

<b>Harmony Steel Mfg. Co. v T. Co Metals LLC</b>
2015 NY Slip Op 30561(U)
April 15, 2015
Sup Ct, New York County
Docket Number: 150751/2014
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 43

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HARMONY STEEL MANUFACTURING CO.,

**DECISION/ORDER**

Plaintiff,

-against-

Index No.: 150751/2014

T. CO METALS LLC,

Defendant,

-----X

**ROBERT R. REED, J.:**

This is an action for breach of contract in which the plaintiff seeks damages in a sum in excess of \$40,000.00.

Defendant moves to dismiss the complaint, pursuant to CPLR 3212. Plaintiff cross-moves for summary judgment in its favor and for leave to correct the caption pursuant to CPLR 305(c).

**FACTUAL ALLEGATIONS**

Harmony Steel and Construction Co., Ltd. (Harmony) and T. Co Metals LLC entered into a contract on March 15, 2013 for the sale by defendant and purchase by plaintiff of rolled steel channels and the shipment of the steel to Lagos, Nigeria. Defendant alleges that it arranged for Grimaldi, an international shipping company, to ship the steel to Lagos, Nigeria (see Jones affidavit). Defendant asserts that Grimaldi was directed to use the “breakbulk” method of shipping, which means non-containerized general cargo (*id at ¶ 8*). Defendant alleges that the steel was delivered pursuant to the contract which specifies in paragraph 14 that the steel is being sold “CIF per Incoterms 2010.” Plaintiff alleges that the steel was not shipped “breakbulk” as contracted, but was shipped “in a private container (Maffi) and not in an open container” (*see*

*Uche affidavit, at ¶ 13).*

## DISCUSSION

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Prospect Hospital*, 68 NY2d 320). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the “burden of production” (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, *i.e.*, with the proponent of the motion. Thus, “if the evidence [on the motion] is evenly balanced, the party that bears the burden of persuasion must lose” (*Director, Office of Workers Compensation Programs v Greenwich Collieries*, 512 US 267, 272; *300 East 34<sup>th</sup> Street Co. v Habeeb*, 248 AD2d 50).

The court’s function on a motion for summary judgment is issue finding, rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8; *Sillman v Twentieth Century-Fox Film Corp.*, *supra.*).

Defendant, through its manager, argues that the International Chamber of Commerce (ICC) Guide to Incoterms 2010 applies to this dispute, and requires a resolution in defendant’s favor. The guidance note in the ICC Guide states in pertinent part:

“When CPT, CIP, CFR, or CIF are used, the seller fulfills its obligation to deliver when it hands the goods over to the carrier in the manner specified in the chosen rule and not

when the goods reach the place of destination”

(see *Jones affidavit*). In opposition, plaintiff submits the affidavit of its manager, who contends that the steel was not shipped as “breakbulk.”

In this case, there is simply not enough evidence in the record on these motions to determine whether the steel was shipped in an open container or private container. The Court is presented with the competing affidavits of plaintiff’s and defendant’s respective managers. The “combined transport bill of lading” submitted by defendant does not on its face plainly indicate how the steel was in fact shipped. Neither party submits admissible evidence from Grimaldi that addresses, from that critical non-party’s perspective, the issue of how the steel was shipped.

A summary determination is inappropriate in light of the existence of a triable issue of fact as to manner in which the steel was shipped. Defendant’s motion to dismiss the complaint pursuant to CPLR 3212 is, therefore, denied. For the same reasons, the portion of plaintiff’s cross-motion that seeks summary judgment in its favor is also denied.

### **CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that defendant’s motion to dismiss the complaint and/or for summary judgment is denied; and it is further

**ORDERED** that plaintiff’s motion for summary judgment is also denied; and it is further

**ORDERED** that the above-captioned action, *Harmony Steel & Const. Co. v. T. Co. Metals LLC*, Index No. 150751/2014, shall be amended to now bear the following caption:

HARMONY STEEL MANUFACTURING CO., LTD.,

Plaintiff,

Index No. 150751/2014

-against-

T. CO. METALS LLC,

Defendant,

And it is further

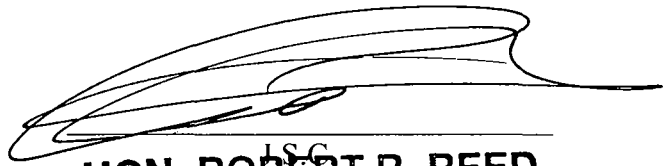
**ORDERED** that plaintiff is directed to serve a copy of this order with notice of entry on the County Clerk, and the Clerk of the Trial Support Office, who shall mark the court's records to reflect the amended caption; and it is further

**ORDERED** that counsel are directed to appear for a preliminary conference in Part 43, located at 111 Centre Street, Room 581, on Thursday, May 28, 2015, at 9:30 am.

The foregoing constitutes the Decision and Order of the Court.

Dated: April 15, 2015

ENTER:



**HON. ROBERT R. REED**  
J.S.C.