

**Independent Temperature Control Servs., Inc. v Alps  
Mech. Inc.**

2011 NY Slip Op 31563(U)

June 1, 2011

Sup Ct, Queens County

Docket Number: 1338/11

Judge: Orin R. Kitzes

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**Short Form Order**

**NEW YORK SUPREME COURT -QUEENS COUNTY**

**PRESENT: ORIN R. KITZES**

**PART 17**

**Justice**

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**INDEPENDENT TEMPERATURE CONTROL SERVICES, INC.,**

**Plaintiff,**

**Index No.: 1338/11**

**Motion Date: 5/25/11**

**-against-**

**Motion Cal. No.: 20**

**ALPS MECHANICAL INC.,**

**Defendant.**

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The following papers numbered 1 to 15 read on this motion by plaintiff for an order pursuant to CPLR § 3212 granting summary judgment in its favor and against defendant.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Affidavit-Exhibits.....	1-4
Memo of Law.....	5-6
Affirmation in Opposition-Exhibits.....	7-9
Reply Affidavit-Exhibits.....	10-12
Reply Memorandum-Exhibits.....`	13-15

Upon the foregoing papers it is ordered that the motion by plaintiff for an order pursuant to CPLR § 3212 granting summary judgment in its favor and against defendant, in the amount of \$129,936.60, plus interest, costs and disbursements is granted, for the following reasons:

According to the complaint, this action stems from several construction projects at which plaintiff performed work for defendant. As set forth in the first cause and second causes of action, (breach of contract and account stated, respectively) plaintiff (“ITC”) and defendant (“Alps”) entered into a written agreement in which ITC agreed to provide certain labor, materials and other services to Alps at the Dormitory Authority of the State of New York project known as the Brooklyn College Project (“Brooklyn College Project”) for the sum of \$825,000.00. Due to additions to the work required to be performed under the Contract, the Brooklyn College Project contract price was adjusted and fixed by Alps at the sum of \$989,442.99. During its performance of work at the Brooklyn College Project, ITC would periodically submit requisitions for payment to Alps for work performed during the applicable period. ITC’s requisitions were approved by both Alps and the Dormitory Authority of the State of New York. ITC completed all of the \$989,422.99 of the contract and change order work. Payments have been made to ITC by Alps on account of said Contract in the sum of \$939,970.84, leaving a balance due and owing of \$49,472.15 from Alps to ITC, no part of which has been paid although duly demanded.

As set forth in the third and fourth causes of action, (breach of contract and account stated, respectively) ITC and Alps entered into a written contract (the “PS 310X Agreement”) in which

the Plaintiff agreed to provide certain labor, materials and other services to Alps for the New York City School Construction Authority project known as PS 310X (“PS 310X Project”) for the sum of \$290,000.00. Due to additions to the work required to be performed under the Contract, the PS 310X Project contract price was adjusted and fixed by ALPS at the sum of \$385,858.00. During its performance of work at the PS 310X Project, ITC would periodically submit requisitions for payment to Alps for work performed during the applicable period, which were approved by both Alps and the New York City School Construction Authority. ITC completed all of the \$385,858.00 of the contract and change order work. Payments have been made to ITC by Alps on account of said Contract in the sum of \$372,875.76, leaving a balance due and owing of \$12,982.24 from Alps to ITC, no part of which has been paid although duly demanded.

As set forth in the fifth and sixth causes of action, (breach of contract and account stated, respectively) ITC and Alps entered into a written contract in which ITC agreed to provide certain labor, materials and other services to Alps for the project known as PS 377K (“PS 377K Project”) for the sum of \$380,000.00. Due to additions to the work required to be performed under the Contract, the PS 377K contract price was adjusted and fixed by ALPS at the sum of \$396,024.00. During its performance of work at the PS 377K Project, ITC would periodically submit requisitions for payment to Alps for work performed during the applicable period, which were approved by both Alps and the New York City School Construction Authority. ITC completed all of the \$396,024.00 of the contract and change order work. Payments have been made to ITC by Alps on account of said Contract in the sum of \$369,667.80, leaving a balance due and owing of \$26,356.20 from Alps to ITC, no part of which has been paid although duly demanded.

As set forth in the seventh and eighth causes of action, (breach of contract and account stated, respectively) ITC and Alps entered into a written contract in which ITC agreed to provide certain labor, materials and other services to Alps for the New York City School Construction Authority project known as PS 16R (“PS 16R Project”) for the sum of \$125,000.00. By reason of additions to the work required to be performed under the Contract, the PS 16R Project contract price was adjusted and fixed by ALPS at the sum of \$132,819.00. During its performance of work at the PS 16R Project, ITC would periodically submit requisitions for payment to Alps for work performed during the applicable period, which were approved by both Alps and the New York City School Construction Authority. ITC completed all of the \$132,819.00 of contract and change order work. Payments have been made to ITC by Alps on account of said Contract in the sum of \$126,178.04, leaving a balance due and owing of \$6,640.96 from Alps to ITC, no part of which has been paid although duly demanded.

As set forth in the ninth and tenth causes of action, (breach of contract and account stated, respectively) ITC and Alps entered into a written contract in which ITC agreed to provide certain labor, materials and other services to Alps for the New York City School Construction Authority project known as Manhattan Center for Science for the sum of \$200,000.00. During its performance of work at the Manhattan Center for Science Project, ITC would periodically submit requisitions for payment to Alps for work performed during the applicable period, which were approved by both Alps and the New York City School Construction Authority.

ITC has performed all of its obligations under the Manhattan Center for Science Contract. Payments have been made to ITC by Alps on account of said Contract in the sum of \$190,000.00, leaving a balance due and owing of \$10,000.00 from Alps to ITC, no part of which has been paid although duly demanded.

As set forth in the eleventh and twelfth causes of action (breach of contract and account stated, respectively) ITC and Alps entered into a written contract in which ITC agreed to provide certain labor, materials and other services to Alps for the New York City School Construction Authority project known as PS 33M (“PS 33M Project”) for the sum of \$115,000.00. Due to additions to the work required to be performed under the Contract, the PS 33M Project contract price was adjusted and fixed by ALPS at the sum of \$115,600.00. During its performance of work at the PS 33M Project, ITC would periodically submit requisitions for payment to Alps for work performed during the applicable period, which were approved by both Alps and the New York City School Construction Authority. ITC completed all of the \$115,600.00 contract and change order work and payments have been made to ITC by Alps on account of said Contract in the sum of \$109,850.00, leaving a balance due and owing of \$5,750.00 from Alps to ITC. No part of which has been paid although duly demanded.

As set forth in the thirteenth and fourteenth causes of action (breach of contract and account stated, respectively) ITC and Alps entered into a written contract in which ITC agreed to provide certain labor, materials and other services to Alps at the New York City School Construction Authority project known as the PS 27 (“PS 27 Project”) for the sum of \$165,000.00. During its performance of work at PS 27 Project, ITC would periodically submit requisitions for payment to Alps for work performed during the applicable period, which were approved by both Alps and the New York City School Construction Authority. ITC completed all of the \$165,000.00 of contract and change order work. Payments have been made to ITC by Alps on account of said Contract in the sum of \$163,350.00, leaving a balance due and owing of \$1,650.00 from Alps to ITC, no part of which has been paid although duly demanded.

As set forth in the fifteenth and sixteenth causes of action (breach of contract and account stated, respectively) ITC and Alps entered into a written contract in which ITC agreed to provide certain labor, materials and other services to Alps at the New York City School Construction Authority project known as the Park West HS (“Park West Project”) for the sum of \$579,062.00. Due to additions and deduction to the work required to be performed under the Contract, the Park West Project contract price was adjusted and fixed by ALPS at the sum of \$383,506.82. During its performance of work at Park West HS Project, ITC would periodically submit requisitions for payment to Alps for work performed during the applicable period, which were approved by both Alps and the New York City School Construction Authority. ITC completed all of the \$383,506.82 of contract and change order work. Payments have been made to ITC by Alps on account of said Contract in the sum of \$379,671.75, leaving a balance due and owing of \$3,835.07 from Alps to ITC, no part of which has been paid although duly demanded.

As set forth in the seventeenth and eighteenth causes of action (breach of contract and account stated, respectively) ITC and Alps entered into a written contract in which ITC agreed

to provide certain labor, materials and other services to Alps at the New York City School Construction Authority project known as the JHS 162K (“JHS 162K Project”) for the sum of \$265,000.00. During its performance of work at JHS 162K, ITC would periodically submit requisitions for payment to Alps for work performed during the applicable period, which were approved by both Alps and the New York City School Construction Authority. ITC completed all of the \$265,000.00 of contract work. Payments have been made to ITC by Alps on account of said Contract in the sum of \$251,750.00, leaving a balance due and owing of \$13,250.00 from Alps to ITC, no part of which has been paid although duly demanded.

Plaintiff now seeks summary judgment on its causes of action and defendant opposes the motion. It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side’s papers do not suggest any issue exists. Moreover, on this motion, the court’s duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v. March*, 127 AD2d 810 (2d Dept. 1987). Finally, as stated by the court in *Daliendo v. Johnson*, 147 AD2d 312,317 (2d Dept. 1989), “Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied.

The court finds that the plaintiff has made a prima facie showing of entitlement to judgment as a matter of law on the issue of liability. *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 (1986). Plaintiff has submitted an affidavit of Bud Flynn, its president, wherein he states the facts set forth above and states that at no time were these costs to by Alps. Plaintiff has also submitted, inter alia, various contracts, invoices, work change orders , and correspondence regarding the above work projects. Based on this evidence, it is clear that plaintiff has established that Alps materially breached the contracts by failing to make payments.

Regarding Alps’ opposition, the Court notes that Alps does not dispute that ITC is owed the sum of money it seeks in this action. Rather, Alps claims the motion should be denied because it is premature as there is outstanding discovery that needs to be conducted and there are issues of fact. Regarding the outstanding discovery, Alps claims that only three written contracts ( JHS 162, PS 377, PS 310X) were attached to the motion herein and there are nine projects in question. The terms for the other projects were governed by the parties course of dealing and purchase orders which did not contain all the material terms of their contract. The parties have done business in the past and only depositions and further discovery would reveal the terms of their agreement and their course of dealing. Alps also claims that it has not breached any contracts implied or express since ITC has prematurely sought amounts being held pursuant to valid retainage clauses specified in contractual agreements and or reflected by their course of dealing for over 12 years. Furthermore, the Brooklyn College project has not been accepted by the owner due to defective work done by ITC and since Alps has not been paid in full by the owners and therefore no payment is due ITC. Alps claims that the other projects are still awaiting acceptance, approval and payment by owners.

This Court rejects Alps' claims that the motion should be denied since there are essential issues of fact which are within their exclusive knowledge of ITC. Specifically, Alps is referring to the terms of the retainage, which is a common construction contracting practice whereby a certain percentage of compensation is withheld by the project owner from the general contractor and in turn by the general contractor from the subcontractors until the project is completed satisfactorily. However, it is clear to this Court that such information is not in the exclusive possession of ITC. This information is equally available to Alps and Alps has set forth its version of the terms of "retainage". Such terms being disputed in the affidavit by ITC's President, Bud Flynn. Furthermore, contrary to Alps' claim, ITC has submitted copies of all the agreements for which payment is sought. Accordingly, there is no basis to deny the motion as being premature, pursuant to CPLR 3212 (f).

Alps also opposes the motion on the ground that it and ITC had written contracts in place for three projects which allowed for retainage of funds from Plaintiff. Article 4 of these contracts state that payment shall be due the subcontractor 30 days after the prime contract is completed and accepted and the last payment received from the owner. It goes on to state " but in the event any portion of such balance is retained by the owner as a guarantee covering the work involved herein the Contractor may retain from the Subcontractor an equivalent amount until payment is released by the owner, it being understood that the Subcontractor shall guarantee the labor and material installed by him for such period and to the same extent as the Contractor is required by the Prime Contract to guarantee same."

Alps has submitted an affidavit of its President, Renato Rancic, stating that "the mutual understanding with plaintiff from doing business together was that once the owner made payment to us for a project we would forward payment to plaintiff less any retainage held by owner on the work." He also states that the Brooklyn College project has serious defects with the work and plaintiff has been working to correct these issues. Until such defects have been corrected, the owner will not pay Alps, who in turn will not pay ITC. Alps has also submitted an affirmation of its attorney and email correspondence that purports to reflect outstanding issues of work quality at the Brooklyn College project.

Alps claims that a contractual provision which does not require the release of retainage to a subcontractor until the general contractor has received its retention from the Owner is valid and not contrary to law. According to Alps, only clauses which would require a subcontractor to wait indefinitely for payment would violate a "paid if paid" provision. In addition, Mr. Rancic states in his affidavit that the Owner(s) have made payments in the sum of \$43,251.97 which are therefore due to ITC, but that Alps must continue to hold retainage in the amount of \$85,234.65 for work not yet approved, accepted and paid by owners on the projects in question. Alps claims and that this procedure for holding retainage is based on the parties course of dealing.

The Court finds that Alps has not submitted sufficient evidence to raise an issue of fact regarding its failure to pay amounts owed to ITC. Contrary to Alps' contention, its claim that it is entitled to withhold payment from ITC until it gets paid by the owner is not allowed in New York State. Alps' reliance upon West-Fair Elec. Contrs. v. Aetna Cas. & Sur. Co., 87 N.Y.2d

148 (1995) is misplaced. In that case, defendants claimed that because the owner had not made any further payments to the general contractor, the general contractor had no obligation to pay the subcontractor. The Court rejected plaintiff's argument that the pay-when-paid provision in the subcontract was allowed since it merely fixed a time for payment. The Court held that "a pay-when-paid provision which forces the subcontractor to assume the risk that the owner will fail to pay the general contractor is void and unenforceable as contrary to public policy set forth in the Lien Law § 34. By contrast, a pay-when-paid provision which merely fixes a time for payment does not indefinitely suspend a subcontractor's right to payment upon the failure of an owner to pay the general contractor, and does not violate public policy as stated in the Lien Law." *Id.* In the instant case, the contract provision cited by Alps conditioned ITC's payment upon Alps being paid by the owner. While the provision required payment to ITC within 30 days of Alps being paid by the owner, that does not eliminate the risk on ITC that the owner will fail to pay Alps. Accordingly, any reliance upon such contract provision or course of conduct of the parties is inappropriate as the provision and conduct is void as against public policy set forth in the Lien Law. *Id.* JC Ryan EBCO/H&G, LLC v Lipsky Enters., Inc., 78 A.D.3d 788 (2d Dep't 2010.)

Alps also claims that some of the projects at which ITC performed work have not received final approval by the owner and that ITC's work on the Brooklyn project was defective. Alps has not submitted any evidence other than the affidavit of Mr. Rancic to support this claim. Alps's claims in this regard cannot raise an issue of fact since ITC has shown it performed the work several years ago and Alps had not raised any issue with the work until the commencement of this lawsuit. Moreover, Alps has not specifically set forth any incomplete or defective work attributable to ITC, and the email correspondence is not signed or verified and in any event fails to find fault with ITC's work. Furthermore, by its own claims regarding the retainage, Alps shows that the work was done since the payments Alps received were progress payments for work completed by ITC. Accordingly, Alps has failed to show it has properly retained payments due to ITC.

For the reasons set forth above, the motion by plaintiff for an order pursuant to CPLR § 3212 granting summary judgment in its favor and against defendant, in the amount of \$129,936.60, plus interest, costs and disbursements is granted.

**DATED: June 1, 2011**

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**ORIN R. KITZES, J.S.C.**