

**AFCO Precast v AJV Constr. Corp.**

2007 NY Slip Op 32943(U)

September 18, 2007

Supreme Court, Suffolk County

Docket Number: 0000951/2004

Judge: Emily Pines

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Short Form Order

Index Number: 0951-2004

**Supreme Court - State of New York**  
**Commercial Division, Part 46, Suffolk County**

**Present:****Hon. Emily Pines**

Justice Supreme Court

**Motion Date:** 08-01-2007**Submit Date:** 08-29-2007**Motion No.:** 001 MOTD

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**AFCO PRECAST, a division of OLDCASTE**  
**PARECAST, INC.,**

**Plaintiff,****-against-**

**AJV CONSTRUCTION CORP. and JOHN**  
**TRUSCELLO,**

**Defendants.**

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**Attorney of Plaintiff**

Law Office of Marshall M. Stern

17 Cardiff Court

Huntington Station, New York 11746

**Attorney of Defendant**

William P. Fitzgerald, Esq.

320 West Main Street

Sayville, New York 11782

Plaintiff, AFCO Precast, moves, by Notice of Motion (motion sequence number 001) for an Order pursuant to **CPLR § 3212**, granting Plaintiff Summary Judgment against Defendants for monies owed on goods sold and delivered to the Defendant, AJV Construction Corp. As set forth in Plaintiff's motion papers, Plaintiff delivered precast concrete structures to the corporate Defendant during 2002 and 2003, at the request of AJV. During this period, AJV signed two written agreements with the Plaintiff. The first was a credit agreement dated May 16, 2002. In return for an extension of credit by Plaintiff to Defendant for goods sold and delivered, Defendant agreed to pay Plaintiff interest on items unpaid for more than 30 days at the rate of 1.5% per month. The May 16, 2002 agreement also called for finance charges on unpaid balances at the rate of 18% per annum and for attorneys' fees should the Plaintiff be required to

resort to litigation to collect unpaid amounts. Such agreement provided that it could only be modified in writing signed by all parties. On January 7, 2003, the parties did enter into a subsequent written agreement, in which the corporate Defendant (and the individual Defendant as guarantor), agreed that Defendant owed Plaintiff an outstanding balance for goods sold and delivered of \$204, 413.77, to be paid at the rate of \$10,000 per week. The 2003 agreement also provided for payment of interest on the unpaid balance at the rate of 1% per month and the payment by Defendant of Plaintiff's legal fees incurred should the Defendant default.

Plaintiff states that of the January 2003 figure, there is still outstanding the amount of \$56,196.78. Plaintiff annexes unpaid invoices amounting to this figure to his motion papers. Supporting each invoice are the delivery slips containing the relevant Purchase order numbers, signed by Defendant's representative. Thus, Plaintiff seeks Summary Judgment, awarding Plaintiff the balance due, \$56,196.78, plus applicable interest, and finance charges and seeks an "inquest" on the amount of reasonable attorneys' fees.

In response, Defendant's President submits an Affidavit in which he states that since the date of the January 2003 agreement, he has paid the Plaintiff, both directly and through others the amount of \$313, 957.41. Defendant attaches no proof of payment of any kind to his papers and merely avers that he does not understand how Plaintiff applied the payments made to the merchandise delivered. Accordingly, he asserts that there exists a question of fact concerning what monies, if any, he and AJV Construction owe the Plaintiff for goods sold and delivered. In his papers, Defendant's President does not address the specific invoices attached to the Plaintiff's papers. However, he states that he has no idea how the Plaintiff applied the over

\$300,000.00 in payments received by the Plaintiff to the various invoices.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. **see, Winegrad v. New York Univ. Med. Ctr.**, 64 NY 2d 851, 487 NYS 2d 316, 476 NE 642 (1985). Once such a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action. **see, Alvarez v. Prospect Hosp.**, 68 NY 2d 320, 508 NYS 2d 923, 501 NE 2d 572 (1986).

The Plaintiff has sustained its burden of establishing its *prima facie* entitlement to Summary Judgment on its cause of action to recover payment for goods sold and delivered, since it has submitted evidentiary proof including invoices, corresponding signed delivery receipts and an account statement demonstrating an outstanding balance of \$56,197.78. **see, Becker v. Shore Drugs**, 296 AD 2d 515, 745 NYS 2d 492 (2d Dep't 2002); **Riverhead Building Supply Corp v. Regine Starr, Inc.**, 249 Ad 2d 532, 672 NYS 2d 117 (2d Dep't 1998). The Defendants do not deny receipt of the goods nor the amount sought. The Defendant's assertion without any evidentiary proof or records, on the eve of trial, that it or some entity on its behalf may have paid for any or some of these goods, without more, is insufficient to raise a triable issue of fact warranting denial of Summary Judgment on that issue.

Where an agreement between parties is clear and unambiguous on its face, it will be enforced according to its terms and without resort to extrinsic evidence. **see, WWW Assocs v. Giancontieri**, 77 NY 2d 157, 565 NYS 2d 440, 566 NE 2d 639 (1990). In this

case, the January 2003 agreement, clearly modified the prior credit extension agreement between the parties. In accordance with the 2003 agreement, Plaintiff was entitled to interest on the unpaid balance of its debt at the rate of 1% per month and attorneys' fees incurred in order to satisfy the debt. It is clear that there is no provision for finance charges. Based on the foregoing, the issues remaining for trial are the date from which interest is calculated and the amount of attorneys' fees to be awarded. As Defendant did not default on the lawsuit, these issues are set down for trial rather than inquest as Plaintiff requests. The trial has been scheduled to commence on October 15, 2007 at 9:30 a.m. There will be no adjournments.

This constitutes the **DECISION** and **ORDER** of the Court.

**Dated:** September 18, 2007  
Riverhead, New York

  
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**EMILY PINES**  
J. S. C.