SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. PART _____
Justice

Index Number : 151278/2013
HESS CORPORATION
vs.
VARSITY BUS CO., INC.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11/22/13

CK, J.S.C.
CYNTHIA S. KERN J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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HESS CORPORATION.,

Plaintiff,

Index No. 151278/2013

-against-

DECISION/ORDER

VARSITY BUS CO, INC.,

Defendant.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmations in Opposition to the Motion	2
Replying Affidavits.....	3
Exhibits.....	1

Plaintiff Hess Corporation ("Hess") has brought the present motion for summary judgment to enforce the provisions of a settlement agreement entered into between the parties. Defendant Varsity Bus Co, Inc. ("Varsity") argues that there is no enforceable written settlement agreement. As will be explained more fully below, the motion for summary judgment is granted.

The relevant facts are as follows. Hess commenced a lawsuit against Varsity in which it alleged that Varsity owed it $318,497.01 as payment for diesel fuel that Hess sold to Varsity. After the suit was commenced, but before Varsity answered, the parties entered into settlement negotiations in an attempt to settle the dispute. The principals met and agreed to the terms of a

settlement. Plaintiff's counsel then drafted a settlement agreement incorporating the terms which were agreed to. The draft agreement contained a settlement amount of $225,000, a due date for payment and a default provision which provided that if Varsity failed to make the settlement payment by the due date, that Varsity would be liable for the unpaid portion of the outstanding balance together with interest at the statutory rate of 9% per annum plus attorney's fees. Defendant's attorney returned a mark up of the settlement agreement in which he changed the default provision so that interest would run from the date of default under the agreement instead of the original due date and to strike the attorney's fee provision. Plaintiff's counsel then advised defendant's counsel that the proposed changes were not acceptable. The principals then spoke again and agreed to reinsert the default provision as originally drafted by Hess's counsel and also agreed on an extension of the due date for the payment of the settlement amount. This agreement was confirmed the same day in an e-mail from Varsity's counsel to Hess's counsel which enclosed an updated agreement and provided that it was subject to further modification and client approval. Hess's counsel then advised Varsity's counsel by e-mail that the enclosed draft was acceptable and asked whether Varsity had any further changes. Varsity's counsel then e-mailed Hess's counsel and stated in the e-mail that there were no further modifications and that "We're good to go." Hess's counsel then e-mailed Varsity's counsel asking for a final copy of the settlement agreement so that Hess could execute it. Varsity's counsel e-mailed back a final version with the message "Here you go." Hess then executed the settlement agreement, which its counsel then e-mailed to Varsity's counsel. Instead of returning the executed copy of the agreement to Hess, Varsity's counsel asked for a brief extension of the payment time and stated that all of the terms are acceptable but that they were waiting to get a change of the payment date.

After further discussions and further requests for an adjournment in the payment date based on inability to pay the settlement amount, Varsity refused to execute the settlement agreement.

Plaintiff argues that it is entitled to summary judgment enforcing the settlement agreement reached between the parties even though Hess never executed the settlement agreement. Varsity argues that there is no enforceable settlement agreement between the parties because it never executed the settlement agreement and also argues that summary judgment is premature on the ground that the parties have not yet conducted discovery.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

The issue before this court is whether the settlement agreement entered into between the parties is enforceable despite that it was not executed by defendant Varsity. CPLR 2104 provides that an agreement between the 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 writing subscribed by him or his attorney or reduced to the form of an order and entered." The First Department, in a case similar to the present case, specifically held that "e-mails exchanged between counsel, which contained their printed names at the end, constitute signed writings

(CPLR 2104) within the meaning of the statute of frauds. (Citation omitted) and entitle plaintiff to judgment(CPLR 5003-a [e])." *Williamson v. Delsener,* 59 A.D.3d 291 (1st Dept. 2009). The court found that the agreement between the parties to settle the action at 60% of the amount demanded was sufficiently clear and concrete to constitute an enforceable contract as the e-mail communication indicated that defendant was aware of and consented to the settlement, the record did not contain any indication to the contrary and did not indicate that the counsel was without authority to enter into the settlement. *Id. at* 292. *See also Davidson v. Metropolitan Transit Authority*, 44 A.D.3d 819 (2nd Dept 2007)(the "subsequent letter written by the plaintiff's attorney on behalf of the party to be bound confirmed the essential terms of the oral settlement agreement reached at the pretrial conference and was a subscribed writing sufficient to satisfy the requirements of CPLR 2104"). In the present case, the court finds that the settlement agreement which the parties clearly and unambiguously agreed to in their exchange of e-mails constitutes an enforceable settlement agreement. In the e-mails exchanged between the attorneys, they actually exchanged the settlement agreement itself and clearly and unambiguously consented to all of the terms of the settlement agreement. Therefore, the settlement agreement is binding even though it was not subscribed by Varsity.

Varsity's contention that summary judgment should be denied pursuant to CPLR § 3212(f) because no discovery has taken place is unavailing. "A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *Rutture & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 (2d Dept 1999). In the present case, Varsity has not identified any evidentiary basis for its claim that discovery in this action will lead to relevant

evidence sufficient to oppose plaintiff's motion for summary judgment. The court's decision granting plaintiff summary judgment is based on the terms of the settlement agreement exchanged between the parties and on the e-mails exchanged between counsel for the parties. Varsity has failed to identify any discovery it might potentially obtain which would result in this court making a different determination about the settlement agreement.

Based on Varsity's failure to make the payment due under the settlement agreement, the clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of $318,497.01, plus interest at the statutory rate of 9% per annum to be calculated by the clerk from the due date set forth on each unpaid invoice, plus costs and disbursements. The portion of plaintiff's action that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees plaintiff may recover against the defendant for collection activities undertaken on behalf of plaintiff after September 3, 2013 is referred to a Special Referee to hear and report. Within thirty (30) days from the date of this order, counsel for plaintiff shall serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 199M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This constitutes the decision and order of the court.

Dated: 11/22/13

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.