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

PRESENT: Hon. MICHAEL D. STALLMAN PART 7
Justice

Index Number : 119134/2006
GLOBAL METALS SALES
vs
T&A SCREW PRODUCTS
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 119134/06
MOTION DATE 5/11/09
MOTION SEQ. NO. 001
MOTION CAL. NO. 44

The following papers, numbered 1 to 5 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affirmation — Exhibits A-J	1-2
Answering Affirmation — Exhibits A-J	3-4
Reply Affidavit—Exhibit K	5

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the annexed memorandum decision and order.

FILED
AUG 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN J.S.C.

Dated: 8/18/09
New York, New York

J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 7

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GLOBAL METAL SALES CORP.,

Plaintiff,

Index No.: 119134/06

-against-

Decision and Order

T & A SCREW PRODUCTS, INC. and
T & A SCREW MACHINE, INC.,

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

Plaintiff, an international supplier of raw metal products, moves, pursuant to CPLR 3212, for summary judgment against defendants T & A Screw Products, Inc. and T & A Machine, Inc. (collectively, T&A), for goods sold.

BACKGROUND

On or about August 1, 2005, T&A issued a purchase order to plaintiff for a 2,000-pound trial order of aluminum bar made to certain specifications. In November, 2005, plaintiff delivered the 2,000-pound trial order, and invoiced T&A for the same. This shipment was accepted by T&A, and the invoice was paid.

On or about August 15, 2006, T&A issued a second purchase order for 72,000 pounds of the same type of aluminum bar, to be used to manufacture certain pieces pursuant to a government contract. Pursuant to this purchase order, the initial shipment was for 40,000 pounds of aluminum bar, with a continuing order of approximately 12,000 pounds per month until the full order was delivered.

Plaintiff did not sign this purchase order, but sent T&A an order confirmation contract setting forth the terms of the order, which included the specifications that the bar be 1.0025 inches diameter by 12 feet length, with a Mill Finish. The contract also stated that claims for defective materials must be presented within 30 days after receipt, and "defective material" was defined as material that did not conform to the specifications. This order confirmation contract was countersigned by T&A on or about September 6, 2005, and was returned to plaintiff.

On or about February 3, 2006, plaintiff delivered to T&A approximately 43,000 pounds of aluminum bar, and invoiced T&A $86,498.41 for this shipment. T&A paid $15,880.00 on this invoice.

T&A asserts that on February 8, 2006, and again on February 13, 2006, it called plaintiff regarding certain issues it had with the shipment.[1] T&A's complaints were that the bar was 10 feet, not 12 feet as ordered, that it did not contain a mill certificate that the bar conformed to the specifications, that some of the labels were missing from the bundles, and that the stamps on the end of some of the bars were illegible or missing. At his deposition, Mark Drouin (Drouin), T&A's president and owner, stated that on his telephone call to plaintiff, he discussed the issues T&A had with the material sent, discussed different ways of fixing the problem, stated that the material was potentially unusable, but further indicated that they would try their best to do something with it. Drouin Deposition at 22-24. Later in his deposition, he says, "[a]t that point we said it really wasn't what we ordered, but we would try to use it. You know, it was basically a rejection." *Id.* at 48.

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[1]There has been some confusion as to who made these calls. It appears, from all the evidence submitted, that the first call was made by T&A's president, and the second call was made by T&A's office manager. Regardless, there does not appear to be a question that two calls were actually made.

Cathie Middleton (Middleton), T&A's office manager, testified regarding the second telephone call to plaintiff in February, 2006, which she allegedly made. In her deposition, she states that at that telephone call "[w]e did not reject the material." Middleton Deposition at 39.

One week after receiving this order, T&A allegedly ordered other material from an alternate supplier.

T&A used approximately 8,000 pounds of plaintiff's materials while it waited for the alternate shipment. Drouin Deposition at 29-30. These 8,000 pounds of aluminum bar was used to manufacture 33,000 pieces, which were accepted by the government. T&A also sold 6,000 pounds of plaintiff's materials. *Id.* at 57-58, 60, 109.

On April 4, 2006, Drouin wrote to plaintiff, stating:

> "I need to know how quickly you could get me 2,000# of 7075-T6 extruded with a size of 1 5/64" or larger from the same mill we purchased the material from. We want to compare the extruded to the cold drawn. The cold.drawn material is causing an unusual variation in size and we hope that it was caused by the cold drawing process since the chemical test was close to the Alcoa material. We will push through this material but need to have a solution in place quickly. Please give this your closest attention time is of the essence."

Motion, Ex. F.

On April 5, 2006, plaintiff wrote to its supplier, indicating that T&A was encountering some difficulties in using the aluminum bar, specifically with the cold drawing temper, and, more importantly, with the machine-ability of the rod. Plaintiff, in this correspondence, states that T&A went back to using the Alcoa material that they had previously used after trying plaintiff's material. Opp., Ex. F.

Between February and August, plaintiff continued to invoice T&A, but no further payments

were received. In the complaint, plaintiff asserts that it did deliver all of the aluminum bar called for in the contract. A final invoice was sent in the beginning of August, 2006, for the full contract price still outstanding.

On August 14, 2006, shortly after receiving plaintiff's final invoice, T&A wrote to plaintiff, stating that it was unable to use the bar sent by plaintiff, primarily because the size of the bar was less than 10 feet and the order called for 12 foot bar. The letter further states that the material was missing lot identification, which caused T&A to test the material with an outside lab, and those tests resulted in differences in chemical composition in excess of 20%, making the material suspect. T&A states that it paid plaintiff for the material it actually used, and will be sending payment for the material it sold to third persons "as a courtesy." T&A said that it would hold the material on its floor for 45 days while awaiting instructions from plaintiff, after which it would sell the material as scrap and forward the proceeds to plaintiff. Motion, Ex. F.

T&A maintains that it paid plaintiff for plaintiff's goods that it actually used, and has counterclaimed for damages resulting from plaintiff's alleged breach of the contract in sending goods that did not meet the contract specifications. It is noted that plaintiff never disputes the assertion that the material sent did not meet the contract specifications.

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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then 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); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Pursuant to the Uniform Commercial Code (UCC) § 2-606 (1), which governs the sale of goods in New York, acceptance of goods occur when the buyer, among other things:

> "(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
>
> (b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them . . ."

"Rejection of good must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller." UCC 2-602 (1).

In the instant matter, when the goods were delivered to T&A, within several days, T&A called plaintiff on two occasions to discuss problems it had with the shipment. However, according to the deposition testimony of Drouin and Middleton, T&A never definitively stated, at that time, that it was rejecting the goods. Rejection must be a "clear and unequivocal act," and not merely a request for a cure or a complaint about the goods. *See Hooper Handling, Inc. v Jonmark Corp.*, 267 AD2d 1075, 1076 (4th Dept 1999); *Sears, Roebuck & Co. v Galloway*, 195 AD2d 825, 827 (3d Dept 1993); *Maggio Importato, Inc. v Cimitron Inc.*, 189 AD2d 654, 654 (1st Dept 1993). Thus, the Court does not accept T&A's contention that it rejected the goods when it asked for corrective action.

After delivery, and the telephone calls to plaintiff, T&A used the aluminum bar provided by plaintiff, and actually paid for the bar so used. Further, T&A apparently continued to accept delivery on the remainder of the contract order. T&A's continued use of the goods constituted an acceptance.

Hooper Handling, Inc., 267 AD2d at 1075-1076; *Maggio Importato, Inc.*, 189 AD2d at 654.

However, even though T&A's actions constituted an acceptance of the goods, such acceptance of goods may be revoked, pursuant to UCC § 2-607 and § 2-608, upon a reasonable assumption that the nonconformity would be cured, which does not occur. The revocation would have to occur within a reasonable time after discovery of the breach. *See Wilson Trading Corp. v David Furguson, Ltd.*, 23 NY2d 398 (1968).

In the case at bar, according to the parties' correspondence referenced above, by April of 2006, T&A was aware that there were problems with plaintiff's aluminum bar, but T&A continued to use the bar. T&A did not affirmatively state that the bar was unusable until August 14, 2006, six months after delivery and four months after T&A wrote to plaintiff voicing concerns with the bar. This delay is deemed to be unreasonable, thereby rendering any attempted revocation of acceptance ineffective.

Based on the foregoing, plaintiff is entitled to summary judgment with respect to liability.

However, T&A's failure effectively to reject or revoke acceptance of the aluminum bar does not impair any other remedy provided by the UCC for nonconformity. In order to preserve such rights, a buyer need only give notice to the seller that the transaction was troublesome. T&A's complaints from February though April are sufficient to preserve its rights to sue for damages (*Cliffstar Corp. v Elmar Industries, Inc.*, 254 AD2d 723 [4th Dept 1998]), which it did by means of its counterclaim.

> "[A] buyer may defeat or diminish a seller's substantive action for goods sold and delivered by interposing a valid counterclaim for breach of the underlying sales agreement. Here, defendant asserted counterclaims for breach of contract and warranties and raised a significant issue regarding the nonconformity of the goods shipped to it by plaintiff which, if established, could significantly diminish or negate plaintiff's recovery [internal quotation marks and citations omitted]."

Hooper Handling, Inc., 267 AD2d at 1076.

The counterclaim asserted by T&A is sufficient to defeat that portion of plaintiff's motion seeking damages.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted only with respect to liability; and it is further

ORDERED that the remainder of the action shall continue.

Dated: August 18, 2009
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.