

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D13625
T/mv

_____AD3d_____

Argued - December 15, 2006

ROBERT W. SCHMIDT, J.P.
PETER B. SKELOS
STEVEN W. FISHER
MARK C. DILLON, JJ.

2006-01323

DECISION & ORDER

Vincent DeVita, et al., plaintiffs-respondents,
v Macy's East, Inc., et al., defendants third and
second third-party plaintiffs appellants-respondents;
Knoller Companies, Inc., third-party defendant
respondent-appellant; Hutton Electrical Contracting Corp.,
second third-party defendant respondent-appellant.
(Action No. 1)

(Index No. 27056/98)

Vincent DeVita, et al., respondents,
v Knoller Companies, Inc., et al., appellants.
(Action No. 2)

(Index No. 24540/01)

Carroll, McNulty & Kull, LLC, New York, N.Y. (Sean T. Burns of counsel), for
defendants third and second third-party plaintiffs appellants-respondents in Action No.
1.

Lawrence, Worden & Rainis, P.C., Melville, N.Y. (Roger B. Lawrence and Mary
Beth Reilly of counsel), for third-party defendant respondent-appellant in Action No.
1/appellant in Action No. 2 Knoller Companies, Inc.

O'Connor, Redd & Sklarin, LLP, White Plains, N.Y. (Joseph T. Redd and Sandy
Mitchell of counsel), for second third-party defendant respondent-appellant in Action
No. 1/appellant in Action No. 2 Hutton Electrical Contracting Corp.

January 23, 2007

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DeVITA v MACY'S EAST, INC.
DeVITA v KNOLLER COMPANIES, INC.

Ravi Batra, P.C., New York, N.Y., for plaintiffs-respondents in Action No. 1 and respondents in Action No. 2.

In two related actions to recover damages for personal injuries, etc., Macy's East, Inc., and Gilman Construction, Inc., appeal, Knoller Companies, Inc., separately appeals, and Hutton Electrical Contracting Corp. also separately appeals, as limited by their respective briefs, from so much of an order of the Supreme Court, Queens County (LeVine, J.), dated December 6, 2005, as denied their respective motions to enforce a purported settlement agreement as to each of them.

ORDERED that the order is affirmed, with one bill of costs payable by the appellants appearing separately and filing separate briefs.

To be enforceable, stipulations of settlement must conform to the requirements of CPLR 2104 (*see Matter of Dolgin Eldert Corp.*, 31 NY2d 1, 8; *Graffeo v Brenes*, 85 AD2d 656, 657). The plain language of CPLR 2104 requires that such an agreement be in writing and signed by the parties (or attorneys of the parties) to be bound by it (*see Bonnette v Long Is. Coll. Hosp.*, 3 NY3d 281). Contrary to the appellants' contention, a confirmatory e-mail sent to the plaintiffs' former attorney by counsel to the insurer of one of the defendants, either alone or in conjunction with an e-mail sent by the plaintiffs' former counsel in response, did not constitute a writing sufficient to bring the purported settlement into the scope of CPLR 2104 (*cf. Page v Muze, Inc.*, 270 AD2d 401; *Rosenfeld v Zerneck*, 4 Misc 3d 193). In addition, the purported settlement was not enforceable under the "open court exception" provided for in CPLR 2104 (*Matter of Dolgin Eldert Corp.*, *supra* at 9; *see Falcone v Khurana*, 294 AD2d 535; *Gustaf v Fink*, 285 AD2d 625, 626; *Avaltroni v Gancer*, 260 AD2d 590; *see also* 22 NYCRR 202.26[f]).

Accordingly, the Supreme Court properly denied the motion of Macy's East, Inc., and Gilman Construction, Inc., and the separate motions of Knoller Companies, Inc., and Hutton Electrical Contracting Corp., to enforce the purported settlement agreement.

The remaining contention has been rendered academic in light of our determination.

SCHMIDT, J.P., SKELOS, FISHER and DILLON, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court