

**Henry Quentzel Plumbing Supply Co., Inc. v Riggs
Plumbing & Heating @ 58th, Inc.**

2019 NY Slip Op 30726(U)

March 15, 2019

Supreme Court, New York County

Docket Number: 656428/2018

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

HENRY QUENTZEL PLUMBING SUPPLY CO., INC.,

Plaintiff,

- v -

RIGGS PLUMBING & HEATING AT 58TH, INC., ERIKA RIBAUDO,
EEMA CONSTRUCTION RIGGS PLUMBING & HEATING INC.

Defendant.

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Upon eFiled documents numbered 4-5, 7-9, the plaintiff's motion for summary judgment in lieu of complaint (CPLR 3213) is denied, as follows.

The Claim Against Defendant Riggs Plumbing & Heating & 58th Inc.:

The moving affidavit attests that plaintiff is a plumbing wholesaler which sold \$58,873.10 worth of plumbing supplies to defendant Riggs Plumbing & Heating @ 58th Inc.; but was never paid. Evidentiary support is exhibited in the form of a "Statement" issued by plaintiff to said defendant, referencing unpaid invoices aggregating the sum of \$58,873.10 in outstanding receivables from said defendant. The invoices span the period May to December 2018.

However, while plaintiff may very well possess a plenary cause of action for an account stated, based on those invoices and statement, it cannot do so by way of this expedited procedural vehicle of summary judgment in lieu of complaint under CPLR 3213. That is because that abbreviated type of litigation procedure is reserved only for "an instrument for the payment of money only" (CPLR 3213.) "The prototypical example of an instrument within the ambit of the statute is of course a negotiable instrument for the payment of money – an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite time"

(*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; see also, *id.* [CPLR 3213 deals

“primarily with some variety of commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness.”). The invoice-referencing statement of account does not qualify as “an instrument for the payment of money only.” Thus, the motion as against defendant Riggs Plumbing & Heating @ 58th Inc. must be denied.

The Claim Against Defendant Erika Ribaud:

The moving affidavit attests that defendant Ribaud is a guarantor of the obligations incurred by defendant Riggs Plumbing & Heating @ 58th Inc.; and exhibits an illegible document (as e-filed) which is described in the affidavit as the “personal guarantee” of defendant Ribaud (Affidavit of Andrew Quentzel ¶¶ 7-8). Absent the court having before it a legible exhibit to any such effect, it cannot grant any relief – let alone summary adjudication – with regard to same. Moreover, even were we to accept the fact of a guaranty (at present, illegible), it would be predicated on the account stated to defendant Riggs Plumbing & Heating @ 58th Inc. which is not, of itself, an unconditional instrument for the payment of money only. It is simply the seller’s invoiced charge, unilaterally sent to the buyer, who has yet to acknowledge any indebtedness, if ever. Thus, the motion as against defendant Ribaud must be denied.

The Claim Against Defendant EEMA Construction Riggs Plumbing & Heating Inc.:

The claim against this defendant, described only as a “related company” vis-à-vis defendant Riggs Plumbing & Heating @ 58th Inc. (Quentzel Aff. ¶ 9), is that it issued a bad check to plaintiff in a sum very close to the sum assertedly owed by defendant Riggs Plumbing & Heating @ 58th Inc. (\$58,873.10) – to wit, \$57,405.06. However, no legally cognizable privity exists between this related company and the plaintiff in relation to the asserted obligation by defendant Riggs Plumbing & Heating @ 58th Inc. In addition, the moving affidavit castigates the bad check as having been issued with malicious intent, and violative of the Penal Law

(Quentzel Aff. ¶ 12). Such allegations, involving intent, cannot properly be adjudicated on summary adjudication, let alone through the abbreviated procedure of a motion for summary judgment in lieu of complaint. Therefore, the motion as against defendant EEMA Construction Riggs Plumbing & Heating @ 58th Inc. must be denied.

Conversion to Plenary Action:

Upon the foregoing denial of the within motion for summary judgment in lieu of complaint, this court now converts the matter to a plenary action, and hereby directs the plaintiff to serve a regular complaint on the defendants no later than 20 days from the date hereof. Said service shall include a copy of this decision and order. Defendants will have 20 days from the date of service of the complaint to serve any answers. (*See*, David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3213:11.)

Accordingly, it is

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that plaintiff shall serve and e-file a regular complaint in this matter no later than 20 days from the date hereof, which service shall include a copy of this decision and order; and it is further

ORDERED that any such complaint shall include a legible copy of the "personal guarantee" referred to in the motion, and, therefore, a hard copy complaint shall be delivered to the undersigned, distinct of e-filing, on the date of service of the complaint; and it is further

ORDERED that defendants will have 20 days from the date of service of the complaint to serve any answers.

This shall constitute the decision and order of the court.

ENTER:

3/15/2019
DATE


LOUIS L. NOCK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	