

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-826

ROLAND T. KOVACS, trustee,¹ & others²

vs.

KATHRYN M. RUBIN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This lawsuit involves an unaccounted for painting by the artist Amedeo Modigliani that was owned by Allen A. Rubin and Harriet Ann Rubin, the parents of plaintiffs Donald Rubin and Sallyann Kovacs. The defendant is Kathryn Rubin, the former spouse of plaintiff Donald Rubin. In an e-mail exchange that concluded on August 11, 2017, at 5:05 P.M., counsel for the parties negotiated a settlement agreement. This negotiation ended with an e-mail from counsel for plaintiffs to counsel for the defendant that stated, "We have an agreement. I will touch base with you on Monday to see about the mechanics. Thanks and have a good weekend." Counsel for plaintiffs reported to the

¹ Of the Harriet Ann Rubin Trust.

² Richard Gold, as trustee of the Harriet Ann Rubin Trust; Donald B. Rubin; Sallyann Kovacs; and Roland T. Kovacs, individually as he is successor-in-interest to certain rights of Sallyann Kovacs.

Superior Court that the case had settled. The parties, however, were unable to agree on the text of a written settlement agreement, and the defendant subsequently filed a motion to enforce the settlement agreement. That motion was allowed. The defendant was required to submit proposed settlement terms to the motion judge. After briefing on the question by the parties, the judge subsequently, on December 27, 2017, entered judgment, requiring compliance with the settlement terms that were set out in an appendix to that judgment and incorporated by reference therein. Those settlement terms are set out in the margin.³ The plaintiffs filed a timely notice of appeal, and the defendant filed a cross appeal.

³ The "Settlement Terms" read in their entirety:

"Plaintiffs Roland T. Kovacs ('Roland') and Richard Gold ('Gold'), as [t]rustees of the Harriet Ann Rubin Trust ('HAR Trust'), Donald B. Rubin ('Donald'), Sallyann Kovacs ('Sallyann') and Roland, individually, (collectively to be referred to as '[p]laintiffs') commenced this action in February of 2014. Defendant Kathryn M. Rubin ('Kathryn') thereafter filed an answer and counterclaim. The settlement terms that resolve the various claims and counterclaims are as follows:

"TERM #1: If the painting that the [p]laintiffs allege to be a Modigliani (referenced as Exhibit 7 in the [p]laintiffs' [a]mended [c]omplaint) surfaces, the parties agree to address and handle the custody and disposition of the painting by further written agreement of the parties. Pending such agreement, the painting will be held at the Fortress or some similar facility.

"Ownership of this painting shall be as follows:
Donald hereby transfers all of his right, title and

interest in the Modigliani to his sons, Scott Rubin ('Scott') and Paul Rubin ('Paul'), with the exception of a [five percent] interest. Likewise, Kathryn, hereby transfers all of her right, title and interest in the Modigliani to Scott and Paul, with the exception of a [five percent] interest.

"Accordingly, the Modigliani will be owned in the following percentages: [fifty percent] to Roland, [twenty percent] to Scott, [twenty percent] to Paul, [five percent] to Don and [five percent] to Kathryn.

"TERM #2: All parties represent and warrant that, to the best of their knowledge, they do not currently control, possess, or know the whereabouts of the Modigliani. All parties, except for Donald, represent and warrant that they, at no time, controlled, possessed or knew the whereabouts of the Modigliani.

"TERM #3: The [p]laintiffs will transfer possession and control of the Matisse (referenced as Exhibit 6 in the [p]laintiffs' [a]mended [c]omplaint), currently being held in storage at the Fortress, to Kathryn, who will then own this work of art free and clear of any and all claims of the [p]laintiffs, their agents, attorneys, heirs, successors or assigns, or anyone claiming through them. Kathryn will retrieve the Matisse at the Fortress within [ten] days of execution of this [a]greement. The [p]laintiffs may have a representative present at the exchange if they so choose.

"Plaintiffs will retain possession and control of the Oudot, Packard, and Millet (referenced as Exhibits 1, 2 and 5 in the [p]laintiffs' [a]mended [c]omplaint), currently being held in storage at the Fortress. Sallyann currently is in possession, and the [p]laintiffs shall retain possession and control, of a painting attributed to an artist (name unknown) but referred to as Charpagous (or Chapingo in this litigation and referenced as Exhibit 4 in the [p]laintiffs' [a]mended [c]omplaint). Plaintiffs will own these works of art free and clear of any and all claims of Kathryn, her agents, attorneys, heirs, successors or assigns, or anyone claiming through her.

"After the completion of the transfers of the artwork contemplated above, no party shall raise any claim with

Having examined the e-mail exchange of August 10 and 11, 2017, we agree with the judge that, consistent with the report of settlement to the court, Basis Tech. Corp. v. Amazon.com, Inc., 71 Mass. App. Ct. 29, 42-43 (2008), a settlement agreement was reached with respect to all material terms.

These terms are properly reflected in the settlement terms attached to the judgment. In one respect, however, we agree with the plaintiffs. The August 10 and 11, 2017, negotiations took place against the backdrop of an e-mail dated August 9, 2017, that stated, "[a]ppropriate releases for future litigation would be included in the agreement." In light of the fact that the subsequent negotiations specifically addressed a motion for contempt then pending in the Middlesex County Probate and Family Court, no releases with respect to that action would be appropriate. However, we conclude that the terms of the settlement should properly include releases for all future

respect to the artwork and the parties acknowledge that no claim or defense with respect to this artwork may be brought in the action for contempt currently pending in the Middlesex Probate Court, entitled Rubin v. Rubin, with the docket number 06D3172 (hereafter the '[c]ontempt action').

"TERM #4: This agreement contains all of the mutually agreed upon language that incorporates the terms agreed to by the parties.

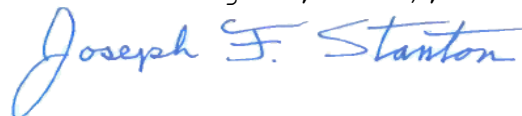
"TERM #5 & 6: With respect to the [c]ontempt action, the parties hereby agree that they will endeavor to negotiate in good faith, to seek a resolution of the [c]ontempt action."

litigation, as of August 11, 2017, the date of the agreement, to which counsel for the defendant represented at argument she had no objection.

Consequently, the case is remanded for the modification of the settlement terms that are attached to the judgment and incorporated by reference therein, to include "appropriate releases for future litigation." As so modified the judgment is affirmed.⁴

So ordered.

By the Court (Green, C.J.,
Rubin & Agnes, JJ.⁵),



Clerk

Entered: November 12, 2019.

⁴ In light of our conclusion that the August 10 and 11, 2017, settlement agreement is valid and binding and includes a release for all future litigation as of August 11, 2017, except as described above, we need not address the plaintiffs' other claims on appeal, nor the defendant's claims on cross appeal.

⁵ The panelists are listed in order of seniority.