

**Arch Specialty Ins. Co. v US Reinforced Concrete,
LLC**

2011 NY Slip Op 30399(U)

February 18, 2011

Supreme Court, New York County

Docket Number: 112326/10

Judge: Judith J. Gische

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

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

PART 10

Index Number : 112326/2010

ARCH SPECIALTY INSURANCE

vs

US REINFORCED CONCRETE, LLC

Sequence Number : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

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

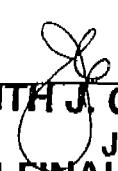
**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

FEB 22 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: FEB 18 2011


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: PART 10

-----X
ARCH SPECIALTY INSURANCE COMPANY,

Plaintiff,

-against-

US REINFORCED CONCRETE, LLC,

Defendant.
-----X

Decision/Order

Index No.: 112326/10
Seq. No. : 001

Present:

Hon. Judith J. Gische
J.S.C.

FILED

FEB 22 2011

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

NEW YORK
COUNTY CLERK'S OFFICE

Papers

Numbered

Pltf's n/m [§ 3215] w/GJB affirm, JM affid, exhs 1

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

This is an action for breach of contract and account stated. Plaintiff now moves, pursuant to CPLR § 3215, for an order directing the Clerk of Court to enter a default judgment in its favor and against defendant, US Reinforced Concrete, LLC.

This motion has been submitted to the court on default, though due proof of service has been filed. Plaintiff served the summons and complaint on defendant through the secretary of state on September 21, 2010. LLC § 303. Plaintiff then mailed a copy of the summons and complaint to defendant on November 1, 2010 and December 28, 2010. CPLR § 3215[g][4][i].

Despite such notice and additional notice, defendant has not appeared, answered the complaint, or moved. Its time to do so has expired and this motion is

* 3]
brought within one year of defendant's default.

Discussion

Plaintiff is entitled to a default judgment, provided it otherwise demonstrates that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3d Dept. 2001). A default in answering the complaint constitutes an admission of the factual allegations therein and the reasonable inferences which may be made therefrom. Rokina Optical Co., Inc. v. Camera King, Inc., 63 N.Y.2d 728 (1st Dept. 1984). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim [Zelnick v. Biderman Industries U.S.A., Inc., 242 A.D.2d 227 (1st Dept. 1997); and CPLR § 3215 (f)] or a complaint verified by a person with actual knowledge of the facts surrounding the claim. Hazim v. Winter, 234 A.D.2d 422 (2d Dept. 1996); and CPLR § 105 (u).

Plaintiff provides the sworn affidavit of Sharon E. Murphy, who states she is the Assistant Vice President and Counsel of plaintiff. Plaintiff asserts two causes of action against defendant for: breach of contract (COA1) and account stated (COA2). Plaintiff alleges that on June 29, 2007, it issued a policy of insurance, No. DPC 0022291-00, effective June 29, 2007 to June 29, 2008 (the "Policy"). The Policy provided that defendant was required to pay a deposit premium of \$252,000.00, which would be adjusted based on the amount of defendant's gross sales. On August 13, 2009, plaintiff conducted an audit and determined that defendant's gross sales totaled \$16,703,761.00, thereby requiring a premium of \$526,168.00, which exceeded defendant's \$252,000.00 deposit by \$274,168.00. On September 3, 2009, plaintiff

[* 4]

demanded payment of \$274,168.00. Plaintiff alleges that despite this demand, defendant owes plaintiff the unpaid principal balance of \$274,168.00.

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furia v. Furia, 166 A.D.2d 694 (2d Dept. 1990).

An account stated represents an agreement between the parties reflecting amounts due on prior transactions. Jim-Mar Corp. v. Aquatic Constr., 195 A.D.2d 868 (3d Dept. 1993), *lv. denied* 82 N.Y.2d 660 (1993). Where either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails. M & A Const. Corp. v. McTague, 21 A.D.3d 610 (3d Dept. 2005).

Based on the foregoing, plaintiff has established a *prima facie* cause of action for breach of contract and account stated against the defendant. Accordingly, plaintiff is entitled to entry of default judgment against defendant. Plaintiff is entitled to \$274,168.00 with interest from August 13, 2010, as the date of default, at the statutory rate.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for entry of a default judgment against defendant, US REINFORCED CONCRETE, LLC, is granted; and it is further

ORDERED that the clerk shall enter judgment in favor of plaintiff, ARCH SPECIALTY INSURANCE COMPANY, and against defendant, US REINFORCED CONCRETE, LLC, in the sum of Two Hundred Seventy-Four Thousand One Hundred Sixty-Eight Dollars and Zero Cents (\$274,168.00) plus interest from August


[* 5]
13, 2010 at the statutory rate; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied; and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
February 18, 2011

So Ordered:



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

FILED

FEB 22 2011

**NEW YORK
COUNTY CLERK'S OFFICE**