

**Castle Oil Corp. v 137th St. Props., LLC**

2014 NY Slip Op 33472(U)

October 10, 2014

Supreme Court, Westchester County

Docket Number: 61184/14

Judge: Mary H. Smith

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This opinion is uncorrected and not selected for official publication.

# DECISION AND ORDER

FILED & ENTERED  
10 / 1 / 14

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

## SUPREME COURT OF THE STATE OF NEW YORK IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH  
Supreme Court Justice

-----X  
CASTLE OIL CORPORATION,

Plaintiff,

MOTION DATE: 10/3/14  
INDEX NO.: 61184/14

-against-

137<sup>th</sup> STREET PROPERTIES, LLC

Defendant.  
-----X

The following papers numbered 1 to 10 were read on this motion by plaintiff for summary judgment.

### Papers Numbered

- Notice of Motion - Affidavit (Conley) - Exhs. (A-C) - Memorandum of Law ..... 1-4
- Answering Affidavits (Carrieri, Mandell) - Exh. .... 5-7
- Replying Affidavits (Durso, Meadvin) - Exhs. (D-G) ..... 8-10

Upon the foregoing papers, it is Ordered and adjudged that this motion by plaintiff for summary judgment is disposed of as follows:

Plaintiff, an oil supply company, commenced this action seeking to recover against defendant the sum of \$70,998.95, together with interest at the rate of 12 percent per

annum from the intermediate date of March 17, 2014, see CPLR 5001, subdivision (b), based upon the theories of goods sold and delivered and an account stated. Submitted at bar are copies of plaintiff's invoices and metered delivery tickets for gasoline deliveries to defendant's afore property, which invoices had been issued between December 2, 2013 and May 2, 2014. According to the submitted affidavit of Paul Conley, plaintiff's Chief Financial Officer, invoices and delivery tickets are generated as part of each fuel oil delivery in the ordinary course of plaintiff's business and each delivery tickets bears initials of defendant's employee acknowledging receipt of the delivery. Mr. Conley avers that defendant never has contested the invoices or delivery tickets and, other than a single "token" payment in the sum of \$9,696.77, has not paid the invoices. Plaintiff had annexed to its served complaint, in compliance with the procedure set forth in CPLR 3016, subdivision (f), the invoices and metered delivery tickets upon which plaintiff's claims are based.

Plaintiff presently seeks summary judgment on its claims, arguing that the foregoing eliminates any questions of fact and that, along with defendant's failure to have complied with the answering requirements of CPLR 3016, subdivision (f), plaintiff is entitled to judgment as a matter of law.

Defendant opposes plaintiff's motion. Defendant does not address its alleged failure to have interposed, as plaintiff claims was required by CPLR 3016, subdivision (f), an answer properly disputing line by line plaintiff's asserted claims, and defendant notably has not submitted any written evidence demonstrating that it had objected to the invoices sent by plaintiff. However, defendant has submitted an affidavit in opposition from its member, Michael Carrieri, who avers that defendant had telephoned plaintiff on "multiple" occasions,

orally disputing the amounts sought in the invoices, and that, although plaintiff had advised defendant that plaintiff's "invoice amounts would be adjusted downward as a result of the excess deliveries," no such downward adjustment ever occurred.

Notably absent from Mr. Carrieri's affidavit however is any identification of who it was on behalf of defendant that had telephoned plaintiff, or who was the person in plaintiff's employee to whom defendant's employee had spoken, nor any specification of how many of these complaining telephoning calls had been made, or on what dates, or how Mr. Carrieri has knowledge of any such alleged telephone calls. Mr. Carrieri also does not state that, after the lapse of a reasonable period of time and defendant's not having received any downwardly adjusted invoice from plaintiff, that defendant again had notified plaintiff as to the outstanding disputed invoice.

Defendant further submits a copy of the parties' Fixed Price Fuel Oil Purchase Agreement, which defendant contends provides that defendant will pay plaintiff the Fixed Price Per Gallon but that if defendant's fuel oil consumption during the term of the Agreement exceeds the contracted for volume, that defendant then "will pay for the excess gallons at plaintiff's Daily Market Price in effect on each delivery date." Although defendant does not dispute that the oil deliveries in issue had been delivered, it argues that plaintiff has not demonstrated that it correctly has invoiced defendant because plaintiff's invoices do not distinguish between the charged Fixed Price Per Gallon and the Daily Market Price with respect to the excess gallons. Defendant argues that this summary judgment motion necessarily must be found to be premature because defendant has not had the opportunity to conduct discovery to ascertain whether the amounts sought by plaintiff are accurate and what plaintiff's Daily Market Price had been on each of the excess delivery dates.

Defendant also argues that the delivery tickets contain handwritten notations describing the total number of gallons that allegedly had been delivered and that, although an individual named Debbie Summers had been designated by defendant as the person authorized to sign off on the fuel delivery tickets that in fact several of the delivery tickets had been signed by a part-time employee, Jose Murello, who was unfamiliar with the parties' Agreement and its terms, and that one ticket, that bearing #6967623, contains an unrecognized signature from a person who allegedly is not authorized or employed by defendant.

Plaintiff's motion for summary judgment is granted on the theories of breach of contract relating to goods and services delivered and an account stated. See Barretta Realty Skyline Div. of Real Property Technologies, LLC v American Abstracts Associates, Inc., 28 Misc.3d 43 (App. T. 2010).

In its replying papers, plaintiff has demonstrated that defendant has misrepresented the terms of the parties' Fixed Price Fuel Oil Purchase Agreement and that in fact there exist no triable issues of fact regarding the amounts plaintiff has charged defendant. Contrary to defendant's reading of the parties' Agreement, the Agreement provides that it covers oil delivery for two separate properties (each with a different property owner but sharing a single managing agent), and that the parties had agreed that the two property owners collectively would purchase a volume of 61,000 gallons of fuel oil at a fixed price of \$3.019 per gallon during the period of November 1, 2013 to October 31, 2014. It is only where the customers' fuel oil consumption during the term of the Agreement exceeded the 61,000 contract volume amount that the defendant owner then would pay for the excess gallons at plaintiff's Daily Market Price in effect on the delivery date. Since the unrefuted

record demonstrates that the property owners had not exceeded the volume amount of 61,000 gallons of oil during the contract term, they having used only 49,326 gallons, defendant is obligated to pay the Fixed Price per gallon fee of \$3.0170, and plaintiff's Daily Market Price is a non-issue.

Moreover, the Court rejects defendant's apparent further argument that plaintiff is not entitled to be paid on invoices where the delivery had been accepted by defendant by an employee other than "Debbie." Indeed, the Agreement does not expressly provide as such, and "Debbie" is only identified on an "Information Sheet," which is not even part of the Agreement, as defendant's "contact name."

The Clerk is directed to enter judgment in plaintiff's favor as against defendant in the sum of \$70,998.95, together with interest at the rate of 12% per annum from March 17, 2014, plus costs and disbursements.

Dated: October 10, 2014  
White Plains, New York



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MARY H. SMITH  
J.S.C.