

**Precast Restoration Servs., LLC v Global Precast,
Inc.**

2014 NY Slip Op 32224(U)

August 14, 2014

Supreme Court, New York County

Docket Number: 104029/10

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: _____
Justice

PART _____

Index Number : 104029/2010
PRECAST RESTORATION SERVICES
vs.
GLOBAL PRECAST, INC.
SEQUENCE NUMBER : 007
SUMMARY JUDGMENT

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 8/14/14

CR, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

S/O

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
PRECAST RESTORATION SERVICES, LLC,

Plaintiff,

Index No. 104029/10

-against-

DECISION/ORDER

GLOBAL PRECAST, INC., 1240 FIRST AVENUE, LLC,
TRUFFLES, LLC, TRAVELERS CASUALTY SURETY
COMPANY OF AMERICA, JOHN DOES 1-30, the last
30 names being fictitious and unknown to the plaintiff,
the person or parties intended being tenants, occupants,
persons or parties, if any, having or claiming an interest
in or lien upon the premises described in the complaint,

Defendants.

-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Precast Restoration Services, LLC (“Precast”) commenced the instant action seeking to recover for work it performed on two construction projects. Plaintiff now moves for an Order pursuant to CPLR § 3212 granting it summary judgment against defendant Global Precast, Inc. (“Global”) on the amended complaint’s cause of action which alleges a violation of New York’s Prompt Payment Act (the “PPA”). For the reasons set forth below, plaintiff’s motion is granted.

The relevant facts are as follows. In or around 2008, plaintiff and Global entered into an oral agreement whereby Global hired plaintiff to perform certain work on two projects, one located at 450 Washington Street, New York, New York (the "Washington Street Project") and the other located at 400 East 67th Street, New York, New York (the "East 67th Street Project"). Plaintiff alleges that pursuant to the oral agreement, the parties did not agree to a billing cycle for the work on the projects. However, Global contends that the parties agreed to a bi-weekly billing cycle.

Plaintiff alleges that it submitted invoices to Global for the work performed as the work was completed but that Global failed to remit payment on all the invoices. Specifically, plaintiff alleges that it submitted to Global the invoices for the Washington Street Project on September 22, 2008, October 10, 2008, October 26, 2008, December 12, 2008 and July 12, 2009 but that Global failed to remit payment on the invoices within thirty days of their issuance. Additionally, plaintiff alleges that Global failed to object to the invoices or advise of a reason for non-payment of the invoices, in writing, within twelve business days after the invoices were issued, and failed to approve or disapprove the invoices within twelve business days after the invoices were issued. Plaintiff alleges that it submitted to Global the invoices for the East 67th Street Project on March 10, 2009, March 15, 2009, March 30, 2009, April 6, 2009, April 17, 2009, April 21, 2009, April 26, 2009 and July 13, 2009 but that Global failed to remit payment on the invoices within thirty days of their issuance. Plaintiff alleges that in response to receiving the East 67th Street Project invoices, on or about April 30, 2009, Global advised plaintiff of an alleged discrepancy in certain invoices related only to the rates being charged for labor but that Global did not object to any other portion of the invoices. Thus, on or about May 15, 2009, Precast submitted revised

invoices to Global to reflect a slight change in the rate being charged for labor on the East 67th Street Project. Plaintiff alleges that Global did not object to, provide a reason for non-payment of or approve or disapprove the revised invoices within twelve business days after their issuance.

Global paid plaintiff over \$220,000 for work performed on the Washington Street Project and over \$100,000 for work performed on the East 67th Street Project but failed to remit payment on the remaining invoices totaling \$565,001.51. Thus, plaintiff commenced the instant action to collect on the outstanding invoices alleging causes of action for, *inter alia*, breach of contract, unjust enrichment and violation of the PPA. Plaintiff now moves for an Order pursuant to CPLR § 3212 for summary judgment on its cause of action against Global for violation of the PPA. The court notes that although plaintiff's Notice of Motion seeks summary judgment "as to the eighth count of Plaintiff's amended complaint," it is clear from plaintiff's motion papers that plaintiff is actually seeking summary judgment on its seventh cause of action against Global for a violation of the PPA.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See id.*

The New York State Legislature enacted the PPA in an effort to help contractors secure

timely payment on private construction projects. *See* General Business Law (“GBL”) § 756-a. Pursuant to the PPA, “[t]he parties to a construction contract may, by mutual agreement, establish a billing cycle for the submission of invoices requesting payment for work performed pursuant to a construction contract. In the absence of an agreement by the parties as to the billing cycle, the billing cycle shall be the calendar month within which the work is performed.” GBL § 756-a(1). Additionally, pursuant to GBL § 756(1), “[c]onstruction contract’ means a written or oral agreement for the construction, reconstruction, alteration...of any building, structure...and where the aggregate cost of the construction project...exceeds one hundred fifty thousand dollars.” The PPA further provides that

Upon delivery of an invoice and all contractually required documentation, an owner [or contractor] shall approve or disapprove all or a portion of such invoice within twelve business days. Owner [or contractor] approval of invoices shall not be unreasonably withheld nor shall an owner [or contractor], in bad faith disapprove all or a portion of an invoice. If an owner [or contractor] declines to approve an invoice or a portion thereof, it must prepare and issue a written statement describing those items in the invoice that are not approved.

GBL § 756-a(2)(a)(i). “An owner [or contractor] may decline to approve an invoice or portion of an invoice for” reasons which include, *inter alia*, unsatisfactory or disputed job progress; defective construction work or material not remedied; disputed work materials; and failure to comply with other material provisions of the construction contract. *Id.* However, “[i]f any interim or final payment to a contractor is delayed beyond the due date established in paragraph (a) of subdivision three of seven hundred fifty-six-a of this article, the owner [or contractor] shall pay the contractor interest beginning on the next day at the rate of one percent per month or fraction of a month on the unpaid balance, or at a higher rate consistent with the construction

contract.” GBL § 765-b(1)(a). Where there is no record of any objection to a contractor’s demand for payment and invoices, and payment was not timely made, summary judgment is appropriate and the contractor is entitled to interest under the PPA. *See W & W Glass, LLC v. 1113 York Ave. Realty Co. LLC*, 113 A.D.3d 563 (1st Dept 2014).

In the instant action, plaintiff has established its *prima facie* right to summary judgment on its seventh cause of action against Global for a violation of the PPA. Plaintiff has provided the invoices at issue along with the affidavit of Alec Altman, plaintiff’s President, who has affirmed that Precast submitted the invoices to Global for work performed on both the Washington Street Project and the East 67th Street Project and that Global failed to pay a total of \$565,001.51 on the invoices within thirty days of their receipt and failed to timely object to or approve or disapprove same, in writing, within twelve days as required by the PPA.

In response, Global has failed to raise an issue of fact sufficient to defeat plaintiff’s motion for summary judgment. Global’s assertion that it agreed to pay plaintiff on a price per square foot basis for each project but that plaintiff improperly invoiced Global on a time and materials basis and that plaintiff inflated its time costs on the invoices is not a defense to payment of the invoices pursuant to the PPA. The PPA requires that any objections to the invoices be made within twelve business days of their receipt. *See* GBL § 756-a. However, it is undisputed that Global failed to make any objections to the invoices and thus, it has now waived those objections pursuant to the PPA. Moreover, Global has not provided any evidence to support such allegations and in fact, plaintiff has provided e-mail correspondence between Mr. Altman, Chris Floro, the Superintendent of Global, and Vito Cannone, President of Global, which demonstrates that Global had not objected to being billed on a time and materials basis

and in fact remitted payment on certain of the invoices on a time and materials basis. Moreover, even if Global could substantiate said allegations, it is now barred by the PPA from asserting such objections to the invoices based on its failure to timely do so.

Global's assertion that it is not required to pay the invoices which state that plaintiff was directed by another company to perform the work is also not a defense to payment of the invoices pursuant to the PPA. If Global wanted to object to the invoices on that ground, it was required to submit an objection, in writing, to plaintiff within twelve business days of receipt of the invoices. However, as it is undisputed that Global failed to do so, it is now barred from objecting to the invoices on that ground.

Global's assertion that plaintiff should be denied summary judgment because the PPA does not apply to this case is without merit. Specifically, Global asserts that the PPA does not apply because the parties' oral agreement provided for a bi-weekly billing cycle, which "supersede[s] the provisions of th[e] [PPA] and govern[s] the conduct of the parties thereto." GBL § 756-a. However, Global has failed to establish that the parties' agreement to a bi-weekly billing schedule exempts it from complying with the timing provisions of the PPA for payment of and objection to the invoices. The PPA makes clear that while the parties to a construction contract may agree to a specific billing cycle that differs from the default billing cycle in the statute, the contractor receiving the invoices is still required to make payment on the invoices within thirty days or object to, approve or disapprove the invoices within twelve business days after their receipt. *See* GBL §§ 756-a(2) & (3).

Global's assertion that even if the PPA does apply, it was justified in not complying with the timing provisions of the PPA because plaintiff failed to submit bi-weekly invoices in

accordance with their oral agreement is without merit. Global has not cited to any authority which would exempt it from complying with the timing requirements of the PPA on the ground that plaintiff failed to submit invoices pursuant to their oral agreement. Indeed, if Global wanted to object to the invoices on the ground that they were not timely submitted, it was required to make such objection in the time frame provided in the PPA or else it waived such objection.

Global's assertion that it was not required to pay the invoices or respond to the invoices in the time frame provided by the PPA because plaintiff did not deliver the "invoice and all contractually required documentation," as required by GBL § 756-a(2)(a)(ii), is without merit. Specifically, Global alleges that the parties agreed that plaintiff would supply Global with an executed partial waiver and release with each invoice and that it failed to do so. As an initial matter, even if such contention is true, Global should have objected to the invoices on that basis in the time frame provided for in the PPA. Indeed, the PPA provides that "[f]ailure to comply with...material provisions of the construction contract" is a basis for withholding approval of an invoice. GBL § 756-a(2)(a)(i)(4). Moreover, Global has failed to establish that the waivers and releases constitute "contractually required documentation" pursuant to the PPA as it has failed to allege that such documentation was required as a condition precedent to Global making payments on the invoices. Indeed, even if it had made such allegation, it cannot be substantiated as it is undisputed that Global paid over \$300,000 to plaintiff on invoices which did not include executed partial waivers and releases. Thus, such agreement was clearly not a condition precedent to payment on the invoices and therefore, such documentation cannot be "contractually required documentation" as provided for in the PPA.

Finally, to the extent Global seeks to discharge the lien plaintiff holds on the ground that

