No._____

In the Supreme Court of the United States

HENSLEY K. MCCALLA,

PETITIONER,

v.

LIBERTY LIFE ASSURANCE COMPANY OF BOSTON;
LINCOLN FINANCIAL GROUP,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1) Did the District Court maintain jurisdiction to enforce the settlement agreement that defendant placed before it?

2) Did the District Court have authority, under federal law, to enforce the settlement agreement against plaintiff that defendant claimed had occurred?

Parties to the Proceedings

Petitioner Hensley K. McCalla was the plaintiff in the United States District Court and the appellant in the United States Court of Appeals. Respondents (identified in the caption above) were the defendants in the District Court and the appellees in the Court of Appeals.

Statement of Related Proceedings

There are no proceedings in any court that are directly related to this case.

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Petition for a Writ of Certiorari

Hensley K. McCalla petitions this Court for a writ of certiorari to review the Orders and Decisions of the Court of Appeals and District Court entered in this action.

Opinions Below

The March 15, 2021 Summary Order of the United States Court of Appeals for the Second Circuit is unpublished and appears at Appendix 1. The February 6, 2020 Memorandum and Order of the United States District Court for the Eastern District of New York is unpublished and appears at Appendix 5.

Jurisdiction

The Summary Order of the United States Court of Appeals was entered on March 15, 2021. App. 1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved

None.

Statement of the Case

Procedural History

Plaintiff commenced this action in the New York State Supreme Court asserting a claim for disability benefits against defendant Liberty Life Assurance Company of Boston. Defendant asserted that the claims were preempted by

ERISA, 29 U.S.C. § 1001, *et seq.*, and removed the case to the district court. Plaintiff filed an amended complaint, and Defendant filed counterclaims alleging an overpayment of disability benefits. App. 1-10.

In September 2018, defense counsel wrote to the District Court that the parties "have reached an agreement in principle" and requested that the court vacate all deadlines pending submission of the dismissal paperwork. The Court granted the request and marked the case closed by electronic order of September 27, 2018: "ORDER granting 17 Motion to Continue: The application is granted to the extent that this case is closed with leave to reopen on ten (10) days notice by no later than 10/26/2018. Ordered by Judge Sandra J. Feuerstein on 9/27/2018. c/ECF (Adell, April) (Entered: 09/27/2018)." App. 1-10.

Five weeks later, on November 1, 2018, plaintiff's counsel moved to withdraw as counsel for plaintiff, citing irreconcilable differences. A115. The District Court (Judge Feuerstein) denied counsel's request on December 3, 2018. App. 1-10.

Three weeks after that, on December 21, 2018, Defendant filed a Motion for Settlement, asserting that the parties had entered into a binding settlement agreement and asking the District Court to enforce the settlement. Plaintiff's counsel, still counsel of record at the time, filed a Brief in opposition. App. 1-10.

While the Motion for Settlement was pending in the District court, Plaintiff, proceeding *pro se*, filed an identical action in New York State Supreme Court,

Nassau County, which defendant again removed to Federal Court and then requested it be consolidated with this action. The District Court (Judge Feuerstein) consolidated the second-filed case (Docket 19-cv-4180) with this action by electronic order dated July 25, 2019. App. 1-10.

Plaintiff's counsel then filed a second motion to be relieved as counsel for the plaintiff. A160. The District Court (Judge Feuerstein) granted this request on August 21, 2019, then scheduled a status conference. The conference was held on October 8, 2019. Plaintiff appeared *pro se* before Judge Feuerstein. App. 1-10. Judge Feuerstein noted that defendant had filed a motion to enforce settlement. Mr. McCalla replied, "I was not party to that agreement, your Honor. The following colloquy occurred,

THE COURT: So you don't want to settle the case. You want to go to trial.

MR. McCALLA: Yes, your Honor.

THE COURT: Even though you know you could lose everything and have to pay back the $35,000.

MR. McCALLA: Yes, your Honor.

Turning to defendant's counsel, Judge Feuerstein asked, "Let me ask you something, as long as I still have it. Would you be willing to forgive the $35,000 and pay him the four, or whatever it is, to settle the case now?

MR. BERSEN: Yes, your Honor. That was one of the terms.

THE COURT: Do you want to do that, sir?

MR. McCALLA: No, your Honor.

THE COURT: Okay.

MR. BERSEN: So that, your Honor, we are clear. The motion to enforce has been denied and the case will be reassigned, and the timeline of the summary judgment will be --

THE COURT: Everything will be subject to the new judge.

MR. BERSEN: Thank you.

THE COURT: Okay. Bye.

The case was then assigned to District Court Judge Azrack, who reviewed the Motion for Settlement papers and held a hearing on February 4, 2020. Defendant advised Judge Azrack several times that his lawyer "settled it without my consent, Your Honor." Judge Azrack nonetheless granted the defendant's motion to enforce the settlement and memorialized her decision by February 6, 2020 Memorandum and Order granting defendant's motion to enforce settlement and dismissing the litigation. Plaintiff appealed below . App. 1-10.

Statement of Facts

The motion papers filed by defendant showed that counsel for the parties had communicated back and forth about settlement. Plaintiff's counsel made an initial settlement offer to defense counsel via email on June 28, 2018. Plaintiff's counsel

made three revised settlement offers on July 20, 2018, September 13, 2018, and September 14, 2018. Plaintiff's counsel stated, " "[a]fter further discussion with our client, we have revised our settlement offer…"

Following the September 14, 2018 email offer by plaintiff's counsel, defense counsel replied, "[i]n exchange for a release of all claims and an agreement to usual and customary terms of a settlement agreement (including confidentiality and non-disparagement), my client offers to waive its counterclaim against Mr. McCalla (approx. $35K) and pay Mr. McCalla an additional $9,000." Plaintiff's counsel replied with a reduced demand amount. On September 17, 2018, plaintiff's counsel stated, "Mr. McCalla will accept $12,500.00. This is our best and final offer."

The following morning, defense counsel indicated that his client would accept the demand of $12,500.00 and waive its counterclaims in exchange for a release of all claims and agreement to usual and customary terms of a settlement agreement. Defendant's counsel indicated that he would draft a settlement agreement, asked to whom the settlement check should be made out, and requested an executed Form W-9 for plaintiff's counsel's firm. Plaintiff's counsel responded with the signed W-9 executed by his law firm and stated that the settlement check should be made payable to his firm, as attorney. One week later, defense counsel asked if he could submit a letter notifying the Court of the settlement, to which plaintiff's counsel responded, "Letter is fine."

Over the next few weeks, defense counsel asked clarifying questions about the preferred designation for the settlement check and sent a settlement agreement to plaintiff's counsel. Defense counsel followed up with plaintiff's counsel about the status of the settlement agreement on October 19, 2018. Plaintiff's counsel responded, "I expect my client in next week."

Around October 25, 2018, however, plaintiff's counsel informed defendant's counsel that the plaintiff, Mr. McCalla, was rejecting the settlement.

Defendant's counsel sent an email to plaintiff's counsel the next day (October 26) advising, "I understand that you are out of the office today. Yesterday, you indicated that Mr. McCalla intends to renege on the parties' settlement agreement. That is not acceptable. Through you, Mr. Mccalla entered into a binding settlement agreement as reflected in our correspondence dated September 18, 2018 and our joint representation to the Court on September 26, 2018. If Mr. McCalla's intention to renege does not change by close of business on November 1, 2018, my client will move the Court to enforce the parties' settlement agreement. I hope that we can avoid unnecessary motion practice." App. 1-10.

Plaintiff's counsel replied by email on October 29 as follows: "Kevin - I write in response to your email of October 26, 2018. I strongly disagree with your claim that Mr. Mccalla entered into a binding settlement agreement via the settlement negotiations engaged in by counsel. My emails to you clearly stated "FOR

SETTLEMENT PURPOSES ONLY WITHOUT PREJUDICE – NOT TO BE USED IN LITIGATION." Furthermore, the joint letter to Judge Feuerstein indicated that a settlement had been reached "in principle," which indicates that same would ultimately have to be reduced to writing to be finalized." App. 1-10.

Reasons for Granting the Petition

The Court should address whether the District Court had jurisdiction to enforce the settlement agreement that defendant presented to the District Court.

This Court has stressed that "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute...." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994); Gunn v. Minton, 568 U.S. 251, 256, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013). A motion to enforce a settlement agreement is "a claim for breach of a contract, part of the consideration of which was dismissal of an earlier federal suit," Kokkonen, 511 U.S. at 381, and therefore "requires its own basis for jurisdiction," Kokkonen, 511 U.S. 375; Hendrickson v. United States, 791 F.3d 354, 358 (2d Cir. 2015). To retain ancillary jurisdiction over enforcement of a settlement agreement, a district court's order of dismissal must (1) expressly retain jurisdiction over the settlement agreement, or (2) incorporate the terms of the settlement agreement in the order. Kokkonen, 511 U.S. at 381; see, e.g., StreetEasy, Inc. v. Chertok, 752 F.3d 298, 305 (2d Cir. 2014).

The Court of Appeals in this case concluded "that the District Court did not dismiss the first McCalla case in either September or October 2018…. Accordingly, these proceedings to enforce a settlement are not subject to the rule articulated in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994), that a court's written judgment must expressly retain jurisdiction over settlement enforcement to support its consideration of a post-dismissal motion to enforce. The District Court here therefore had jurisdiction to grant the motion to enforce the settlement that was filed in the first action in December 2018." App. 3.

The Court should clarify application of this governing law. The District Court marked the case closed by electronic order of September 27, 2018 providing, "ORDER granting 17 Motion to Continue: The application is granted to the extent that this case is closed with leave to reopen on ten (10) days notice by no later than 10/26/2018. Ordered by Judge Sandra J. Feuerstein on 9/27/2018. c/ECF (Adell, April) (Entered: 09/27/2018). A5. This Order did not (1) expressly retain jurisdiction over the settlement agreement, or (2) incorporate the terms of the settlement agreement in the order. The District Court's September 27, 2018 Order, moreover, provided for "leave to reopen on ten (10) days notice by no later than 10/26/2018." Id. The record showed that on October 25, 2018, plaintiff's counsel told defendant's counsel that Plaintiff was not accepting the settlement agreement.

A155. Mr. Sibbersen did not seek leave to reopen the case by the October 26, 2018 date set by the District Court.

Though plaintiff did file a new state court action that defendant then removed to the federal court and consolidated with this action, this occurred months after this action was already closed. The actions remained separate actions, moreover, though consolidated. The settlement that defendant claimed to have occurred arose from this particular action, not the subsequently-filed action later purported to be consolidated with it. Consolidation could not revive what was already a closed action in the District Court in this case. Consolidation did not provide the District Court with jurisdiction to address defendant's motion to enforce settlement claimed to have occurred in the already-closed civil action. As this Court has said, consolidation is a matter of convenience and economy of administration but does not merge the suits, change the rights of parties, or make a party to one of the suits a party to another consolidated one, Hall v. Hall, 138 S. Ct. 1118, 1125, 200 L. Ed. 2d 399 (2018) (holding that when one of multiple cases consolidated under Fed. R. Civ. P. 42(a) is decided, that decision confers upon the losing party the immediate right to appeal, regardless of whether any of the other consolidated cases remain pending; "From the outset, we understood consolidation not as completely merging the constituent cases into one, but instead as enabling more

efficient case management while preserving the distinct identities of the cases and the rights of the separate parties in them.")

Circuit courts have applied Kokkonen inconsistently, see, e.g., Bd. of Trustees of Hotel & Rest. Emps. Loc. 25 v. Madison Hotel, Inc., 97 F.3d 1479, 1483 (D.C. Cir. 1996) ("We find it unnecessary to reach the issues of exactly what must be stated or included in a stipulation of dismissal in order to retain federal jurisdiction under *Kokkonen* over a settlement agreement, or whether these requirements were met in this case. Instead, we find that the district court had independent federal subject matter jurisdiction over the second suit. *** The *Kokkonen* Court specifically left open the possibility of finding 'some independent basis for federal jurisdiction,' even in the absence of ancillary jurisdiction. *See 511 U.S. at ——, 114 S.Ct. at 1677*"); Zimmerman v. City of Austin, Texas, 969 F.3d 564, 569 (5th Cir. 2020) ("Ancillary enforcement jurisdiction extends to fees, but it does not extend to enforcement of a settlement that prompted a Rule 41(a) dismissal unless the parties' Rule 41 stipulation 'expressly manifest[s] their intent that dismissal be contingent upon a future act (such as the district court's issuing an order retaining jurisdiction).' … This means that *Kokkonen* does not control here.")

Before *Kokkonen*, the Second Circuit had ruled that "[a] district court has the power to enforce summarily, on motion, a settlement agreement reached in a case that was pending before it." Meetings & Expositions, Inc. v. Tandy Corp., 490 F.2d

714, 717 (2d Cir. 1974). After *Kokkonen*, the Second Circuit reaffirmed its decision in *Meetings & Expositions*, *see* BCM Dev., LLC v. Oprandy, 490 F. App'x 409, 409 (2d Cir. 2013). Other circuits similarly have held that "nothing in *Kokkonen* precludes district courts from enforcing settlements that occur during litigation." T St. Dev., LLC v. Dereje & Dereje, 586 F.3d 6, 10 (D.C. Cir. 2009); Bailey v. Potter, 478 F.3d 409, 412 (D.C. Cir. 2007) (jurisdiction to enforce settlement agreement existed because "claims were still pending before the district court"); Bryan v. Erie Cty. Off. of Child. & Youth, 752 F.3d 316, 322 (3d Cir. 2014) (same); Roman-Oliveras v. Puerto Rico Elec. Power Auth. (PREPA), 797 F.3d 83, 86 (1st Cir. 2015) (same).

The Court should clarify whether this is proper application of governing law under *Kokkonen*. As the D.C. Circuit noted in Board of Trustees of Hotel and Restaurant Employees Local 25, 97 F.3d at 1486, "although the Supreme Court denied federal jurisdiction in *Kokkonen*, it left open the possibility that litigants could sometimes retain federal jurisdiction over a settlement agreement by executing an adequately explicit stipulation of dismissal."

> [W]hen ... the [district court's] dismissal is pursuant to Rule 41(a)(1)(ii) ... we think the court is authorized to embody the settlement contract in its dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract) if the parties agree…. *511 U.S. at ——, 114 S.Ct. at 1677.* As in this case, the stipulation of dismissal in *Kokkonen* did not explicitly state that the district court would retain jurisdiction, nor did it incorporate the actual text of the settlement agreement. Unlike the stipulation in *Kokkonen*, however, which "did

> not so much as refer to the settlement agreement," *511 U.S. at ——, 114 S.Ct. at 1675*, the stipulation of dismissal here did at least refer to the settlement agreement, specifying that the stipulation was to be "in accordance with" that agreement.
>
> We leave it to another day to decide whether such a reference to a settlement agreement suffices to retain federal jurisdiction over a case in which there is no independent federal subject matter jurisdiction. In the meantime, litigants can readily avoid such ambiguities by clearly providing for retention of federal district court jurisdiction in their stipulations of dismissal, or by incorporating the full text of the settlement agreement into those stipulations. *See Kokkonen, 511 U.S. at ——, 114 S.Ct. at 1677.*
>
> [Board of Trustees of Hotel and Restaurant Employees Local 25, 97 F.3d at 1486]

The Court should address whether the District Court had authority, under federal law, to enforce the settlement agreement against plaintiff.

The Court of Appeals in this case ruled, "the settlement agreement between the parties was enforceable under both New York and federal law. Email exchanges between counsel for the parties demonstrate that McCalla's former attorney had authority to settle McCalla's claims," *citing* Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., 487 F.3d 89, 95 (2d Cir. 2007); Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc., 145 F.3d 543, 548 (2d Cir. 1998) ('[P]reliminary agreements can create binding obligations.')." App. 4.

The Court should clarify when district courts have authority to enforce settlement agreements presented to the federal court, and which law should be applied in making the determination. The Second Circuit has stated that New York

and federal law on enforcing settlements are "materially indistinguishable." Powell v. Omnicom, 497 F.3d 124, 129 (2d Cir. 2007); Ciaramella v. Reader's Dig. Ass'n, Inc., 131 F.3d 320, 322 (2d Cir. 1997). Under New York Civil Practice Law and Rules § 2104, however, "[a]n agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered." Massie v. Metro. Museum of Art, 651 F. Supp. 2d 88, 97 (S.D.N.Y. 2009); Langreich v. Gruenbaum, 775 F. Supp. 2d 630, 637 (S.D.N.Y. 2011). The district and appeal courts ruled the settlement claimed by defendant in this case is enforceable, yet the settlement plainly does not meet the requirements of N.Y. C.P.L.R. 2104. The agreement was not made in open court, nor was it reduced to the form of an order and entered. Defendant presented only emails between counsel in support of its motion to the District Court – emails which plainly provided, "FOR SETTLEMENT PURPOSES ONLY WITHOUT PREJUDICE - NOT TO BE USED IN LITIGATION."

The Court should clarify, further, that when the party himself was not involved in the settlement discussions between counsel – as defendant's own motion papers showed in this case, the lower court must hold an evidentiary hearing to confirm that the party, not simply the attorney, agreed to settle and have his case dismissed from court.

Here, Mr. McCalla told the District Court Judges assigned to hear his case that he had not authorized his attorney to resolve his claims for the $12,500 settlement defendant's counsel claimed. Though federal courts may "presume that an attorney-of-record who enters into a settlement agreement, purportedly on behalf of a client, had authority to do so," In re Artha Mgmt., Inc., 91 F.3d 326, 329 (2d Cir. 1996), that presumption is rebutted when the party challenges the attorney's authority to have settled the case, this Court should clarify, cf. United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO, 986 F.2d 15, 20 (2d Cir. 1993) ("[t]he burden of proving that an attorney entered into a settlement agreement without authority is not insubstantial"); Jian Wang v. IBM, 634 F. App'x 326, 326–27 (2d Cir. 2016). Mr. McCalla's statements to both District Court Judges that he had not authorized his lawyer to settle his claims was sufficient to rebut the apparent authority that defendant claimed. The burden remained on defendant to prove to the federal court the settlement it sought to enforce. The District Court erred by resolving this contested issue of authority in defendant's favor on the face of the papers and despite the assertions by Mr. McCalla that his lawyer had no authority to settle for him, this Court should clarify by grant of Certiorari here.

Conclusion

The Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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