

Doka USA, Ltd. v Manny P Concrete, Inc.
2020 NY Slip Op 33618(U)
October 23, 2020
Supreme Court, Kings County
Docket Number: 508827/14
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of October, 2020

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X
DOKA USA, LTD.,
Plaintiff,

- against -

Index No. 508827/14

MANNY P CONCRETE, INC., PERKAN
CONCRETE CORP. and BROOKLYN COLLEGE
OF THE CITY OF NEW YORK, and
CITY UNIVERSITY CONSTRUCTION FUND and
PHILADELPHIA INDEMNITY INSURANCE
COMPANY,
Defendants.

-----X
The following efiled papers read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____137-138_____
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	_____

Upon the foregoing papers, plaintiff Doka USA, Ltd. (Doka) moves for an order, pursuant to CPLR 2104, enforcing a stipulation of settlement between the parties.

Doka commenced this action to recover damages and to foreclose a mechanic's lien stemming from Doka's leasing and provision of equipment and materials for a construction project at Brooklyn Performing Arts Center. According to the affirmation of Doka's counsel,

Geoffery Johnson, Esq., shortly before the parties were scheduled to appear for trial, he engaged in settlement negotiations with Manny Frade, Esq., who represented the two contractors, Manny P Concrete, Inc. (MPC) and Perkan Concrete Corp (Perkan), and MPC's bonding company, Philadelphia Indemnity Insurance Company, which had issued payment and lien bonds. On February 24, 2020, at 8:14 AM, Mr. Johnson sent an email to Mr. Frade stating the following:

"Manny, Doka will settle based on \$125,000 payable no later than 6 months from today, the settlement to be made with MPC and Perkan with a personal guarantee from [the owner of MPC]. In addition, in the event of default Doka will be entitled to collection costs including attorney's fees plus interest at the rate of 10 percent annually from the date of default until collection.

Geoff"

According to Mr. Johnson, at 8:29 AM, Mr. Frade replied with an email stating "Ok. Please let the court know we have settled." Mr. Johnson also alleged that he received a second email from Mr. Frade, shortly thereafter at 8:32 AM, stating "Just to confirm. I am turning around and heading back to the office. Let me [know if] you will be drafting the agreement."

Mr. Johnson thereafter drafted a settlement agreement which was signed by Doka, but has not been signed by defendants. As a result, Doka brings the instant motion for an order enforcing the settlement agreement pursuant to CPLR 2104 based on the email chain between Mr. Johnson and Mr. Frade which Doka alleges evinces mutual assent.

CPLR 2104 states, in relevant part, that “[a]n 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 her] or his [or her] attorney or reduced to the form of an order and entered.” Furthermore, “[t]o be enforceable, a settlement agreement must set forth all material terms, and there must be [a] clear mutual accord between the parties” (*Martin v Harrington*, 139 AD3d 1017, 1018 [2d Dept 2016]; see *Little v County of Nassau*, 148 AD3d 797, 798 [2d Dept 2017]; *De Well Container Shipping Corp. v Mingwei Guo*, 126 AD3d 846, 847 [2d Dept 2015]). An email that merely confirms a purported settlement is not necessarily sufficient to bring the purported settlement into the scope of CPLR 2104 (see *DeVita v Macy’s E., Inc.*, 36 AD3d 751, 751 [2d Dept 2007]). However, where “an email message contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be treated as a signature, such an email message may be deemed a subscribed writing within the meaning of CPLR 2104 so as to constitute an enforceable agreement” (*Forcelli v Gelco Corp.*, 109 AD3d 244, 251 [2d Dept 2013]; see *Kataldo v Atlantic Chevrolet Cadillac*, 161 AD3d 1059, 1060 [2d Dept 2018]). Correspondence “acknowledging the settlement and signed by [a party’s] attorney satisfy the requirement of a subscribed writing” pursuant to CPLR 2104 (*Morrison v Bethlehem Steel Corp.*, 75 AD2d 1001, 1002 [4th Dept 1980]; see *Gaglia v Nash*, 8 AD3d 992, 993 [4th Dept 2004]).

“[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” (*Williamson v Delsener*, 59 AD3d 291, 291 [1st Dept 2009]; see *Stevens v Publicis S.A.*, 50 AD3d 253, 255-256 [1st Dept 2008], *lv dismissed* 10 NY3d 930 [2008]). The copy of the 8:29 AM email from Mr. Frade filed with the court (purportedly acknowledging and accepting the settlement offer) is redacted, and thus the court is unable to confirm the contents therein. There are no other indications that Mr. Frade properly “subscribed” either the 8:29 AM email or the 8:32 AM email in accordance with CPLR 2104 by typing his name therein “under circumstances manifesting an intent that the name be treated as a signature.”

Accordingly, Doka’s motion to enforce the settlement agreement is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

Justice Lawrence Knipel