

**Lif Indus. Inc. v George A. Fuller Co., Inc.**

2015 NY Slip Op 32973(U)

April 16, 2015

Supreme Court, New York County

Docket Number: 116411/2010

Judge: Saliann Scarpulla

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

PRESENT: Hon. Saliann Scarpulla  
*Justice*

PART 39

LIF INDUSTRIES INC. d/b/a LONG ISLAND  
FIREPROOF DOOR,

INDEX NO. 116411/2010

Plaintiff,  
- v -

MOTION DATE 7/9/2014

MOTION SEQ. NO. 004

GEORGE A. FULLER COMPANY, INC.,

MOTION CAL. NO. \_\_\_\_\_

Defendant.

The following papers, numbered 1 to 8 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion — Affidavits — Exhibits _____	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4-6</u>
Replying Affidavits _____	<u>7-8</u>

Cross-Motion:  Yes  No

Upon the foregoing, it is ordered that the motions are decided in accordance with the accompanying memorandum decision.

Dated: 4/16/15

  
Hon. Saliann Scarpulla, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER/JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION: PART 39

-----X  
LIF INDUSTRIES, INC., d/b/a LONG ISLAND  
FIREPROOF DOOR,

Plaintiff,

**DECISION and ORDER**

- against -

Index No. 116411/2010

GEORGE A. FULLER COMPANY, INC.,

Defendant.

-----X

For Plaintiff:  
Tesser & Cohen  
946 Main Street  
Hackensack, NJ 07601

For Defendant:  
DelBello Donnellan Weingarten Wise & Wiederkehr, LLP  
One North Lexington Avenue  
White Plains, NY 10601

HON. SALIANN SCARPULLA, J.:

In this action brought by plaintiff LIF Industries, Inc., d/b/a Long Island Fireproof Door (“plaintiff” or “LIF”) to recover payments allegedly owed for goods and services delivered to defendant George A. Fuller Company, Inc. (“defendant” or “GAFCO”) for various construction projects, LIF moves for summary judgment on its complaint (motion sequence no. 003). GAFCO also moves for summary judgment dismissing (1) all claims arising from the contracts between the parties for materials to be supplied by LIF to projects located at 221 Main Street, White Plains, New York (the “Main Street project”) and at 33 Broad Street, Stamford, Connecticut (the “Broad Street Project”) on the grounds that claims based on those contracts are time-barred by the limitations provisions in the

contracts; (2) dismissing all remaining claims in the second cause of action for account stated on the grounds that LIF has not produced statement of account to support those claims; (3) dismissing all remaining claims in the third and fourth causes of action on the grounds that the parties' obligations are governed by the existence of written contracts, the existence of which is not in dispute; and (4) dismissing the fifth cause of action for breach of the settlement agreement on the ground of statute of frauds and election of remedies (motion sequence no. 004). Motion sequence nos. 003 and 004 are consolidated for disposition.

As alleged in the second amended complaint, GAFCO ordered goods and supplies from LIF for four (4) separate construction projects, each with its own contract between the parties. LIF asserts in the second amended complaint that it performed all of its work in accordance with the contracts, and GAFCO failed to fully compensate LIF for the goods and services provided. LIF asserts causes of action for breach of contract, account stated, unjust enrichment, and breach of a settlement agreement.

In support of its motion for summary judgment, LIF argues that there are no material questions of fact, and that GAFCO breached the project contracts between the parties by receiving the building materials requested, and failing and refusing to remit full payment of those materials. LIF also argues that GAFCO breached the settlement agreement entered into between the parties by failing to pay the agreed upon settlement amount.

There is no dispute that the parties entered into the four separate project contracts. For the first cause of action, LIF alleges that it performed all of its work under the contracts “in a good and workmanlike manner,” and that GAFCO breached the contracts by failing to “fully compensate LIF for the goods and services provided, and LIF has therefore been damaged as a result.”

In the second cause of action, LIF alleges that an account stated exists between the parties. LIF contends in its motion that at GAFCO’s request, LIF supplied GAFCO with materials for use on the construction projects, and that following the deliveries, LIF produced and provided payment applications to GAFCO, which set forth in detail the value of the materials delivered. LIF asserts that GAFCO never objected to any of the payment applications from LIF on the projects. LIF maintains that GAFCO made substantial – but incomplete – payments on the separate projects, without explanation as to why GAFCO was not paying the full amount due. This, LIF asserts, creates an account stated between the parties.

Similarly, in the third and fourth causes of action, LIF alleges that GAFCO received and utilized the materials delivered by LIF without fully paying for them. LIF argues, therefore, that GAFCO was unjustly enriched at LIF’s expense.

Lastly, the fifth cause of action in the second amended complaint asserts that the parties entered into a settlement agreement, pursuant to which GAFCO would pay LIF \$250,000.00, and GAFCO would provide LIF the opportunity to bid on a last look basis on

future work until GAFCO awarded LIF \$100,000.00 in contracts. LIF argues that GAFCO breached this agreement by failing to comply with its terms.

LIF submits affidavits from Vincent Gallo (“Gallo”), president of LIF, as well as copies of the contracts and change orders for the four projects. LIF contends that after it delivered all materials, it provided GAFCO with payment applications and/or invoices, copies of which it submitted in support of this motion, and that GAFCO did not dispute the payment applications, or the quality, quantity or price of materials LIF delivered.

LIF also submits an email exchange between Gallo, and Louis Capelli (“Capelli”), president of GAFCO, dated March 19, 2010. Gallo, in an email message to Capelli, state:

Dear Louis,

HELLO LOUIS, I would like to get this matter settled, as you are aware the balance due is \$390,000.00 from three separate projects and dates back to 2007. I have made an offer to settle for \$250,000.00 and carry over \$100,000.00 to the next job, which is a very fair offer. This is quite a loss to my company. At no time have I ever stopped deliveries and have continued to ship material to you for over two years so that you could complete your projects. Because of our long relationship, I have always accommodated you.

Louis, I would like to settle this amicably. If my offer is not accepted, I will turn this over to my attorney, which I have been trying to avoid.

VINCENT GALLO

The email in response from Capelli states in its entirety: “Its [sic] accepted. We are getting it from our credit line with our bank. Joe and Peter. What’s happening?”<sup>1</sup>

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<sup>1</sup> Peter Palazzo and Joe Anello, copied on the email message, are GAFCO employees.

In addition, LIF submits an affidavit by Maria Barry (“Barry”), LIF’s credit/collections manager. Annexed to Barry’s affidavit are a series of email messages she sent to GAFCO informing GAFCO that it owed money to LIF for the contracted projects, and requesting prompt payment of the outstanding balances. In response, Peter Palazzo (“Palazzo”) of GAFCO stated “I’m trying to work loose another \$50,000, but it’s not ready as yet.” In her affidavit, Barry further states that GAFCO “always indicated that payments would be sent, a payment plan would be established, or that the invoices would be satisfied in some manner.”

In opposition to LIF’s motion, and in support of its own motion for summary judgment, GAFCO argues that claims stemming from the Main Street and Broad Street projects are time barred. This argument is based on the following language which appears in Paragraph 21 of the contracts for both the Main Street and Broad Street projects:

No action or proceeding shall be maintained by [LIF] against [GAFCO] upon any claim arising out of or based upon this Agreement or by reason of any act or omission . . . unless such action or proceeding shall be commenced within one (1) year after delivery of the Materials to the Site, or if this Agreement is terminated earlier, within one (1) year following the date of such termination.

GAFCO also argues that because there is no dispute that there were contracts between LIF and GAFCO for the four projects, LIF cannot also recover in quasi contract. Therefore, GAFCO argues, the second, third and fourth causes of action for unjust enrichment and account stated should be dismissed.

With respect to the breach of settlement agreement cause of action, GAFCO argues that the email exchange between Gallo and Capelli fails to satisfy the Statute of Frauds, and therefore does not create a binding settlement agreement. Lastly, GAFCO argues that because LIF moved for summary judgment when it first commenced the action, before amending the complaint to add the cause of action for breach of the settlement agreement, LIF made a binding election of remedies, which now bars LIF from attempting to enforce the purported settlement agreement.

### **Discussion**

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, the terms of the contracts for the construction projects are clear and unambiguous, and therefore will be enforced according to their terms. *See Continental Ins. Co. v. 115-123 West 29<sup>th</sup> St. Owners Corp.*, 275 A.D.2d 604, 605 (1<sup>st</sup> Dep't 2000) ("It is well settled that when the terms of an agreement are clear and unambiguous, the court will not look beyond the four corners of the agreement and will enforce the writing according to its terms").

### The Causes of Action Relating to the Main Street and Broad Street Projects

The language included in the Main Street and Broad Street projects contracts at Paragraph 21 plainly shortens the time period for bringing an action based on those contracts to one (1) year from delivery of the materials to the site. “There is no question that parties may agree to a statute of limitations shorter than that set forth in the CPLR, provided that the agreement is in writing and the shortened period is reasonable.” *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 80 A.D.3d 293, 304 (1st Dep’t 2010). A contractual shortening of statute of limitations to one-year for bringing claim of breach of contract is reasonable. *See Diana Jewelers of Liverpool, Inc. v. A.D.T. Co.*, 167 A.D.2d 965, 966 (4<sup>th</sup> Dep’t 1990); *Par Fait Originals v. ADT Sec. Systems, Northeast, Inc.*, 184 A.D.2d 472 (1st Dep’t 1992) (one year shortened statute of limitations in contract is enforceable).

For the Main Street project, LIF certified in its Application and Certification for Payment that all of its work was completed, and all materials were delivered to the site as of February 15, 2009. Therefore, LIF had until one year later, or February 15, 2010, to commence an action. Similarly, LIF certified in its Application and Certification for Payment for the Broad Street project that as of December 13, 2009, all of LIF’s work was completed in accordance with the terms of the project contract, thereby giving LIF until one year later or December 13, 2010 to commence its action. This action was not

commenced until January 2011, outside the one year statute of limitations agreed to by the parties.

LIF's argument in opposition that the one year statute of limitations was equitably estopped by the settlement negotiations between the parties is without merit. LIF maintains that GAFCO repeatedly promised to pay some portion of its outstanding balance, yet repeatedly failed to do so. "Mere promises to pay in the future, however, are insufficient to support a theory of equitable estoppel where, as here, "[t]here is no evidence that the . . . promises to pay were intended to lull [decedents] into inactivity until after the expiration of the [s]tatute of [l]imitations.'" *Matter of Thomas*, 124 A.D.3d 1235 (4th Dep't Jan. 2, 2015) (quoting *Erlichman v Ventura*, 271 AD2d 481 (2d Dep't 2000)).

LIF submits nothing to suggest that GAFCO made these promises to pay to lull LIF to wait to commence this action until after the expiration of the statute of limitations. *See Medina v. City of New York*, 63 A.D.3d 632 (1st Dep't 2009) (plaintiff "failed to offer any evidence that defendant had induced him to delay bringing the action by misleading him into believing settlement negotiations were imminent. There are no grounds for estopping defendant from asserting the statute of limitations").

LIF also submits the email messages exchanged which LIF alleges constituted a settlement of the dispute between the parties. This is not enough, however, to establish estoppel of the statute of limitations. As discussed below, this exchange of emails is evidence only of settlement negotiations, and does not establish a settlement agreement

between the parties. “It is well-settled law in New York that the mere fact that settlement negotiations have been ongoing between parties is insufficient to estop a party from asserting the Statute of Limitations as a defense. Here, while there were settlement negotiations, [GAFCO did not take] any steps, by representation or otherwise, to lull plaintiff into inaction until after the statute of limitations had run.” *Dailey v. Mazel Stores, Inc.*, 309 A.D.2d 661, 663-664 (1<sup>st</sup> Dep’t 2003) (internal quotation omitted).

Accordingly, all causes of action relating to the Main Street project and Broad Street project are dismissed as time barred.

#### **Plaintiff’s Alternate Theories of Liability on All Four Contracts**

In its first cause of action in the second amended complaint, LIF alleges that as a result of GAFCO’s alleged breach of the four contracts at issue, it has been damaged in the amount of \$400,064.80. In the second cause of action, LIF alleges that it is owed the same amount, \$400,064.80, based on a book account. Similarly, the third cause of action seeks to recover \$400,064.80 due and owing based on invoices LIF delivered to GAFCO for the goods LIF sold and delivered to GAFCO, and in the fourth cause of action, LIF also seeks to recover \$400,064.80 “as set forth in the contract and LIF’s invoices.”

LIF’s claims all stem from alleged breach of the project contracts. LIF cannot, therefore, allege multiple alternative quasi-contract causes of action stemming from the same alleged breach of contract. *See Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70

N.Y. 2d 382, 388 (1987). When the claims stem from the same allegations and basis as the

causes of action for breach of contract, they must be dismissed. “It is well settled that a claim for unjust enrichment does not lie where it duplicates or replaces a conventional contract claim.” *Scarola Ellis LLP v. Padeh*, 116 A.D.3d 609, 611 (1st Dep’t 2014). See also *JDF Realty, Inc. v Sartiano*, 93 A.D.3d 410, 411 (1st Dep’t 2012) (in light of express agreement between the parties, plaintiff’s claim of unjust enrichment was not viable”). Similarly, “[a] cause of action alleging an account stated cannot be utilized simply as another means to attempt to collect under a disputed contract.” *Simplex Grinnell v. Ultimate Realty, LLC*, 38 A.D.3d 600 (2d Dep’t 2007). See also *Martin H. Bauman Assoc., Inc. v. H & M Int’l Transport, Inc.*, 171 A.D.2d 479, 485 (1st Dep’t 1991) (“as is the situation with the[] cause of action in quantum meruit, a claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract”); *Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc.*, 95 A.D.3d 434 (1st Dep’t 2012).

Accordingly, the second, third, and fourth cases of action are dismissed as to all four contracts.

#### **The Fifth Cause of Action for Breach of an Alleged Settlement Agreement**

LIF also argues that GAFCO breached the settlement agreement. LIF maintains that the settlement agreement was formed by the email messages exchanged, as discussed above. GAFCO asserts that the email messages constitute an unenforceable executory

accord, because it is not signed by the party to be charged, as required by the Statute of Frauds.

General Obligations Law (“Gen. Oblig. L.”) §15-501(1) provides that

Executory accord as used in this section means an agreement embodying a promise express or implied to accept at some future time a stipulated performance in satisfaction or discharge in whole or in part of any present claim, cause of action, contract, obligation, or lease, or any mortgage or other security interest in personal or real property, and a promise express or implied to render such performance in satisfaction or in discharge of such claim, cause of action, contract, obligation, lease, mortgage or security interest.

“An executory accord is enforceable so long as ‘the promise of the party against whom it is sought to enforce the accord is in writing and signed by such party.’” *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 384 (1993) (quoting Gen. Oblig. L. § 15-501 [2]).

A party cannot “sign” an email in the traditional sense. However, “[a]n e-mail sent by a party, under which the sending party’s name is typed, can constitute a writing for purposes of the statute of frauds.” *Newmark & Co. Real Estate Inc. v 2615 E. 17 Realty LLC*, 80 A.D.3d 476, 477 (1st Dep’t 2011) (citing Gen. Oblig. L. §5-701[b]). It follows, therefore, that an email which is “unsigned,” in that it lacks the printed name of the author at the end, is not sufficient to satisfy the statute of frauds. *See Landesbank v 45 John St. LLC*, 102 A.D.3d 587 (1st Dep’t 2013) (“email relied upon by defendants, which contained a pre-printed signature, was not a sufficient writing under the statute of frauds” in case

seeking damages for failure to increase construction loan where contract contained provision barring oral modifications); *Cf Stevens v. Publicis, S.A.*, 50 A.D.3d 253, 255-256 (1st Dep't 2008) (“e-mails from plaintiff constitute ‘signed writings’ within the meaning of the statute of frauds, since plaintiff’s name at the end of his e-mail signified his intent to authenticate the contents”).

Here, the email messages from Gallo to Capelli include complete settlement terms. However, Capelli did not type his name at the end of his message accepting the settlement offer, therefore it does not constitute a signed writing sufficient to satisfy the requirements of the Statute of Frauds.<sup>2</sup> Accordingly, LIF fails to establish the existence of the settlement agreement between the parties, and the fifth cause of action for breach of the settlement agreement must be dismissed.

Turning to LIF’s motion for summary judgment on its complaint, all that remains is the first cause of action for breach of contract relating to the contracts for the project at City Center, 9 City Place, White Plains, New York (the “City Center project”) and at 3770 Barger Street, Shrub Oak, New York (the “Shrub Oak project”). As to these contracts,

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<sup>2</sup> Were this a valid accord, LIF would have to elect bring a cause of action for either a breach of the underling contracts, or a breach of the settlement agreement. “An accord is an agreement that a stipulated performance will be accepted, in the future, in lieu of an existing claim (citations omitted). The . . . obligee does not intend to discharge the existing claim merely upon the making of the accord; what is bargained for is the performance, or satisfaction. If the satisfaction is not tendered, the obligee may sue under the original claim or for breach of the accord (citations omitted).” *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, (1993). As I find that the proposed settlement agreement does not satisfy the Statute of Frauds, I need not address LIF’s decision to pursue both causes of action.

LIF argues in support of its motion for summary judgment that there are no material issues of fact, that it fully performed under the contracts, and that GAFCO failed to perform by failing to pay for all materials received in the amount of \$3,987.00 for the City Center project, and \$127,823.00, for the Shrub Oak project.

GAFCO did not move for summary judgment dismissing the first cause of action as to these projects. Instead, GAFCO maintains that there are material issues of fact preventing summary judgment. Specifically, as to the Shrub Oak project, GAFCO argues that LIF failed to provide all the materials requested by the contract. GAFCO maintains that it paid LIF for all the material which were delivered which complied with the contract's terms and provisions.

In support, GAFCO submits the affidavit of Joseph Anello ("Anello"), vice president of GAFCO. Anello states that there were chronic deficiencies with LIF's work associated with this project, and that LIF's failures relating to this project include supplying non-conforming materials, defective materials and work, untimely and incomplete deliveries, and out-of-sequence deliveries. GAFCO submits emails messages from GAFCO to LIF dated April 25, 2009, February 16, 2008, January 19, 2008 and May 23, 2007, which reflect GAFCO's complaints about LIF's deliveries at the Shrub Oak project.

As to the City Center project, Anello states that while LIF alleges that it delivered material to GAFCO pursuant to the City Center project contract, GAFCO has no record of such delivery, and LIF has failed to establish that the material was delivered as agreed.

After reviewing the foregoing, I find there are questions of fact as to the claims for breach of contract for the Shrub Oak project contract and the City Center project contract. Accordingly, LIF's motion for summary judgment on the remaining portions of the first cause of action as to these contracts is denied.

In accordance with the foregoing it is

ORDERED that the motion for summary judgment by plaintiff LIF Industries, Inc. d/b/a Long Island Fireproof Door (motion seq. no. 003) is denied; and it is further

ORDERED that the motion for partial summary judgment by defendants George A. Fuller Company, Inc. (motion seq. no. 004) is granted, dismissing:

- (1) all claims arising from the contracts between the parties for materials to be supplied by LIF to projects located at 221 Main Street, White Plains, New York and at 33 Broad Street, Stamford, Connecticut on the grounds that claims based on those contracts are time-barred by the limitations provisions in the contracts; and
- (2) dismissing all claims in the second, third, fourth and fifth causes of action; and it is further

ORDERED that the first cause of action as it pertains to the contract for the project located at 23770 Barger Street, Shrub Oak, New York, and the contract for the project located at City Center, 9 City Place, White Plains, New York, is severed and shall continue; and it is further


ORDERED that judgment on the dismissed portions of the first cause of action, and second, third, fourth and fifth causes of action shall be entered at the conclusion of the action.

The parties are directed to appear in Part 39 on May 20, 2015 at 2:15 p.m. for a pretrial conference.

This constitutes the decision and order of this Court.

Date: New York, New York  
April 16, 2015

ENTER:

  
Saliann Scarpulla, J.S.C.