

FLASHER FLARE SOUTH EAST, INC.,

Plaintiff,

DECISION AND ORDER

v.

Index #2007/07928

R.A.K. INDUSTRIES, A DIVISION OF
AMERICAN INDUSTRIAL SALES CORP.,

Defendant.

Plaintiff, Flasher Flare South East, Inc., moves pursuant to CPLR 2104 for an order enforcing the settlement agreement entered into by the parties on or about August 15, 2007.

This action was commenced in June, 2007. No answer was served, and a default judgment was entered. After entry of the default, defendant retained counsel, and plaintiff stipulated to vacate the default. On August 14, 2007, plaintiff alleges that the parties reached a resolution of this matter whereby defendant agreed to tender \$35,000 as settlement in full payable in monthly at the rate of \$5,000 per month for seven months.

Plaintiff's motion is based upon the email of defense counsel, which states as follows:

Done at 7 installments at 5K per month, provided that RAK shall remit its first installment by September 20, with 5 days notice to cure. Between American Allsafe (10k) and their rather large monthly bank payment on their line of credit, there is just no way to do it sooner.

See Plaintiff's Exhibit D. This email prompted plaintiff's counsel to write a letter agreeing to payment on September 20, 2007, see letter of August 16, 2007. See Plaintiff's Exhibit E. The August 16, 2007 letter to defense counsel also encloses a Payment Stipulation for defendant's signature. There is no indication that the Payment Stipulation was ever executed.

CPLR 2104 states:

An 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

An enforceable settlement must be a "complete agreement, definite and intended to be binding...." In re Dolgin Eldert Corp., 31 N.Y.2d 1, 8 (1972). Moreover, "[t]he plain language of the statute directs that the agreement itself must be in writing, signed by the party (or attorney) to be bound." Bonnette v. Long Island College Hosp., 3 N.Y.3d 281, 286 (2004).

The Second Department, considering an e-mail exchange within the scope of CPLR 2104, stated:

Contrary to appellants' contention, a confirmatory e-mail sent to the plaintiffs' former attorney by counsel to the insurer of one of the defendants, either alone or in conjunction with an e-mail sent by the plaintiffs' former counsel in response, did not constitute a writing sufficient to bring the purported settlement into the scope of CPLR 2104.

DeVita v. Macy's East, Inc., 36 A.D.2d 751, 751 (2d Dept. 2007).

Relying upon DeVita, at least one other court has refused to hold that an e-mail exchange conforms to the requirements of CPLR 2104. See Weldon v. 210 East 73rd Owners Corp., 15 Misc.3d 1125(A), *1 (Sup.Ct. N.Y. Co. 2007). While the Weldon court declined to reach the issue of whether the e-mails involved contained electronic signatures valid for the purposes of CPLR 2104, the court nonetheless held that the subject e-mail exchange did not conform to CPLR 2104 in that it was not a subscribed writing. Id.

Here, not only does the e-mail from defense counsel to plaintiff's counsel suffer from the same questionable (at best) subscribed writing and signature, but the e-mail from defense counsel was a counter offer, agreeing to the settlement, on the condition that the first installment not be due until September 20. Defense counsel stated: "Done at 7 installments at 5K per month, *provided that* RAK shall remit its first installment by September 20, with 5 days notice to cure." See Exhibit D (emphasis added). The e-mail from defense counsel lacks definiteness as to whether the September 20, 2007 date for payment is acceptable to plaintiff. Plaintiff's counsel's letter of August 16, 2007 agrees to the September 20, 2007 first payment date and continues:

Enclosed please find a Payment Stipulation
Kindly execute the Stipulation, return the

original to my office and I will provide you with a time-stamped copy of same once filed with the County Clerk's office.

Thus, not only is the agreement to the September 20, 2007 date only in a writing by plaintiff's counsel (not defense counsel or defendant, the party to be bound), but it also lacks the intent to be binding, as it was sent with a Payment Stipulation, requiring defendant's signature. See In re Dolgin, 31 N.Y.2d at 8.

As the documents before the court do not suffice to create a agreement by the party to be bound subscribed in writing, plaintiff has not demonstrated its entitlement to enforcement of the alleged settlement pursuant to CPLR 2104. The motion is denied.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: November __, 2007
Rochester, New York