

**Oxford Health Plans (NY), Inc. v Acme Architectural Prods., Inc.**

2010 NY Slip Op 32947(U)

October 14, 2010

Supreme Court, New York County

Docket Number: 105469/2010

Judge: Judith J. Gische

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JUDITH J. GISCHE  
J.S.C.

PART 10

Index Number : 105469/2010

OXFORD HEALTH PLANS (NY), INC.

VS.

ACME ARCHITECTURAL PRODUCTS, INC.

SEQUENCE NUMBER : 001

DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

his 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

**FILED**

OCT 20 2010

NEW YORK  
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

Dated: 10/14/10

JSG  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10

-----X  
OXFORD HEALTH PLANS (NY), INC.

Plaintiff,

**-against-**

ACME ARCHITECTURAL PRODUCTS, INC.

Defendant.  
-----

**DECISION/ ORDER**

Index No.:

Seq. No.:

**PRESENT:**

Hon. Judith J. Gische

J.S.C.

**FILED**

**OCT 20 2010**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Recitation, as required by CPLR § 2219(d) of the papers considered in the review of this (these) motion(s):

**Papers**

Pltffs' motion [CPLR 3215] w/AF affirm, GA affid, exhs ..... 1

**Numbered**

-----  
*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action by Oxford Health Plans (NY), Inc. ("Oxford") for breach of contract, account stated and unjust enrichment against defendant Acme Architectural Products, Inc. ("Acme"), its insured. Oxford now moves for an entry of default judgment against Acme pursuant to CPLR § 3215 on the basis that Acme has not answered the complaint or appeared in this action.

This action was commenced with the filing of the summons and complaint on April 27, 2010. The summons and complaint were served upon the Secretary of State on May 10, 2010, as required under BCL § 306 (b). Acme has not appeared or answered the complaint within the time provided under the CPLR, nor has it obtained

an order from the Court extending its time to do so.

This motion is submitted on default, although proof of service has been filed. Since Acme is a corporation, Oxford has also complied with the additional notice requirements of CPLR § 3215 (g) (4) by mailing another copy of the summons and complaint to the Acme at its last known business address more than 20 days prior to entry of judgment. Acme is, therefore, in default and Oxford is entitled to entry of a default judgment since this motion is timely, provided Oxford can demonstrate a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3<sup>rd</sup> Dept. 2001).

The following is established through the complaint and sworn affidavit of Giovanni Amore ("Amore"), the finance manager for Oxford:

Oxford and Acme entered into a written agreement for the payment of monthly premiums to Oxford in exchange for Oxford providing health insurance. Acme defaulted on payment of four invoices, totaling the sum of \$55,114.93 for the premiums due in January, 2009. Coverage was terminated by Oxford as of February 1, 2009. According to Amore, Acme subsequently made a partial payment of the premiums due in the amount of \$19,488.67. However, as of August 17, 2010, Acme still had an unpaid balance due of \$35,626.26 for the January, 2009 premiums. The amount of \$35,626.26 represents the remaining balance due to Oxford following the partial payment of the January, 2009 premiums for Acme's employees.

In the first cause of action, for breach of contract, Oxford claims Acme's failure to pay the premiums is a breach of contract and that pursuant to the contract, Acme must also pay a late penalty charge on the unpaid balance at the rate of 1.5% per month.

\* 4] .

Although Amore's affidavit establishes that there was an agreement between the parties, no copy of the written contract alleged has been provided to the court so as to support the existence of the late penalty term.

On the second cause of action, for an account stated, Oxford alleges it sent statements of the premiums due, which Acme kept without objecting to them and also without paying them. Copies of the four (4) invoices identifying Acme corporation as the insured have been provided. Although Oxford has not provided updated statements of the account reflecting the partial payment in the amount of \$19,488.67, plaintiff acknowledges receipt of partial payment, and presently the total outstanding amount is \$35,626.26.

On the third cause of action, for unjust enrichment, Oxford alleges that it provided health coverage to Acme, who retained the benefit of the services provided by Oxford, and that Oxford reasonably expected to be compensated by Oxford for the reasonable value of services rendered.

#### Discussion

The essential elements of an account stated are that the Oxford sent bills to the Acme which were retained without any objection within a reasonable period of time. Herrick Feinstein LLP v. Stamm, 297 AD2d 477 1<sup>st</sup> Dept 2002). Oxford has proved its account stated cause of action and it is entitled to entry of a default judgment in the amount of \$35,626.26. Oxford has provided premium statements indicating that its insured, Acme, has four accounts with balances due, in the total amount of \$35,626.26.

Oxford's request for a 1.5% late penalty charge under the cause of action for breach of contract is, however, denied. Oxford claims Acme must pay a penalty charge

[\* 5] .  
on Acme's unpaid balance at the rate of 1.5% per month, however, Oxford has failed to provide a copy of the alleged written contract in order to prove a meeting of the minds and the existence of the penalty charge term in the contract.

Oxford requests attorney's fees in the complaint of this action, but has not requested such relief in the moving papers, nor is there any contract provided that would support the award of such fees. Generally, parties involved in an action are responsible for payment of all legal fees and costs incurred and cannot recover the same from an opposing party unless there is an agreement, contract, or statute that provides otherwise. Hooper Associates, Ltd. v. AGS Computers, Inc., 74 NY2d 487 (1989). Therefore, Oxford's request for attorney's fees is severed and dismissed without prejudice.

Oxford is entitled to interest, as requested in the motion, at the statutory rate, from January 1, 2009, the date of default.

Oxford's cause of action for unjust enrichment is also denied because it duplicates the relief sought in the first two causes of action. Where, as here, there is a legal remedy available, a claim for unjust enrichment will not lie. Cirri v. Daily News LP, 9 Misc. 3d 1130(A) (NY Sup. Ct. 2005).

#### **Conclusion**

In accordance with the foregoing,

*It is hereby:*

**ORDERED** that plaintiff's motion for entry of a default judgment against defendant Acme Architectural Products, Inc., for the relief sought in the complaint is

granted as to the second cause of action for account stated, and it is further

**ORDERED** that the Clerk shall enter a money judgment in favor of plaintiff Oxford Health Plans (NY), Inc. against defendant Acme Architectural Products, Inc., in the total amount of Thirty Five Thousand Six Hundred Twenty Six and 26/100 Dollars (\$35,626.26), with interest from January 1, 2009, together with costs and disbursements, and it is further


**ORDERED** that plaintiff's first cause of action as to breach of contract and third cause of action as to unjust enrichment are hereby severed and dismissed, and it is further

**ORDERED** that any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
October 14, 2010

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
**OCT. 20 2010**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**