5

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

CERAMICA SALOMI, S.A., Plaintiff,	TRIAL / IAS PART 32 NASSAU COUNTY
- against -	Index No. 5793/07
A-1 TILE, INC. and CIDA TILE WHOLESALERS, INC., Defendants.	Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits .....
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

The plaintiff moves for an order granting the plaintiff summary judgment pursuant to CPLR 3212 for $15,080.37, and striking the defense affirmative defenses pursuant to CPLR 3211 (b). The defendants oppose the motion. The underlying commercial contract action arises from an allegation of money due and owing to the plaintiff for goods, wares and merchandise provided by the plaintiff to the defendant.

The attorney for the plaintiff states, in a supporting affirmation dated August 28, 2007, the defendants' two affirmative defenses are baseless, and must be stricken. The attorney for the plaintiff states the parties entered into an agreement where the plaintiff was to provide ceramic tiles to the defendants in consideration for $15,080.37. The attorney for the plaintiff asserts the first affirmative defense, to wit failure of consideration and breach of the contract by the plaintiff, is negated by the existence of consideration in the parties' agreement. The

attorney for the plaintiff avers the second affirmative defense, namely the plaintiff tendered nonconforming goods which the defendant did not accept, is a self-serving, unsubstantiated attempt to thwart the plaintiff's bona fide claim. The attorney for the plaintiff points to the plaintiff's supporting affidavit dated July 27, 2007, by the vice president of the commercial agent, S. Gillman Associates for the plaintiff corporation, Ceramica Salomi, S.A., which indicates all merchandise was shipped to the defendants at its special instance and request in accord with the defendants' specifications to 896 Old Country Road, Westbury, New York. The attorney for the plaintiff notes the specifications are delineated in the invoices annexed to the moving papers, and the goods were shipped and delivered in good and marketable condition as stated by the affiant agent. The attorney for the plaintiff notes the defendants accepted the subject goods, wares and merchandise without dispute, inspected these items at its place of business, and never made any timely claim nor allegation concerning the condition or marketability of the goods delivered. The attorney for the plaintiff maintains the second affirmative defense must not be considered an issue of fact, as a matter of law, and the defense claims are barred by the Uniform Commercial Code § 2-607 (3) (a). The attorney for the plaintiff contends the defendant unjustifiably allowed an inordinate amount of time to pass before notifying the plaintiff the merchandise was allegedly non-conforming, thus asserting an alleged claim of defective goods against the seller which was unreasonable, as a matter of law.

The attorney for the plaintiff states the plaintiff is entitled to summary judgment because there are no genuine triable issues of fact. The attorney for the plaintiff argues the defendants breached the agreement without excuse nor defense. The vice president of the commercial agent, S. Gillman Associates for the plaintiff corporation, Ceramica Salomi, S.A.

reiterates, in a supporting affidavit dated July 27, 2007, the assertions by counsel for the plaintiff.

The vice president of both defendants states, in an opposing affidavit dated September 12, 2007, the defendant A-1 Tile, Inc. operates a retail tile operation, and its affiliate the defendant Cida Tile Wholesalers, Inc. operates a wholesale tile operation in Nassau County. The vice president of both defendants states the defendant Cida Tile Wholesalers, Inc. ordered various shipments of wall tiles from the plaintiff, some decorative. The vice president of both defendants asserts there is an initial question concerning why the plaintiff named both defendants as parties because only one of the two entities could have ordered the tiles, and should have been billed for the cost. The vice president of both defendants avers the defendant A-1 Tile, Inc. should not be a party despite what the plaintiff's documents show. The vice president of both defendants points out the plaintiff provides no documentation, signed or otherwise, from either of these defendants which reflects an acknowledgment by the defendants as to which company purchased and received the tiles in question, so there is a question of fact as to which entity, if any should be responsible for the charges. The vice president of both defendants maintains, in the ordinary course of business, the defendant Cida Tile Wholesalers, Inc., typically orders matching sets of decorative and wall tiles for ultimate resales to its customers, and the problem with what the plaintiff shipped is the background color of the decorative tiles did not match the corresponding wall tiles which were ordered, and the whole shipment was rendered useless. The vice president of both defendants claims the defendants promptly brought this defect to the attention of plaintiff's sales representative, but the problem was never rectified, and the defendants offered to return what was shipped, but the plaintiff refused to take the shipment back, so the

defendants are struck with the merchandise. The vice president of both defendants contends, based upon these assertions, the defendants should not have to pay the sums sought by the plaintiff, and, at the very least, there are triable issues of fact that would preclude summary judgment being entered in the plaintiff's favor.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."

Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 325; ***Andre v. Pomeroy***, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (***see, Whelen v. G.T.E. Sylvania Inc.***, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (***see, e.g., Sillman v. Twentieth Century-Fox Film Corp.***, 3 N.Y.2d 395; ***Gervasio v. Di Napoli***, 134 A.D.2d 235, 236; ***Assing v. United Rubber Supply Co.***, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (***Gervasio v. Di Napoli, supra***, 134 A.D.2d at 236, quoting from ***Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo***, 110 A.D.2d 616, ***aff'd*** 66 N.Y.2d 701). If the issue

claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (***see, Andre v. Pomeroy***, 35 N.Y.2d at 364; ***Assing v. United Rubber Supply Co., supra***).

CPLR 3211 (b) provides "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." CPLR 3211 (b) requires the motion Court to search the record (***see*** Siegel, Supplementary Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:38). The motion Court is compelled, as a matter of law, to dismiss affirmative defenses "totally bereft of factual data," "merely plead[ing] conclusions of law without supporting facts" (***Brody v. Siroka***, 173 A.D.2d 431, 433, 570 N.Y.S.2d 57 [2d Dept., 1991] ***quoting Glenesk v. Guidance Realty Corp.***, 36 A.D.2d 852, 853, 321 N.Y.S.2d 685 [2d Dept., 1971]). The Second Department also holds affirmative defenses should be dismissed where they simply repeat denials already set forth in the answer to a complaint (***Plemmenou v. Arvanitakis***, 39 A.D.3d 612, 613, 833 N.Y.S.2d 596 [2d Dept., 2007]). But, the motion Court should grant leave to a corporate defendant to replead those affirmative defenses in proper form (***see Bentivegna v. Meenan Oil Co., Inc.***, 126 A.D.2d 506, 508, 510 N.Y.S.2d 626 [2d Dept., 1987]).

The Court has carefully reviewed and considered all of the parties' submissions on this motion. The Court finds there are genuine triable issues of fact here which require resolution by the trier of fact. The Court also finds the affirmative defenses must be dismissed because of the holding in ***Glenesk v. Guidance Realty Corp., supra***, which requires factual data, rather than merely pleading conclusions of law without supporting facts. However, the Court grants the defendants leave to replead these affirmative defenses in

proper form.

Accordingly, the motion is denied with leave given to the defendants to replead these affirmative defenses in proper form.

So ordered.

Dated: **November 13, 2007**

ENTER:

J. S. C.
HON. ANTONIO I. BRANDVEEN

FINAL DISPOSITION NON FINAL DISPOSITION XXX