STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

LHV PRECAST, INC,

Plaintiff,

-against-

Index No.: 06-1876
RJI No.: 55-06-01183

XL SPECIALTY INSURANCE, CO.,

Defendant.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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Attorneys for Defendant
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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff commenced this action seeking to recover the contractual price for precast concrete sections of bridge span pursuant to a performance bond issued by defendant. Plaintiff has moved for summary judgment for such relief, as well as dismissing the affirmative defenses and counterclaim asserted in defendant's answer. Defendant has cross-moved to consolidate the instant action with an action against the prime contractor

which seeks identical relief.

Summary judgment is a drastic remedy which should only be granted when it is clear that there are no triable issues of fact (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see also Bush v St. Clare's Hosp., 82 NY2d 738, 739 [1993]). Once the movant has established a right to judgment as a matter of law, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). In general, the Court will then view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact (see Boyce v Vazquez, 249 AD2d 724, 726 [3d Dept 1998]; Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997]; Simpson v Simpson, 222 AD2d 984, 986 [3d Dept 1995]).

Plaintiff has submitted an affidavit from its president alleging that it supplied eight sections of bridge span, that it delivered such sections to the job site in full compliance with its contract with Kubricky Construction Corporation (hereinafter Kubricky), that the bridge spans have been accepted by the Department of Transportation of the State of New York, that Kubricky has been paid for such sections and that Kubricky has failed to pay

the sums due and owing under the contract. Plaintiff has also established that the terms of the performance bond require defendant to pay under such circumstances. Plaintiff has thus made a prima facie showing of a right to summary judgment.

Defendant, in opposition to the motion, contends, and plaintiff concedes, that it is entitled to assert any defense which its principal, Kubricky, could assert (see e.g. Spancrete Northeast v. Travelers Indem. Co., 112 A.D.2d 571, 572 [3d Dept 1985]). Such rule of law includes the right to assert any set off the principal may have against the plaintiff (see Durable Group v. De Benedetto, 85 A.D.2d 524 [1st Dept 1981]).

Defendant has submitted an affidavit from Michael Dunn, the project manager on the bridge reconstruction contract. Mr. Dunn alleges that the precast concrete was defective and did not comply with the contract specifications for structural strength, that numerous repairs and corrections were required in order to obtain approval of the sections by the Department of Transportation, that plaintiff failed to comply with contractual time limits for delivery causing the prime contractor to lose significant incentives pursuant to its contract with the State, and that through plaintiff's active negligence, the trailer carrying one of the concrete sections was caused to topple over, destroying the concrete section and causing significant damage to the shoulder and drainage system, as well as causing Kubricky to incur costs to remove the broken section and costs associated with the delay in casting a new section. The damages alleged by Kubricky relating to plaintiff's performance of the instant contract amount to approximately 85% of the

contract price.

In addition, the counterclaim asserted in the related action against Kubricky asserts a set off from an unrelated contract in the amount of approximately 43% of the contract price. As such, the counterclaims significantly exceed the amount claimed by plaintiff.

Plaintiff contends that the damages associated with the accident during delivery are the responsibility of Kubricky, relying upon the risk of loss provisions of UCC § 2-509 (1). The cited subdivision applies to contracts in which the goods are shipped by carrier. Plaintiff has not alleged that the sections were shipped by a carrier, and based upon the record it may be inferred that the tractor-trailer involved in the accident was owned by plaintiff. As such, the cited subdivision would not be applicable. Under the circumstances of this case, it would appear that the risk of loss of conforming goods passes to the buyer upon receipt of the goods pursuant to UCC § 2-509 (3).

Mr. Dunn has alleged that the accident occurred prior to Kubricky's effective receipt of the section, when plaintiff's agent or employee attempted to uncouple the tractor from the trailer. Such activity occurred on the job site, but at some considerable distance from the point where Kubricky would use a crane to unload the trailer, thereby taking receipt of the bridge section. The trailer was rated for only 50,000 pounds, while the section of bridge span weighed in excess of 70,000 pounds. The front supporting gear of the trailer failed when the tractor was no longer supporting the load, causing the trailer to topple over.

It thus appears that there is an issue of fact as to whether Kubricky had received the goods at the time of the accident. Moreover, UCC 2-510 (1) provides that the risk of loss for non-conforming goods does not pass to the purchaser until the defects are cured or the goods are accepted by the buyer. It is uncontroverted that the sections did not conform to the contract specifications. The record indicates that the defects were not fully cured and the sections accepted until several months after the accident. Moreover, the risk of loss provisions of the UCC are intended to allocate such risk in the absence of negligence by one of the parties (see e.g. Conway v. Larsen Jewelers, 104 Misc 2d 872, 873 [Civ Ct, Richmond County 1980]; Ramos v. Wheel Sports Ctr., 96 Misc 2d 646, 647 [Civ Ct, Bronx County 1978]). Nothing in either section indicates an intent to bar a cause of action for active negligence involving damage to goods. As such, defendant has raised a triable issue of fact with respect to plaintiff's liability for damages associated with the accident.

Plaintiff also contends that it never agreed to be responsible for losses associated with delay in completing and re-opening the bridge. However, Mr. Dunn has alleged that the plaintiff's president was aware of the time constraints, incentives and penalties and orally agreed that time was of the essence. Nothing in the purchase order submitted to the Court indicates that it constitutes the entire agreement, nor has plaintiff shown any other ground for disregarding the alleged oral agreement. Plaintiff has also failed to show that the counterclaim in the related action seeking a set off based upon an unrelated contract is

without merit. Since the counterclaims exceed the amount sought by plaintiff, defendant has shown the existence of numerous issues of fact with respect to defenses to plaintiff's claim. Summary judgment is clearly not warranted.

Plaintiff has not offered any opposition to the cross-motion to consolidate the two actions. Since both actions involve the same claims and identical facts and applicable law, consolidation is clearly appropriate. Therefore, the two actions shall be consolidated under the caption LHV Precast, Inc. v XL Specialty Insurance, Co. and Kubricky Construction Corp. under the index number and RJI number of this action.

Accordingly it is

ORDERED that the motion for summary judgment is hereby denied, and it is further

ORDERED that the cross-motion to consolidate the two related actions is hereby granted as indicated herein.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for defendant, who are directed to enter this Decision/Order without notice and to serve plaintiff's counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
June 8, 2007

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated January 6, 2007; Affidavit of Robert Willis sworn to January 29, 2007; Affirmation of Robert C. Grieco, Esq. dated January 29, 2007 with Exhibits A-I annexed;
Memorandum of Law dated January 29, 2007;

Notice of Cross-Motion dated February 16, 2007;
Affidavit of Michael Dunn sworn to February 16, 2007 with Exhibits A-Y annexed;
Affirmation of James E. Dering, Esq. dated February 16, 2007 with Exhibits A and B annexed;
Memorandum of Law dated February 16, 2007;

Affidavit of Robert Willis sworn to February 23, 2007 with Exhibits A and B annexed;
Affirmation of Robert C. Grieco, Esq. dated February 23, 2007;

Letter Memorandum dated February 28, 2007.