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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

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RICHARD A. WILLIAMSON, as Successor Liquidating Trustee on Behalf of Lipper Fixed Income Fund, L.P.,

Plaintiffs,

-against-

RON DELSENER, JUDITH HOLSTON, RAND HOLSTON, DIANE MILLER, DUSTIN OVITZ, MARK H. OVITZ CUSTODIAN FOR DUSTIN OVITZ, MARK OVITZ 1993 FAMILY TRUST, HOWARD SWARZMAN and STEVEN SWARZMAN,

Defendants.

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INDEX NO. 100828/2004

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

FILED
NOV 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: November 7, 2007

KARLA MOSKOWITZ J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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Index No. 100828/2004

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-against-

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DECISION and ORDER

Defendants.

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KARLA MOSKOWITZ, J.:

This action is one of many lawsuits that resulted from the demise and liquidation of Lipper Fixed Income Fund, L.P. and Lipper Convertibles L.P. (the "Partnerships"). Richard A. Williamson ("Williamson"), as the successor liquidating trustee, seeks to recover distributions wrongfully paid to limited partners at the time of their withdrawal from the Partnership. Defendant Ron Delsener ("Delsener") was a limited partner in Lipper Fixed Income Fund who withdrew from the Partnership prior to 2002. In motion sequence number 003, plaintiff moves, pursuant to CPLR 2104 and 5003-a, for a judgment against Delsener in the amount of $84,868.20,[1] plus costs, disbursements and interest, on the basis of an alleged settlement agreement between the parties. Defendant Delsener cross-moves for dismissal of plaintiff's claims for failure to serve a complaint within the time allowed under CPLR 3012(b). For the following reasons, the court denies plaintiff's motion, grants defendant's cross-motion and dismisses the case.

BACKGROUND

[1] Some of plaintiff's papers state $86,868.50. However, plaintiff bases the money judgment on 60% of $141,447, and the correct amount is $84,868.20.

Williamson's claim against Delsener for overwithdrawn money from the limited partnership amounted to $141,447. (Affidavit of Jonathan Gardner, dated February 8, 2007, ¶ 5). On December 23, 2005, plaintiff's counsel, Jonathan Gardner ("Gardner"), began an e-mail exchange with Delsener's counsel, Alan G. Katz ("Katz"), to reach a settlement on what Delsener would pay. (*Id.* ¶ 6). Katz initially expressed concern that his client would even want to settle and stated, "Knowing Delsener, it is something we will probably have to litigate and eventually, join other parties." (E-mail, dated December 23, 2005, from Katz to Gardner, attached to Gardner Aff., Exh. D). However, Gardner claims that, by e-mail on January 19, 2006, Katz accepted a "deal at 60%" pursuant to which Delsener would pay only 60% of his overwithdrawn amount or $84,868.20. (Gardner Aff. ¶¶ 7-8).

Specifically, Katz wrote, "As much as I wanted to test the statute of limitations, my client doesn't. We have a deal at 60% – which approximates 84k. Please confirm. I assume you will draft the papers and send them to me when they are finished." (E-mail, dated January 19, 2006, from Katz to Gardner, attached to Gardner Aff., Exh. E). Katz's signature line followed and consisted of his name, law firm and contact information. (*See id.*). Gardner replied that same day, "Confirmed. You will likely hear from Barry Okun of my office to work out the details of the settlement papers." (E-mail, dated January 19, 2006, from Gardner to Katz, attached to Affidavit of Alan G. Katz, dated March 6, 2007, Exh. B).

Barry Okun ("Okun"), who works with Gardner, then prepared and submitted to Katz the release and partial stipulation of discontinuance. (Gardner Aff. ¶ 10). Okun e-mailed these documents to Katz on July 26, 2006. In this e-mail, Okun stated, "Attached, as discussed, are the form releases we propose be exchanged in connection with the settlement between Trustee Williamson and Ron Delsener. Please confirm to me that these forms are acceptable so we can

get them executed. Wiring instructions for the settlement payment will follow." (E-mail, dated July 26, 2006, from Okun to Katz, attached to Affidavit of Barry M. Okun, dated February 8, 2007, Exh. H). Katz responded, "Please send me wiring instructions so that I can address the release and payment when I discuss the matter with Mr. Delsener." (E-mail, dated July 31, 2006, from Katz to Okun, attached to Katz Aff., Exh. C). Katz also claims that, upon his receipt of these documents, he "called Mr. Okun and asked him where the settlement agreement was–having only received the releases." (Katz Aff. ¶ 7). Katz also claims to have raised the issue with Okun "of how Mr. Delsener would be protected in a settlement from a third party claim by PricewaterhouseCoopers." (Katz Aff. ¶ 8).

Katz then did not communicate with Okun for approximately one month but did inform Okun on August 24, 2006, "I have had vacation conflicts with my client. I will finalize the paper work and payment soon after Labor day." (E-mail, dated August 24, 2006, from Katz to Okun, attached to Okun Aff., dated February 8, 2007, Exh. I). On September 19, 2006, Katz claimed he planned on "taking care of the release next week." (E-mail, dated September 19, 2006, from Katz to Okun, attached to Okun Aff., dated February 8, 2007, Exh. I). On November 16, 2006, Katz wrote that he was still "[t]rying to get this done." (E-mail, dated November 16, 2006, from Katz to Okun, attached to Okun Aff., dated February 8, 2007, Exh. I).

Plaintiff then had another attorney from his counsel's law firm, Craig Martin ("Martin"), try to conclude the settlement with defendant. (Katz Aff. ¶ 10). Katz claims that he had a telephone conversation with Martin in which he reiterated his concern about his client being vulnerable to claims by PricewaterhouseCoopers. Martin apparently insisted that the settlement was not "open to renegotiation," whereupon Katz wrote that "I do not believe I ever requested any renegotiation," but Katz also raised the concern of the possibility of the Trustee recovering

more than 100% of the loss and how to deal with that issue. (*Id.* and E-mail, dated December 6, 2006, from Katz to Martin, attached to Katz Aff., Exh. D). Katz then asked for Martin's "thoughts on this." (*Id.*). Katz also stated "[o]ne way or the other, this will be resolved by Friday." (*Id.*)

On December 12, 2006, when defendant substituted Jane G. Stevens ("Stevens") for Katz as his counsel, Katz informed Gardner that Delsener would not honor the settlement. (Gardner Aff. ¶ 12). The Trustee then fully executed a release and a stipulation of discontinuance on December 12, 2006 and sent them to defendant on December 13, 2006, but Delsener has refused to make any payment. (*Id.* ¶¶ 13-14).

Plaintiff's counsel explains that they prepared only releases and stipulations because no settling partner had ever objected to this arrangement or demanded a settlement agreement. (Affidavit of Barry M. Okun, dated March 21, 2007, ¶ 4). Plaintiff asserts that Delsener never requested a formal settlement agreement either. (*Id.* ¶ 6). Katz, however states that he did request a settlement agreement in a phone conversation with Okun. (Katz Aff. ¶ 7). In addition, plaintiff claims Delsener explained his initial failure to sign the release and the stipulation as simple scheduling conflicts and never suggested any problems with the papers or the settlement. (Okun Aff., dated February 8, 2007, ¶ 5).

Katz refutes this contention and cites two concerns about the settlement: (1) protection of Delsener from a third-party claim by PricewaterhouseCoopers, the accounting firm whose alleged improper audits failed to discover that the Partnerships were overvalued and (2) the question of reimbursing Delsener in the event that the trustee recovered more than 100% of the loss. (Katz Aff. ¶¶ 8, 10). Neither Delsener nor his counsel ever signed any written documents for the settlement. (*Id.* ¶ 15). Katz also states that, before proceeding, he needed "[his] client's input,

imprimatur and authority before finalizing any settlement." (*Id.* ¶ 9).

Katz further claims the parties never reached a final settlement agreement and that counsel for both parties always intended for written documentation to finalize the deal. (Katz Aff. ¶¶ 5-6). Katz explains, "[I]t has been my uniform practice in settling cases that a written settlement agreement is negotiated, and executed by the actual client. . . . I would not have consummated any settlement for Delsener without such writings." (*Id.* ¶ 6). Gardner, however, alleges that the parties reached a settlement in January 2006. (Gardner Aff. ¶ 11). Gardner insists that he relied upon the alleged settlement to prepare a complaint that he filed on February 1, 2006 against the remaining partners from the Lipper Fixed Income Fund, L.P. who had not settled. (*Id.*). On January 16, 2007, Delsener demanded that plaintiff serve a complaint on or before February 13, 2007, but plaintiff has not done so. (Affidavit of Ben Delphin, dated March 8, 2007, ¶¶ 6-8).

On June 19, 2007, the Appellate Division, First Department rendered its decision in *Williamson v Culbro Corp. Pension Fund*, 41 AD3d 229 ("*Culbro*"). In that decision, the court interpreted the statute of limitations contained in Partnership Law § 121-607 (c) to limit to three years claims against a limited partner for "any improper distribution." It is undisputed that *Culbro* would now bar any claims plaintiff might have against defendant were it not for the alleged settlement agreement.

DISCUSSION

I. Plaintiff's Motion for a Money Judgment Against Defendant

A. CPLR 2104

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. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

Courts are generally quite strict in requiring litigants to adhere to the formalities of CPLR 2104. As the Court of Appeals has recently articulated '[i]f settlements once entered, are to be enforced with rigor and without a searching examination into their substance, it becomes all the more important that they be clear, final and the product of mutual accord." (*Bonnette v Long Island Coll. Hosp.*, 3 NY3d 281, 285 [2004]). For that reason, the Court of Appeals held in *Bonnette* that "to be enforceable under CPLR 2104, an out-of-court settlement must be adequately described in a signed writing." Cases subsequent to *Bonnette* have strictly enforced the requirements of CPLR 2104. (*See DeVita v Macy's East, Inc.*, 36 AD3d 751 [1st Dept 2007] [confirmatory e-mail from counsel to the insurer of one of the defendants to plaintiff's former attorney insufficient to constitute a settlement in the scope of CPLR 2104]; *Katzen v Twin Pines Fuel Corp.*, 16 Ad3d 133, 134 [1st Dept 2005] [out-of-court settlement not enforceable where party seeking to enforce the settlement did not introduce anything to show that party had authorized his prior attorney to enter into the settlement]; *Weldon v 210 East 73rd Owners Corp.*, 15 Misc 3d 1125A [Sup. Ct., NY County 2007] [refusing to find an enforceable settlement agreement when "the initiatory e-mail contains a summary or outline of a settlement proposal and requests 'Please confirm, without prejudice, that the following is the settlement *proposal*'"] [emphasis added]).

In this case, there is no "writing subscribed by [Delsener] or his attorney" as CPLR 2104 requires because neither ever signed the releases that plaintiff's counsel sent. The e-mails between the parties clearly contemplated signed releases for the settlement to be binding.

Without the releases, there is no settlement.

In addition, "the authority of an attorney to enter into settlement negotiations does not necessarily constitute authority to enter into a binding settlement under CPLR 2104." (*Katzen*, 16 AD3d at 134). Noticeably absent from the record is any statement directly from Delsener that he consented to the settlement. Also, that Katz had concerns about third-party claims and what to do about that possibility indicates that, at best, the parties had an agreement in principle about the settlement amount, but meant to leave these other, material issues for future negotiation.

Accordingly, it is

ORDERED THAT plaintiffs' motion, pursuant to CPLR 2104 and CPLR 5003-a, for a judgment against defendant in the amount of $84,868.20, plus costs, disbursements and interest, is denied; and it is further

ORDERED THAT defendant's cross-motion to dismiss plaintiff's claims for failure to serve a complaint pursuant to CPLR 3012(b) is granted; and it is further

ORDERED THAT the Clerk is directed to enter judgment accordingly.

Dated: November 07, 2007

ENTER

J.S.C.