996, 1002 (D.C. 2008); *Georgetown Ent. Corp. v. District of Columbia*, 496 A.2d 587, 590 (D.C. 1985); *Blackstone v. Brink,* 63 F. Supp. 3d 68, 77 (D.D.C. 2014).

Hart's Brief makes repeated allusions to there being an onerous burden to prove an "oral" contract where the parties contemplate a subsequent written contract unless the written document is to be a mere memorial of the agreement already reached.[6] It was not an "oral" contract being submitted for enforcement

[6] Cases making reference to an "onerous" burden involved contracts for detailed commercial relationships as opposed to simple settlement agreements. *See New Econ. Cap., LLC v. New Markets Cap. Grp.*, 881 A.2d 1087, 1094 (D.C. 2005); *Jack Baker, Inc. v. Office Space Dev. Corp.*, 664 A.2d 1236, 1238 (D.C. 1995).

and no "subsequent written contract" was needed here. The settlement agreement here was immediately reduced to writing by carefully dictating its terms to a certified court reporter. All of the subsequent documentation contemplated for drafting by the attorneys was simply to implement the terms of the settlement and was routine: a motion notifying the court of the settlement; a set of releases; a document transferring Rad's LLC interest in Cap Hill to Hart; and a stipulation of dismissal. Even the transfer of Rad's LLC interest was a routine drafting exercise. That is because the parties had already undertaken the same process when Hart transferred his interest in KRE to Rad in August 2018. That was accomplished with an Asset Purchase Agreement and a one-page assignment. As the attorneys recognized at the time, Rad's sale of his interest in Cap Hill to Hart was a simple cut and paste drafting task, since the template already existed in the form included with Hart's Complaint. *See* App'x. at 44a. The settlement agreement itself is documented in the transcript, which identified all the obligations of the parties with enforceable specificity.

Moreover, Hart did not, and does not, challenge the accuracy of the transcription or claim that the parties had verbally agreed to any terms that were not recited to the court reporter. Hart's objection rests on the theory that there was a material term, or terms, upon which no agreement was reached. Those arguments fail, as the Superior Court found, because the plain language of the transcribed

agreement and the actions of the parties that day permit neither interpretation and because Hart has presented no evidence to the contrary. And any argument now that the Superior Court issued its Order "without an evidentiary hearing" or that a Court could not rely on the May 5, 2021 transcription is meritless.

First, the Court held a hearing and Hart was specifically offered the opportunity to present evidence, but he declined to provide any evidence to support his assertions of a lack of settlement agreement. August 9, 2021 Tr. at p. 190a, lines 20-24, App'x. at 190a ("The Court: I can swear him in now. Should I or should I not? Mr. Onorato: Your Honor, I don't think it's necessary. I don't plan to put on any testimony from Mr. Hart at this point."). Second, the May 5, 2021 Transcript was not only proffered by Appellees without objection to its authenticity or accuracy, but was in fact again submitted by Hart himself, confirming that all parties were in agreement as to the transcription's authenticity and accuracy. *See* Exhibit B to Motion to Enforce, App'x. at 119a-125a and Exhibit A to Hart's Response in Opposition to Motion to Enforce, App'x. at 146-152a. Moreover, as explained to the Superior Court at the August 9, 2021 hearing, the Transcript was included not only as an exhibit to the parties' filings on the Motion to Enforce, but was also before the Court as an authenticated exhibit as it was included on both the Appellant's and Appellees' respective trial exhibit lists, which the parties submitted as part of their Joint Pretrial Statement in advance of the August 9, 2021

pretrial conference. Joint Pretrial Statement (August 2, 2021), Hart's Exhibit Summary at Ex. 5, Appellees' Exhibit Summary at Ex. 40; August 9, 2021 Tr. at 185a, lines 21-25, App'x 185a ("It's attached as an exhibit to our motion. It's also a trial exhibit, Trial Exhibit 40."); *see* Super. Ct. Civ. R. 16(g)(1) ("Exhibits, the authenticity of which is not genuinely in dispute, will be deemed authentic and the offering party will not be required to authenticate these exhibits at trial."). Thus, any challenge by Appellant at this point on that basis is therefore both meritless and waived.

Third, whereas there is no dispute about what was said between the parties (since they have an agreed-upon transcript of their settlement agreement), the reliance on that transcript (exclusively or otherwise) is of no error. On this issue, *Dyer* is instructive. In that case, the appellant complained that "the trial court should have held an evidentiary hearing," even though "the terms . . . were set forth in writing and . . . announced . . . on the record." *Dyer*, 983 A.2d at 359. But the Court explained that when "[t]here is no dispute about what was said between the parties," the Court of Appeals, like the Superior Court, "can interpret the agreement without resort to extrinsic evidence." *Id.* "Indeed, the objective law of contracts requires us to avoid considering extrinsic evidence in the absence of ambiguity." *Id.* at 359-60 (citing *1010 Potomac Assocs. v. Grocery Manufacturers of America, Inc.*, 485 A.2d 199, 205 (D.C. 1984) ("Extrinsic evidence of the

parties' subjective intent may be resorted to only if the document is ambiguous.")). Thus, the Superior Court acted well within its discretion in relying on the unambiguous May 5, 2021 Transcript to conclude that the parties reached a settlement.

A. The Settlement Agreement Includes All Material Terms.

What terms are material to an agreement is a question of fact that depends on the particular circumstances of the case. *Blackstone,* 63 F. Supp. 3d at 77. In the context of settlement agreements, normally the amount to be paid and the claimant's release of liability are considered the material terms. *E.g. Wise v. Riley,* 106 F. Supp. 2d 35, 39 (D.D.C. 2000).

The Settlement Agreement here was comprehensive, setting: a closing date; payment amounts; a transfer of Rad's LLC interest to Hart (effecting a final divorce of the business interests of Hart and Rad); complete releases of all claims among all the parties, including Cap Hill; and an agreement to dismiss all the claims and counterclaims in the litigation after closing. The settlement agreement between the parties included all material terms, in particular an agreement to dismiss the $190,000 claim by Hart that started the litigation. The Superior Court therefore correctly found that all material terms were included in the settlement agreement:

> [T]his Court finds that the May 5, 2021 Agreement contained all material terms. Specifically, the respective actions and obligations of the parties were

> explicitly detailed, such that each party was clear how each party was to perform. The only term that is allegedly missing from the agreement is the determination of Plaintiff Thomas Hart's $190,000 claim. However, this Court finds that Plaintiff's claim was encompassed in the language of the Transcript, **"[t]hen the parties agree to dismiss <u>all the claims and counterclaims</u> in this litigation**." This Court finds that this language clearly demonstrates that the parties intended for the terms described in the agreement, namely, the payment of funds by Mr. Hart, and the transfer of interest by Mr. Rad, to resolve all outstanding claims, including Mr. Hart's claim for $190,000. This is bolstered by the fact that neither Plaintiff nor Plaintiff's counsel made any comment regarding Plaintiff's claim for $190,000 during the recitation of the agreement before the Court Reporter.

Order at 7-8, App'x. at 211a-212a (emphasis in original). The Superior Court's determination of what are the material terms was a question of fact and the Superior Court's determination based on the credible evidence of the transcript may not be overturned unless manifestly wrong, which it clearly was not.

Hart had argued to the trial court that the agreement was incomplete because it did not cover his claim for $190,000. Hart never asserted that there was an ambiguity about what was said. The Superior Court rightfully rejected Hart's sole argument of "incompleteness" as inconsistent with the plain and unambiguous language the parties agreed to in the transcript stating that, **"the parties agree to dismiss <u>all the claims and counterclaims</u> in this litigation."** Order at 8, App'x. at 212a (emphasis in original). Hart's claim for $190,000 was his claim in the litigation and it was dealt with in the settlement agreement by agreeing that it would be dismissed; no additional negotiation regarding the "$190,000 claim" was required or even permitted under the agreement; it was to be dismissed.

On appeal, Hart provides no rationale for why he thinks the Superior Court was wrong to find that his $190,000 claim was covered by the agreement to dismiss all claims and counterclaims. The fact that nothing can be said to support it demonstrates that it is not a genuine objection to the agreement. Instead, Hart now argues that the agreement "fails to address numerous material terms" and offers a scattering of equally spurious issues:

- whether the comprehensive releases would include Hart releasing Rad from claims regarding the condition of the Cap Hill Property
    - Yes, the releases are "comprehensive," and a release from Cap Hill was expressly included — thereby also making the filing of the second Superior Court lawsuit all the more egregious;
- whether parties would be responsible for the other's attorneys' fees
    - No, the payments to be made are expressed in the agreement;
- who covers settlement costs for the corporate transaction related to Cap Hill
    - There are no material settlement costs to transfer an LLC interest, the transfer follows the form used in APA for KRE;
- how are tax liabilities assigned
    - Each party pays its own taxes if they have a taxable event;
- are any obligations to the noteholder triggered by the change in ownership in the LLC

- The debtor on the Cap Hill note is the LLC and, unlike the KRE note, neither Hart nor Rad are personally liable, the note is well secured by the real estate, and Hart bears responsibility for the note going forward.

The first, and conclusive, response to this "numerous material terms" argument is that, in the Superior Court, Hart raised only *one* potential issue that he claimed was a material issue not included in the agreement: his $190,000 claim. None of the new issues were raised below and are therefore waived on appeal.[7]

Nevertheless, it is easy to see that none of these questions are material to the parties' agreement. Hart makes no effort to show that any of these matters were material to the agreement. In fact, Hart claims that the parties did not address these terms in their May 5 discussions and when parties do not discuss terms during their negotiations, but only bring them up after-the-fact, those terms may be deemed immaterial. *See Dyer*, 983 A.2d at 358 (confidentiality clause not material where not previously mentioned); *Blackstone,* 63 F. Supp. 3d at 77 ("Importantly, if the parties have reached an agreement as to all *material* terms, a party's misgivings about other terms do not constitute grounds for relieving a party of his obligations

[7] "It is a well-established principle of appellate review that arguments not made at trial may not be raised for the first time on appeal." *D.C. v. Califano*, 647 A.2d 761, 765 (D.C. 1994). "Ordinarily, arguments not made in the trial court are deemed waived on appeal." *Hollins v. Fannie Mae*, 760 A.2d 563, 572 (D.C. 2000).

to comply with the agreement.") (emphasis in original) (citing *Dyer*, 983 A.2d at 358; *Williams v. WMATA*, 537 F. Supp. 2d 220, 222 (D.D.C. 2008)). If these "collateral issues" were truly material "it is curious that [Hart and his] counsel stood by silently while the material terms of the agreement were stated by his opponent on the record . . . ." *See Dyer*, 983 A.2d at 358.

Hart cites *United House of Prayer* for the proposition that an enforceable contract "must be sufficiently definite as to its material terms . . . that the promises and performance to be rendered by each party are reasonably certain[,] such that the contract provides a sufficient basis for determining whether a breach has occurred and for identifying an appropriate remedy." 112 A.3d at 338 (internal citations omitted). But of significance here, *United House of Prayer* clarifies that a contract is not required to include every term to be binding on the parties. "Where the parties have intended to conclude a bargain, uncertainty as to incidental or collateral matters is seldom fatal to the existence of the contract." *Id*. (citing Restatement (Second) of Contracts, § 33 cmt. a (1981) (stating also that "the actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon")). "It is also plain that all the terms contemplated by [an] agreement need not be fixed with complete and perfect certainty for a contract to have legal efficacy." *Id*. (internal citation and quotations omitted)).

Hart even acknowledges that the new arguments involve "collateral issues" and "may not have been the most important among the many terms under discussion." App. Br. at 17. These other concerns noted by Appellant are not material to the agreement.

> A contract's material terms (such as subject matter, price, payment terms, and duration) must be sufficiently definite so that each party can be reasonably certain about what it is promising to do or how it is to perform. Generally, parties need to express their intentions so that a court can understand them, determine whether a breach has occurred, and identify the obligations it should enforce. However, because all agreements have some degree of indefiniteness and some degree of uncertainty, the terms need not be fixed with complete and perfect certainty for a contract to [be enforceable].

Dyer, 983 A.2d at 356-57 (internal citations and quotations omitted).

Contract terms that are "not necessary for the parties to understand how they are expected to perform the contract itself are not material and do not undermine the binding nature of the agreement." *Id.* at 358. The collateral issues that Hart now raises as purported material terms are not instructive as to how to perform the contract.

Hart contends that the "brief hypotheticals" highlight the insufficiency of the parties' agreement, stating that if the parties "continued as planned and taken all the steps outlined in the deposition transcript, they easily could have found themselves in Superior Court fighting over legal fees or other aspects of the sale interest in Cap Hill[.]" App. Br. at 18. Hart's argument tacitly concedes that the

steps outlined in the transcript indeed, are the steps they planned and agreed to take. Those steps cover the material issues. The hypotheticals do not change the fact the parties reached agreement on all the material issues. And those hypotheticals have nothing to do with Hart's reason for not complying with the agreement.

The possibility of collateral issues is inherent in every agreement; this does not mean that the settlement agreement is invalid. The reality is that no agreement can prevent parties from ending up fighting in court, especially when one party breaches the agreement or acts in bad faith. The settlement agreement here included all material terms and Hart breached it. Thus, as the Superior Court found, it should be enforced.

B. The Parties Demonstrated Their Intent to be Bound by Dictating the Agreement to a Court Reporter, Cancelling the Depositions, and Agreeing to Notify the Court of the Settlement.

Hart is an experienced attorney and businessman. He makes no argument that he did not comprehend anything that was said to him or in his presence during settlement negotiations or during the dictation of the agreement before the court reporter. He was also represented by counsel at the time the settlement agreement was entered into and he makes no claim that he was ineffectively represented or that his counsel made any unauthorized action. Nor does he claim he was under any duress at the time. Order at 9, App'x at 213a (noting that Hart made "no

allegations of fraud, duress, or mutual mistake"). He voluntarily accompanied his attorney to go before a Court Reporter for the sole purpose of documenting the parties' settlement agreement in which the parties agreed to "settle all this litigation" and specifically to "dismiss all the claims and counterclaims in this litigation." May 5, 2021 Tr. at 3:5, 5:2-3, App'x. at 148a, 150a. Further they agreed to "exchange mutual and complete releases among all the parties to this matter . . . as well as . . . [t]he entity Cap Hill Properties, LLC." *Id.* at 4:14-5:1, App'x. at 149a-150a. As part of that agreement, each side was to make a specific payment to the other on a specific date; Rad agreed to transfer his interest in Cap Hill to Hart; and Hart agreed to assume all obligations of the Cap Hill entity; and Hart agreed that Rad would have no further obligations. *Id.* at 3:16-4:7, App'x. at 148a-149a. Those actions and words are a clear demonstration of intent to be bound and a meeting of the minds at that time. *See Kramer Assocs., Inc. v. Ikam, Ltd*., 888 A.2d 247, 252 (D.C. 2005) (noting that even without signing a document, "[t]he parties' acts at the time of the making of the contract are also indicative of a meeting of the minds").

Yet Hart contends there was no meeting of the minds because, he did not believe the negotiations had addressed whether Rad had the authority to allow $190,000 of the collateral on deposit in KRE's checking account to be used to repay the $450,000 loan from Industrial Bank. This argument is essentially the

same as his argument that there was a material term on which they had not agreed and which is answered by the fact that Hart unambiguously agreed to dismiss all his claims.

But it is also worth noting in this context that Hart's claim was for damages of $190,000, and not for the specific money in the KRE checking account. Hart did not have a lien on the account; Industrial Bank did. The payoff of the loan did not affect Hart's rights. Had the parties not reached a settlement agreement, Rad and Industrial Bank still would have had authority to use the collateral funds to pay off the loan and Hart would still have had his claim against Rad for $190,000 damages, notwithstanding the frivolousness of the claim.

In addition, whether Rad and KRE could pay off the loan was simply not a term of the agreement. For example, Hart could have asked for a term to be included in the agreement that Rad would not pay off the loan until some later point. But he did not request such a term — which would have likely been a deal breaker anyway as the loan had a May 3, 2021 maturity date[8]— just like many other issues that were raised by both sides but did not make it into the agreement. The final agreement was a compromise that took many hours to reach. Since the rights of Rad and Industrial Bank to use the funds for the loan payoff was not a

[8] Reply to Opp. to Motion to Enforce, Ex. A thereto, App'x. at 163a.

term of the settlement agreement, the payoff of the loan cannot be considered evidence of an absence of meeting of minds on the terms of the agreement.

Hart relies on the case *Brooks v. Rosebar,* which is entirely distinguishable from the current situation. In that case, there was a misunderstanding between the parties regarding a fundamental term of the settlement agreement, specifically which parties were released through the settlement agreement. *Brooks v. Rosebar*, 210 A.3d 747, 751-52 (D.C. 2019). The Court found that there was "insufficient evidence to establish that the parties had the requisite meeting of the minds to create a valid, enforceable settlement agreement" because they did not discuss and agree on whether the settlement would release both Mr. and Ms. Rosebar, or just Mr. Rosebar, explaining:

> The court cannot enforce a contract, including a settlement agreement, unless it can determine what the agreement is. If there is a misunderstanding between the parties that goes to the very essence of the purported contract, then there is no contract to enforce. Here, at the time the court dismissed the case, there was a dispute between the parties regarding a fundamental term of the purported settlement agreement: whether the execution of the agreement would dismiss the case against only Mr. Rosebar or against both Rosebars.

Id.

Another issue in *Brooks* centered around the parties' understanding of the agreement, due to lack of legal knowledge. The Court of Appeals noted that one of the parties, Mr. Brooks, was a *pro se* litigant, and the Superior Court should have explained the proceedings, and given him additional time to consult with an

attorney before the agreement was finalized. *Id.* at 753. But here the parties have not only been represented by counsel, Hart is himself an attorney; he cannot claim ignorance of the proceedings and applicable practices regarding settlement of Superior Court cases.

Hart also cites *Simon v. Circle Assocs., Inc.*, 753 A.2d 1006 (D.C. 2000) as being instructive on the issue, but misconstrues the lesson. In *Simon*, there was confusion as to which parties were bound by the agreement. *Id.* at 1007-13. The court found the language of the agreement was ambiguous as to whether the owner of the corporation was personally liable, or just the corporate entity. *Id.* at 1012-13. The parties to an agreement are clearly terms that are material to the interpretation and enforcement of an agreement. No such ambiguity exists here — the settlement agreement specifies the parties making payments and the parties giving releases as to individuals and entities.

Indeed, nothing in the transcript of the agreement supports the view that there remained any material issue open for further negotiation. The parties negotiated for several hours and reached a settlement agreement that was then memorialized in writing. Both parties were given time to object to the agreement or suggest additional terms, and neither did. And the parties did not proceed with the scheduled deposition. The very act of the parties mutually and voluntarily going before the Court Reporter for no other reason than to announce and record

their agreement is evidence of that intent to be bound. Indeed, as part of the agreement, the parties committed, as their next step, to notify the Court that they had reached a settlement. That Mr. Hart may now wish to renegotiate the agreement does not mean an agreement was never reached in the first place.

II. Hart's Actions are Not Consistent with Any Intention to Negotiate in Good Faith.

Hart concludes his Brief with a section arguing that the parties left the table on May 5, 2021 having reached agreement on some terms, but intending to continue negotiating in good faith. Hart suggests such an intention indicates that that parties reached only a Type II agreement, as that concept is defined in *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1130-31 (D.C. Cir. 2015).[9] He then asks the Court of Appeals to remand the case to allow the parties to complete their negotiations. Hart also contends that further negotiation is "imperative" so that the parties' negotiations can culminate in a written contract to satisfy the statute of frauds. All of Hart's remaining arguments lack merit.

[9] In a Type II agreement, parties "can bind themselves to a concededly incomplete agreement in the sense that they accept a mutual commitment to negotiate together in good faith in an effort to reach final agreement within the scope that has been settled in the preliminary agreement." *Banneker Ventures, LLC*, 798 F.3d at 1131. In contrast to the situation here, in *Banneker Ventures*, the parties indicated the intention to continue negotiating over unresolved terms by reciting the statement, "intended to summarize the principal terms of a proposal being considered by" the parties, and to express the parties' "wish to negotiate a Definitive Agreement." *Id.*

To begin, there was never any indication that the parties considered the statute of frauds to be any impediment to their settlement agreement. Indeed, that issue was not raised below in the Superior Court and, to the extent it is being raised now as a defense, it is waived. Moreover, in order to implicate the statute of frauds before this Court, Hart proceeds to mischaracterize the agreement as, "Hart would essentially purchase Rad's 50% interest in the 2nd Street property." App. Br. at 27. The property is 100% owned by Cap Hill and under the Settlement Agreement, Hart is to acquire Rad's 50% interest in that entity. "LLC members, like corporate shareholders, own an interest in an LLC; they are not the LLC nor do they own an LLC's property." *Martin v. Santorini Cap., LLC*, 236 A.3d 386, 394 (D.C. 2020).

Hart further references *Scoville St. Corp. v. Dist. TLC Tr.*, 857 A.2d 1071, 1077 (D.C. 2004). That case, however, did not involve the sale of an LLC interest. Rather, the alleged settlement agreement in *Scoville* required one party to pay $475,000 and in turn the other agreed to transfer title to the property at issue. *Id*. As the Court noted, that agreement was "an oral contract for the redemption of an interest in land." *Id*. No transfer of an interest in land is involved in the settlement agreement that the Superior Court ordered enforced here. And, in any event, the transcribed agreement does provide for a closing at which documentation effecting the transfer of Rad's LLC interest is executed. Drafting such documentation did

not require further negotiation over a material issue. The statute of frauds issue is merely another red herring.

The transcript is also devoid of any indication that the parties considered there be any need for further negotiation over a material term such that the agreement would be considered a Type II agreement. Of course, the entire notion that Hart had any intention of continuing to negotiate any issue in good faith after he left the table on May 5, 2021 is belied by his conduct.

One of the terms of the agreement was that counsel would file within seven days, *i.e.* May 12, a joint motion notifying the court of the settlement and seeking to hold in abeyance any further event deadlines in the court's scheduling order. May 5, 2021 Tr. at 5:8-12, App'x. at 150a. Without explanation Hart breached that first term by refusing to allow his counsel to authorize the filing of the joint motion or even share any information about why Hart was refusing that authorization. May 14, 2021 email, App'x. at 132a. Not until May 19 (after close of discovery and motions deadlines) was his lawyer allowed to cryptically report by phone on May 19 that Hart considered the agreement "incomplete." May 21, 2021 email recounting May 19, 2021 telephone conference, App'x. at 127a. Hart offered no proposal for further negotiation, simply a vague claim that there was no agreement. *Id.* Not until June 2 did he allow his lawyer to state in writing he did not want to

settle on the terms set forth in the transcript, effectively repudiating the agreement. June 2, 2021 email, App'x. at 127a.

Also on June 2, Hart, who had in the meantime secured a different lawyer not familiar with the prior proceeding, filed a new lawsuit for him against Capital Carpet. 2021 CA 001945 B docket; Reply to Opp. to Motion to Enforce at 4-5, App'x. at 159a. That lawsuit constituted a violation of an additional term of the agreement: the releases of Capital Carpet by Hart and Cap Hill. May 5 Tr. at 4:14-5:1, App'x. at 149a-150a. Consequently, it cannot be claimed that Hart considered there to have been agreement on some terms of the agreement and an agreement to continue negotiating on remaining terms. He promptly breached those agreed terms and repudiated the entire agreement.

The only conclusion that can be drawn from Hart's conduct is that Hart entered into an enforceable agreement on May 5, 2021. That agreement initially served his purpose of avoiding his deposition. He has no valid basis for refusing to comply with the agreement, and will not comply until he is compelled to do so.

CONCLUSION

For the reasons stated herein, the Court should affirm the decision of the trial court requiring Appellant to comply forthwith with the parties' Settlement Agreement.

Dated: June 10, 2022

Respectfully submitted,

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Steven K. White
Signature

21-CV-0639
Case Number(s)

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