# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 601455/2004
ELM SUSPENSION SYSTEMS
VS
SKYLINE RESTORATION &
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided per attached

FILED
MAY 19 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/12/08

J.S.C.
EMILY JANE GOODMAN

Check one: if appropriate: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

ELM SUSPENSION SYSTEMS, INC.,

Plaintiff,

-against-

SKYLINE RESTORATION & WATERPROOFING, INC., VASILIOS (BILL) PIERRAKEAS, ANNE M. FRIED, BOARD OF MANAGERS OF THE 169 HUDSON STREET CONDOMINIUM, THE HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY, 26-30 WEST 38TH STREET OWNERS CORPORATION, and BOARD OF MANAGERS OF THE EVANS VIEW TOWER CONDOMINIUM,

Index No. 601455/04

Defendants.

----------X



**EMILY JANE GOODMAN, J.S.C.:**

In this action, plaintiff ELM Suspension Systems, Inc., a supplier of scaffolds and other equipment, seeks to recover unpaid rental charges on equipment that it rented to defendant Skyline Restoration & Waterproofing, Inc. (Skyline), an exterior restoration contractor. Plaintiff now moves, pursuant to CPLR 3212, for summary judgment on its fourth, sixth, eleventh, and sixteenth causes of action for a total of $183,905.02 against Skyline, Vasilios (Bill) Pierrakeas, one of Skyline's principals, and the Board of Managers of the 169 Hudson Street Condominium, which hired Skyline to perform work at its building. Plaintiff also seeks dismissal of Skyline's counterclaim. Defendants cross-move for summary judgment against plaintiff.[1]

[1]Although Skyline seeks summary judgment, it concedes that it owes plaintiff $79,287.96 in principal (Kalafatis Aff., ¶ 91).

## BACKGROUND

Plaintiff is a supplier of electric, cantilevered scaffolds. Pursuant to separate rental contracts, Skyline rented scaffolds and related equipment from plaintiff on various dates from 2001 through 2003 for specific jobs. Pierrakeas is one of the three owners of Skyline. The Board of Managers of the 169 Hudson Street Condominium manages the building at 169 Hudson Street in Manhattan.

By letter dated June 29, 2000, plaintiff quoted Skyline its "best rental prices for the 2000 rental season" as the following:

| | | |
|---|---|---|
| a. | Scaffolds with hooks or parapet clamps: | |
| | - Aluminum stage (fixed length platform): | $700.00 per 28 days |
| | - Modular stage with end stirrups: | $800.00 per 28 days |
| | - Modular stage with walk-by stirrups: | $900.00 per 28 days |
| b. | Scaffolds with Delta systems of outrigger beams and counterweights: | |
| | - Aluminum stage (fixed length platform): | $1,100.00 per 28 days |
| | - Modular stage with end stirrups: | $1,200.00 per 28 days |
| | - Modular stage with walk-by stirrups: | $1,300.00 per 28 days |
| c. | Accessories: | |
| | - Roof hook: | $35.00 per 28 days |
| | - Parapet clamp: | $40.00 per 28 days |
| | - Outrigger beam: | $90.00 per 28 days |
| | - Counterweight: | $5.00 per 28 days |
| | - Boost up transformer: | $75.00 per 28 days |
| | - Step-up transformer (220V/110V): | $75.00 per 28 days |

Special scaffold configurations or special rigging arrangements would be quoted individually. (Yaffe Affirm., Exh. E).

The proposal further states that "the charge for deliveries and pick-ups is $75.00 per trip" (*id.*). Short-term rentals of one, two, and three weeks were charged at the rates of 40, 60, and 80% of the 28-day price (*id.*).

Skyline applied for credit from plaintiff pursuant to a credit application dated March 13,

2001. The application states as follows:

> **AGREEMENT:**
> WE HEREIN MAKE APPLICATION TO ELM SUSPENSION SYSTEMS FOR CREDIT. IF CREDIT IS GRANTED, WE PROMISE TO PAY ALL INVOICES WITHIN 30 DAYS OF RECEIPT OF INVOICE. IN THE EVENT PAYMENT IS NOT MADE AND THIS ACCOUNT IS TURNED OVER TO AN OUTSIDE PARTY FOR COLLECTION, WE AGREE TO PAY ALL COSTS (INCLUDING LEGAL FEES AND COURT EXPENSES) OF COLLECTION. THE APPLICANT AGREES TO PAY INTEREST AT 1½% PER MONTH OR 18% ANNUALLY (OR THE HIGHEST LEGAL RATE IF LESS) ON ANY UNPAID BALANCE OVER 30 DAYS AFTER RECEIPT OF INVOICE. PERMISSION IS GRANTED TO E.L.M. SUSPENSION SYSTEMS TO VERIFY THE INFORMATION WITH OUTSIDE PARTIES WHOSE NAMES ARE HEREIN PROVIDED. NO OTHER TERMS OF PAYMENT SHALL APPLY UNLESS DEFINED IN WRITING AND SIGNED BY BOTH THE APPLICANT AND REPRESENTATIVE OF E.L.M. SUSPENSION SYSTEMS.

(*id.*, Exh. F). In consideration of credit being granted to Skyline, Pierrakeas unconditionally guaranteed payment of all sums owed by Skyline to plaintiff (*id.*). Plaintiff alleges that it granted credit to Skyline.

Every rental was made pursuant to a rental contract, which contained a listing of the equipment rented under the contract. The terms and conditions of the contract, which are undisputedly identical, state that:

> With respect to any material or equipment furnished hereunder, the Contract term shall commence on the date the material and equipment is delivered or picked up and shall continue until the date the material and equipment is made available and actually returned to E.LM.'s warehouse.

(*id.*, Exh. G, § 1). The contracts further provide the following provision concerning payment:

> Based upon invoices submitted by E.L.M. to the Contractor, the Contractor shall make monthly payments to E.L.M. within 30 days from the billing date of the Contract Term and monthly thereafter. Final payment constituting the entire unpaid balance of the contract term shall be paid by Contractor to E.L.M. within ten (10) days of the termination of the contract. Sums due E.L.M. for the performance of extra work shall be invoiced monthly and due upon presentation.

(*id.*, § 2). In case of loss or damage to the equipment, the contracts state that:

> During the Contract Term, Contractor shall assume and bear the complete risk of loss or damage to E.L.M. material and/or equipment. In the event that any materials or equipment provided by E.L.M. under this Agreement shall be damaged, lost, stolen, or destroyed, the Contractor shall pay to E.L.M. a sum equal to the current list price for said equipment and/or material, at the time of such loss.

(*id.*, § 15).

After Skyline placed an order with plaintiff, plaintiff delivered the scaffolding to the job site (Kalafatis EBT, at 55-56). One of Skyline's representatives would accept delivery and sign for the equipment (*id.* at 56). Thereafter, Skyline's mechanics assembled the components for the scaffolds (*id.* at 57). One of the owners of Skyline, John Kalafatis, then conducted a final inspection to ensure that "everything was safely installed" and that "it operate[d]" (*id.* at 57-58).

The complaint contains 16 causes of action relating to rental of various equipment for jobs at different sites, sounding in breach of contract and account stated. However, only the fourth, sixth, eleventh, and sixteenth causes of action are in dispute, inasmuch as the parties settled the balance of the complaint. Each of the remaining causes of action relates to Skyline's rental of equipment for specific job sites in Manhattan: the fourth cause of action relates to a project at 100 Trinity Place (Complaint, ¶ 39); the sixth cause of action relates to a job at 169 Hudson Street (*id.*, ¶ 52); the eleventh cause of action pertains to a project at 222 Park Avenue South (*id.*, ¶ 87); and the sixteenth cause of action relates to a job at 303 East 60th Street (*id.*, ¶ 131).

With respect to the fourth cause of action, plaintiff alleges that Skyline entered into two rental contracts: contract numbers 01064 and 01077 (*id.*, ¶¶ 39-46). Plaintiff alleges in the sixth cause of action that Skyline entered into two rental contracts: contract numbers 01324 and 01494

(*id.*, ¶¶ 52-61). The eleventh cause of action alleges that Skyline entered into the following five rental contracts: contract numbers 01510, 01516, 01533, 01572, and 01579 (*id.*, ¶¶ 87-101). As for the sixteenth cause of action, plaintiff alleges that amounts are due and owing on 18 contracts: contract numbers 01047, 01280, 01288, 01303, 01306/01352, 01353, 01392, 01393, 01424, 01557, 01558, 01608, and 01614 and rental ticket numbers 002723/004490, 002797, 004415, 004296, and 005072 (*id.*, ¶¶ 131-215).

Skyline asserts one counterclaim against plaintiff seeking $1,000,000, claiming that, by letter dated April 26, 2004, Skyline notified plaintiff that its equipment was defective, which plaintiff failed to cure or adjust the rental prices. Additionally, Skyline claims that plaintiff's filing of mechanic's liens against Skyline's clients' real property was made in bad faith, in order to frustrate Skyline's relations with its clients (Answer, ¶¶ 17-19).

Plaintiff moves for summary judgment in its favor as follows:

(1) $11,049.63 against Skyline and Pierrakeas, based on invoices sent between September 2001 and January 2002 (fourth cause of action);

(2) $45,482.99 against Skyline, Pierrakeas, and the Board of Managers of the 169 Hudson Street Condominium, based on invoices sent between June 2002 and August 2003 (sixth cause of action);

(3) $28,952.66 against Skyline and Pierrakeas, based on invoices sent from October 2002 and June 2003 (eleventh cause of action); and

(4) $98,419.74 against Skyline and Pierrakeas, based on invoices sent from August 2002 through August 2003 (sixteenth cause of action).

In sum, plaintiff seeks a total of $183,905.02 in principal against these three defendants.

## DISCUSSION

"'The 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 eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). The court's role in resolving summary judgment motions is issue finding, not issue determination (*Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 472 [1st Dept 2008]).

Although plaintiff's moving papers do not specify what theory it is proceeding under, the court shall analyze plaintiff's motion under both account stated and breach of contract theories.

Account Stated

An account stated is an agreement, either express or implied, between the parties to an account based upon prior transactions between them (*Abbott, Duncan & Wiener v Ragusa*, 214 AD2d 412, 413 [1st Dept 1995]; *Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431 [4th Dept 1979]). The agreement is an acceptance of an amount due on an account that has been rendered (*Interman Indus. Prods. v R. S. M. Electron Power*, 37 NY2d 151, 153-154 [1975]). "There can be no account stated where no account was presented or where any dispute about the account is shown to have existed" (*Abbott, Duncan & Wiener*, 214 AD2d at 413). Courts have implied assent under two circumstances: (1) where the defendant assents to the balance by

retaining invoices without objection within a reasonable period of time (*Federal Express Corp. v Federal Jeans, Inc.*, 14 AD3d 424 [1st Dept 2005]; *Herrick, Feinstein v Stamm*, 297 AD2d 477, 478-479 [1st Dept 2002]); and (2) where the defendant makes partial payment on invoices without any objection or reservation of rights (*see Ellenbogen & Goldstein v Brandes*, 226 AD2d 237, 237-238 [1st Dept 1996], *lv denied* 89 NY2d 806 [1997]; *Chisholm-Ryder Co., Inc.*, 70 AD2d at 431). It is the plaintiff's burden to show that the invoices were sent using a regular office mailing procedure (*Morrison Cohen Singer & Weinstein, LLP v Brophy*, 19 AD3d 161, 162 [1st Dept 2005]).

In this case, plaintiff submits only an attorney affirmation, which is apparently not based on personal knowledge of the facts, indicating that the invoices were sent to Skyline (Yaffe Affirm., at 5-6, 7-8, 9-10, 11-18). Plaintiff does not state that these invoices were sent to Skyline according to a regular mailing procedure or the dates when these invoices were sent to Skyline. Accordingly, summary judgment based upon an account stated theory must be denied (*see Morrison Cohen Singer & Weinstein, LLP*, 19 AD3d at 161-162 [reversing trial court's grant of summary judgment on account stated theory, since plaintiff failed to submit evidence of a regular mailing procedure or the dates when the invoices were mailed]).

Breach of Contract

To recover for breach of contract, the plaintiff must prove: (1) the existence of an agreement, (2) performance by the plaintiff, (3) the defendant's failure to perform, and (4) resulting damages (*see Noise In The Attic Prods., Inc. v London Records*, 10 AD3d 303, 307 [1st Dept 2004], citing *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). A party breaches if it

fails to make payment in accordance with the terms of the contract (*Republic Natl. Bank of N.Y. v Olshin Woolen Co.*, 304 AD2d 401, 402 [1st Dept 2003]). If the failure to pay is not disputed or excused, the plaintiff is entitled to summary judgment on its breach of contract claim (*see e.g. Titan Corp. v Cellular Vision Tech. & Telecom.*, 271 AD2d 437 [2d Dept 2000]).

Fourth Cause of Action

Plaintiff contends that, pursuant to contract numbers 01064 and 01077, it rented electric scaffolds, long-reach outriggers, counterweights and related equipment to Skyline, and that Skyline failed to pay rental charges for this equipment. It provides invoices dated September 2001 through January 2002 for rental of equipment made thereunder, with total rental charges of $9,444.12 (Yaffe Affirm., Exhs. H, I, J, K). Additionally, plaintiff submits a statement dated August 21, 2003 reflecting that these charges had not been paid as of that date. Thus, plaintiff has made a prima facie showing that it performed under the rental contracts, and that Skyline failed to make payments in accordance with their terms (*see George S. May Intl. Co. v Thirsty Moose, Inc.*, 19 AD3d 721, 722 [3d Dept 2005]).

Defendants contend that Skyline and Pierrakeas should not be held liable for the amounts in these invoices because the equipment was never found after the events of September 11, 2001. They offer an affidavit from Skyline's principal, John Kalafatis, who avers that, because of the job site's proximity to Ground Zero, Skyline was not permitted access to the site for at least four months, and that when it was able to return to the site, "all of [plaintiff's] equipment was gone." Kalafatis states that the whereabouts of the equipment were never determined (Kalafatis Aff., ¶¶ 34-36). According to Kalafatis, plaintiff's principal, Eugene Sikorski, told him that plaintiff

"would not charge Skyline for the value of this equipment" and "not to worry about it" (*id.*, ¶ 37). Kalafatis states that he was told that other companies were in the same position as Skyline and that Sikorski was "working things out with them as well" (*id.*). Defendants take the position that if Skyline owes anything, it should only be held liable for the $1,604.81 for the replacement value of the equipment (*id.*, ¶ 41).

Defendants have failed to raise an issue of fact as to Skyline's liability. Although defendants claim that the equipment could not be located after September 11th, the terms and conditions of the rental contracts state that "[d]uring the Contract Term, Contractor shall assume and bear the complete risk of loss or damage to E.L.M. material and/or equipment" (Yaffe Affirm., Exh. G, § 15). Furthermore, defendants' assertion that Sikorski modified the rental contracts is untenable in view of their provision that "[t]his Agreement may not be altered, modified or amended except by a written agreement executed by E.L.M" (*id.*, § 22). General Obligations Law § 15-301 (1) also provides that "[a] written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent."

In view of the fact that Pierrakeas unconditionally guaranteed payment of all sums owed by Skyline, Pierrakeas is equally liable to plaintiff (*see City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998] ["[o]n a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guaranty"]).

However, plaintiff also seeks $1,604.81 for the value of equipment that was not returned

to it. The rental contracts state that plaintiff is entitled to "a sum equal to the current list price for said equipment and/or material, at the time of such loss" (Yaffe Affirm., Exh. G, § 15). Plaintiff has not offered any proof to substantiate the value of this equipment. Therefore, partial summary judgment is granted in the amount of $9,444.12 on the first cause of action against Skyline and Pierrakeas, and is denied as to the amount of $1,604.81 for failure to substantiate the value of the equipment.

Sixth Cause of Action

Plaintiff maintains that it rented Delta outrigger beams with bench work and counterweights under contract number 01324 and a 12-foot stage platform and related equipment under contract number 01494 (Yaffe Affirm., Exhs. O, P, Q, R). According to plaintiff, Skyline failed to pay $11,265.89 in rental charges and an additional $760.38 per month ($543.13 on contract number 01324 and $217.25 on contract number 01494) since August 2003, because the equipment has not been returned to plaintiff. Plaintiff further contends that it is entitled to judgment against the 169 Hudson Street condominium board of managers under Real Property Law § 339-l (2).

However, in opposition to the motion, defendants contend that plaintiff subsequently sold this equipment to Skyline, and thus plaintiff is not entitled to its claimed rental charges, but rather is only entitled to $5,339.02 for the equipment sales price. Skyline's principal, Kalafatis, avers that Sikorski, on behalf of plaintiff, signed a sales agreement dated July 18, 2002 selling the leased equipment, which was subsequently executed by Pierrakeas on behalf of Skyline (Palmeri Affirm., Exh. B; Kalafatis Aff., ¶¶ 29-30). According to Kalafatis, this agreement was

never disavowed (*id.*, ¶ 31). Kalafatis states that he has no objection to paying plaintiff $5,339.02 in accordance with the sales agreement, but states that Skyline should not be required to pay interest since plaintiff has continually refused to honor the sales contract (*id.*, ¶ 32).

Sikorski's affidavit, submitted in reply, states that, in July 2002, he sent Skyline a proposal to sell leased equipment relating only to contract number 01324. Nonetheless, plaintiff never received the proposal back from Skyline nor any other response, so he assumed that the proposal was rejected (Sikorski Aff., ¶ 6). In fact, one of plaintiff's invoices, which was provided by Skyline, states: "Bill these rentals keep accruing because your guys apparently NEVER returned the items. Do you have a return slip? Whatever the case may be, this could have been purchased 10X over. We currently have $7,131.86 in an escrow account on the [sic] this location. 1/25/05" (Yaffe Reply Affirm., Exh. RRR).

Here, summary judgment is not appropriate. There is a disputed question of fact as to whether the parties subsequently entered into a sales contract for the rented equipment. If the finder of fact concluded that they did enter into such an agreement, then plaintiff would not be entitled to rental charges after the sale.

In support of its motion for summary judgment against the Board of Managers of the 169 Hudson Street Condominium pursuant to Real Property Law § 339-l (2), plaintiff merely asserts that it is a "matter of public record that 169 Hudson Street was a landmark warehouse building built in the 1880's that was converted, as part of the restoration of the building performed by Skyline, into residential condominium lofts" (Yaffe Affirm. in Support, at 8).

Real Property Law § 339-l (2) states, in part, as follows:

No labor performed on or materials furnished to the common elements shall be the

> basis for a lien thereon, but all common charges received and to be received by the board of managers, and the right to receive such funds, shall constitute trust funds for the purpose of paying the cost of such labor or materials performed or furnished *at the express request or with the consent of the manager, managing agent or board of managers*, and the same shall be expended first for such purpose before expending any part of the same for any other purpose (emphasis added).

Plaintiff has submitted no evidence to demonstrate that the work was performed with the express request or consent of the board. Accordingly, summary judgment must also be denied as to the board of managers on this cause of action.

Eleventh Cause of Action

Plaintiff contends that it rented the following equipment to Skyline, as reflected in its invoices and statements: (1) Delta outrigger beams with bench work and counterweights (contract number 01510); (2) a 12-foot stage platform and related equipment (contract number 01516); (3) steel frame, scaffolding and related equipment (contract number 01533); (4) a modular platform with end stirrups and a counterweighted outrigger system with scaffold towers and related equipment (contract number 01572); and (5) an outrigger beam with scaffold tower and counterweights and related equipment (contract number 01579) (Yaffe Affirm., Exhs. U, W, Y, AA, CC, DD). According to plaintiff, Skyline has failed to pay $28,952.66 in rental charges for this equipment.

Skyline relies on the affidavit from Kalafatis, which states that it is customary in the scaffold business for vendors to credit rental of equipment during winter months (Kalafatis Aff., ¶ 43). Thus, the three modular scaffolds that were rented at $800 per month for a total of $7,200 should not be charged to Skyline (*id.*, ¶ 47). Kalafatis also claims that there should be a further reduction in an amount of $3,600 because plaintiff double-billed Skyline for parts of the modular

scaffold which should have been included in the rental price (*id.*, ¶ 49). Skyline may not seek to vary the terms of the unambiguous rental contracts by resorting to extrinsic evidence of industry custom (*see South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]). Because Skyline admits that it owes plaintiff $18,152.66 ($28,952.66 less $10,800) and because the Court has determined that Skyline's defense of a credit for the winter months in the amount of $7,200 is unsupported, partial summary judgement will be granted in the amount of $25,352.66 and the issue of double billing will be determined at trial (*see Coyne Elec. Contrs. v Kalikow Constr. Corp.*, 134 AD2d 399, 401 [2d Dept 1987]).

Sixteenth Cause of Action

Here, plaintiff contends that it rented numerous types of scaffolds and other equipment to Skyline, and that Skyline failed to pay applicable rental charges (Yaffe Affirm., Exhs. FF- OOO).

Skyline, however, maintains that it owes plaintiff only $54,185.47 for this job, factoring in various credits, backcharges to plaintiff, and double-billing.[2] Specifically, Kalafatis claims that there should be the following backcharges and credits: (1) a $10,000 backcharge and $1,150 credit for the use of a four-point scaffold which was never approved by the Department of Buildings; (2) a $5,228.48 credit for the use of a six-point scaffold which was also never approved by the Department of Buildings; (3) a $2,000 credit for dismantling equipment at the job site; (4) a $6,258.26 credit for missing and lost equipment; (5) a $2,381.49 reduction in invoice H-2044-11-11 because of a reduction in the scaffold cost from $980 to $760 in invoice

[2]Kalafatis does, however, concede that Skyline has no objection to paying these invoices totaling $44,857.17: H-2044-2 ($1,753.65); H-2044-4 ($2,718.16); H-2044-5 ($19,558.09); H-2044-7 ($162.38); H-2044-10 ($13,922.03); H-2044-12 ($351.83); H-2044-17 ($5,141.87); H-2044-18 ($324.76) and H-2044-24 ($924.40) (Kalafatis Aff., ¶ 87).

H-2044-11-12; (6) a $1,983.29 credit for double-billing for an aluminum platform in H-2044-20; (7) a $1,381.90 credit for double-billing in invoice H-2044-21; (8) a $5,369.27 credit for "excessive" charges for counterweights, roof hooks, and hardware; (9) $649.51 reduction for a booster charge; (10) $1,667.12 reduction for excessive charges for a three-point scaffold; (11) a $142.89 reduction for safety lines; and (12) a $649.50 reduction for a manual system (Kalafatis Aff., ¶¶ 66-86). As with the eleventh cause of action, Skyline has raised issues of fact concerning its entitlement to backcharges and credits sufficient to withstand summary judgment (*see Coyne Elec. Contrs., Inc.*, 134 AD2d at 401).

Skyline's Counterclaim

As described above, Skyline asserts one counterclaim against plaintiff, seeking $1,000,000, alleging that although it notified plaintiff that its equipment was defective and that its claims for rental charges were exaggerated, plaintiff did not cure the defects or adjust the rental prices. Skyline further claims that plaintiff filed mechanic's liens against its clients' real property in bad faith in order to frustrate Skyline's relations with its clients.

Plaintiff moves for summary judgment dismissing this counterclaim as "incomprehensible," and notes that all of the causes of action concerning the mechanic's liens have been settled, mooting the counterclaim. However, as noted above, Skyline's counterclaim also seeks setoffs for plaintiff's defective equipment. Accordingly, summary judgment dismissing the counterclaim is not appropriate.

Prejudgment Interest

In its cross motion, Skyline contends that it should be required to pay prejudgment

interest at the rate of 9% per annum, not 18% per annum, on any sums owed to plaintiff. The credit application provides that "[t]he applicant agrees to pay interest at 1½% per month or 18% annually (or the highest legal rate if less) on any unpaid balance over 30 days after receipt of invoice" (Yaffe Affirm., Exh. F, at 2). Considered in context, the above provision unambiguously requires that Skyline pay interest at the rate of 18% annually.

Attorney's Fees

Although plaintiff requests that attorney's fees be assessed against Skyline and Peirrakeas in paragraph F of the wherefore clause in the Affirmation in Support, the notice of motion does not contain that request, and no argument is made in support of that request until plaintiff's reply papers. In its cross motion, Skyline contends that it should not be required to pay attorney's fees. It points to the provision in the credit application which states, in relevant part, that

> IF CREDIT IS GRANTED, WE PROMISE TO PAY ALL INVOICES WITHIN 30 DAYS OF RECEIPT OF INVOICE. IN THE EVENT PAYMENT IS NOT MADE AND THIS ACCOUNT IS TURNED OVER TO AN OUTSIDE PARTY FOR COLLECTION, WE AGREE TO PAY ALL COSTS (INCLUDING LEGAL FEES AND COURT EXPENSES) OF COLLECTION.

Skyline correctly notes that legal fees are ordinarily not assessed, absent statute or express agreement. Skyline maintains that the above cited provision is not triggered because the account was not turned over to an outside party for collection given that plaintiff brings suit in its own name. Further, Skyline maintains that plaintiff's attorney cannot be deemed an "outside" party because an attorney is an agent or representative of a party and therefore should not be considered a separate, outside, party. Plaintiff maintains that an attorney is an outside party

because even though the attorney is a representative, it is still not a party but a separate entity. Plaintiff also cites cases referring to "an outside party such as an attorney."

Neither party is entitled to summary judgment on plaintiff's claim for attorneys fees. The fact that an attorney represents a party does not preclude consideration of that attorney as an outside party, especially because the attorney cannot be deemed a party. Words in a contract must be construed as having meaning, yet Skyline does not propose an alternative, logical, interpretation of the intent of the provision. Skyline maintains that plaintiff cannot sue in its own name. However, such an interpretation would mean that in order to trigger the provision (which references payment of "court expenses") Skyline would have to assign its interest in the lawsuit to another party to maintain it. Given that the provision in question uses the words "turned over" to an outside party, rather than "assigned" to an outside party, Skyline's argument is unsupported. However, an issue still exists as to whether plaintiff would be entitled to an award of attorney's fees. Attorney's fees are ordinarily only awarded to a prevailing party (*see Nestor v McDowell*, 81 NY2d 410 [1993]), and this issue has not yet been determined.

Accordingly, it is

ORDERED that the motion by plaintiff E.L.M. Suspension Systems, Inc. for summary judgment is determined as follows:

(1) on the fourth cause of action, partial summary judgment is granted to the extent that defendants Skyline Restoration & Waterproofing, Inc. and Vasilios (Bill) Pierrakeas are liable to plaintiff $9,444.12, and the issue of the amount of whether $1,604.81 is owed for the value of equipment that was not returned shall be determined at the trial herein;

(2) on the sixth cause of action, summary judgment is denied;

(3) on the eleventh cause of action partial summary judgement is granted in the amount of $25,352.66 and the issue of double billing will be determined at trial;

(4) on the sixteenth causes of action, summary judgment is denied;

(5) summary judgment is denied as to dismissal of Skyline's counterclaim;

And it is further

ORDERED that the cross motion by defendant Skyline Restoration & Waterproofing, Inc. for summary judgment is denied;

And it is further

ORDERED that the parties *personally* appear at a settlement conference with their attorneys on June 26, 2008 at 2:15 pm in Room 422 at 60 Centre Street.

**This Constitutes the Decision and Order of the Court.**

Dated: May 12, 2008

ENTER:

J.S.C.

EMILY JANE GOODMAN