At a Term of the Supreme Court of the State of New York held in and for the County of Nassau, 100 County Seat Drive, Mineola, New York, on the 11th day of July 2016

PRESENT:

HON. JULIANNE T. CAPETOLA
Justice of the Supreme Court

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MARUSI & SON EQUIPMENT CORP.,

Plaintiff,

ORDER
Index No: 606386/14

- against -

ALPINE READY MIX INC.,

Defendant.

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Plaintiff having filed a complaint seeking damages for breach of contract and failure to remit payment, and Defendant having cross-claimed for damages for negligence, breach of contract, fraud, unjust enrichment, and misrepresentation, and the matter having come on to be duly heard before this Court for hearing on June 13, 2016, the court finds as follows:

Plaintiff and Defendant had been involved in an ongoing business relationship since on or about 2006 whereby Plaintiff provided the equipment to Defendant for a concrete plant (hereinafter referred to as "Plant 1"). The Plaintiff provided all the equipment consisting of a whole new system, and the Defendant installed same. Plaintiff and Defendant maintained a relationship whereby Plaintiff would come down to see "Mike Sr.", the father, and his son "Mike Jr.", owners of the corporate Defendant, on a monthly basis to see if the company needed anything.

In 2007, Mike Sr. purchased used plant equipment and brought it to his existing site in Brooklyn (hereinafter referred to as "Plant 2"). He bought an overhead bin, a scale, and a conveyor from another facility going out of business. After Defendant started Plant 2 with an aggregate section and a conveyor, he asked Plaintiff to provide him with proposals for parts for Plant 2 in lieu of the proposal for a mechanical installation, putting all the parts together. In 2008, Plaintiff sold Defendant a silo for Plant 2 and a cement

scale. Defendant performed the installation. In 2009, Plaintiff sold Defendant a secondary silo for Plant 2. In 2012, Defendant asked Plaintiff to sell him a cement screw, a solenoid panel and a flop chute. Inasmuch as the Defendant Mike Sr. had told Plaintiff he was not ready to for Plant 2 to become operational, and asked Plaintiff to give him prices for various items, in 2012 Defendant purchased a flex wall conveyor from Plaintiff. It is important to note at this juncture that Plant 2 remained devoid of a gearbox or motor on the transfer conveyor to feed the truck, no compressed air, no motor starters for the hot water heater, and no operational batch system. However, Plant 1 had all of these components, all of which had been purchased from Plaintiff by Defendant. Due to the limited 40-foot height of Plant 2, Defendant required a 120-foot conveyor to be operational. Plaintiff's Exhibit 7, referred to by the parties as the "Contract", evidences the following items with various specifications sold by Plaintiff to Defendant: Item #1: a loader hopper, Item #2: feeder conveyor, and Item #3: flex belt conveyor to feed turnhead for a total of $92,015.00, estimated freight $4000.00. There were additional optional items listed. The Plaintiff came to New York to the Defendant's place of business and showed Mike Sr. and Mike Jr. a video of the flex wall conveyor described in Exhibit 7. The Plaintiff says he gave them an estimate and went through several different proposals and brought in Kent Malley to take measurements before the system was sold to the Defendants.

Kent Malley, a witness who testified herein for Plaintiff, is the installer for Stanley Batch Systems, the manufacturer of the flex wall conveyor. He is the exclusive installer of the flex wall system. The $92,015.00 price did not include installation. The flex wall system was delivered during November 2013. Mike Sr. was too busy so the installation was called off until the spring. Plaintiff provided a new proposal, entered into evidence as Exhibit 2, for the installation. The proposal clearly states that Malley Industrial Solutions, Kent Malley's business, will supply all supervision, labor and tools to complete said job, scheduled to begin April 2, 2014. Defendant will supply the crane and man lift with jib. Plaintiff would supply all parts and materials. The Defendant was to supply the base portion of the flex wall. The proposal also clearly notes "**Notes: I would wait one day if they could get belt wire ready to run. Does not include foundations or electric**". The installation of the flex wall belt and hopper with covers only and training on operation of the belt would cost $21,920.00. All starters by [Defendant]. Plaintiff testified, as did the Defendant, that a local electrician was needed on the date of installation inasmuch as each jurisdiction has its own requirements regarding electrical components. A deposit of $5000.00 was given. Defendant was responsible for the ultimate installation of the system, to wit, Defendants were to supply the electric components and the computer system required to have the Batch System operational as

they did in Plant 1. Plaintiff would unpack all the equipment, erect it on the ground and vertically mount it up against the plant. Mr. Malley and an assistant were there to supervise the installation and train on the use of the conveyor belt. The installation took five days, however, a credit was afforded the Defendant for $1500.00 as a courtesy by Plaintiff charged to the Defendant for a lost day of work due to broken equipment during the installation. A balance of $16,920.00 remains for the delivery and erection of the system. It is the Defendant's contention that, after spending in excess of $90,000.00 for all the equipment for his plant plus monies he agreed to pay for the flex wall conveyor that he is refusing to pay the balance because the electrical components and wiring were not included with the conveyor belt. In Plant 1, an electrician was brought in by the Defendant to hook up the electric to the control box and the computer that operates the system. Plant 2, which was purchased piecemeal did not have the computer components or the electrical components to hook up to the conveyor belt. The Defendant testified that he had been under the impression that he had paid for an operating flex wall conveyor system. It is Plaintiff's contention that Defendant purchased same without the electronic components necessary for operation.

Inasmuch as the Defendant was aware and should have been aware of how a total system works, as was purchased by Plaintiff for Plant 1, including the computer box and electrical components which were hooked up by Defendant's electrician, he should have known the same was to happen for Plant 2. Rather than pay the additional $9000.00+ to Plaintiff for the electrical components and computer necessary to have the system operational, Defendant testified he felt he paid Plaintiff enough, that he no longer wished to complete Plant 2 and was refusing to pay the balance due and owing Plaintiff.

A letter dated June 10, 2014 entered into evidence as Plaintiff's Exhibit 10, written by Defendant's only witness "Mike Sr." (Marcangelo Cortoia) refers to several conversations with Plaintiff regarding several problems with the conveyor system and further complaining that the assembly of the system was not done properly. However, the letter does not in any way mention the lack of electrical components or computer systems or any specificity as outlined by Defendant in their opening statement. Defendant's letter, which was dictated to his secretary and not read by Defendant inasmuch as he does not read or write, was responded to by Plaintiff Lawrence Marusi on June 23, 2014 addressing Defendant's concerns about the flex wall conveying system.

Four days were spent on the installation by Plaintiff. The fifth day was lost due to damage done to the man life by the Defendant and Plaintiff reiterated its request for payment due and owning for said installation. The Defendant did not provide any

estimates from any other companies which would be indicative of the costs by Defendant to bring said system up and running by a provider other than Plaintiff.

Accordingly, the Court is constrained to find that the after testimony by both Plaintiff's witness Malley, and Defendant plus and exhibits submitted to date, do not negate Defendant's responsibility to Plaintiff to pay the balance due and owing for the equipment provided. Plaintiff's testimony was unrefuted that they provided what was ordered as delineated in Exhibit 7, that it is not operational (other than electronics and computer system) but that it has been 90% installed. All of Defendant's complaints regarding the hopper and the legs of the unit were addressed and resolved to the best of Plaintiff's capabilities.[1]

Accordingly, Defendant shall pay to Plaintiff all monies due and owning, to wit, $16,920.00 together with interest thereon retroactive to September 29, 2014, the date of demand for payment.

For the reasons stated heretofore, the Defendant's counterclaims are dismissed in their entirety. Other than Defendant Mike Sr.'s testimony, the Defendant offered no other witnesses and no documentary evidence to support the claims set forth in their counterclaim.

In light of the foregoing, it is hereby:

ORDERED, that Defendant shall pay to $16,920.00 together with statutory interest retroactive to September 29, 2014; and it is further

ORDERED, that Plaintiff shall provide a top flange around the hopper within a reasonable time as retrofitted by the manufacturer, and in no event later than forty five (45) days after payment of said judgment in full; and

ORDERED, that Defendant's counterclaims are hereby dismissed in their entirety.

Plaintiff shall submit judgment on notice.

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[1] Plaintiff testified (Transcript, p. 46 Lines 10-23) that he agreed that there should have been a top flange around the hopper, an oversight by the manufacturer.

Plaintiff shall serve a copy of this order upon Defendant within ten (10) days of their receipt hereof.

This constitutes the decision and order of the Court.

ENTER

Dated: July 13, 2016

HON. JULIANNE T. CAPETOLA
J.S.C.

ENTERED

JUL 21 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE