

**United Metro Energy Corp. v K&V Realty Corp.**

2019 NY Slip Op 31757(U)

June 20, 2019

Supreme Court, New York County

Docket Number: 162636/2015

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----X  
UNITED METRO ENERGY CORP.,

Plaintiff,

-against-

K&V REALTY CORP. and 2109 FIRST AVENUE  
REALTY CORP.,

Defendants.

-----X  
CAROL R. EDMEAD, J.S.C.:

**DECISION AND ORDER**  
Index No.: 162635/2015  
Motion Sequence 003

**MEMORANDUM DECISION**

In this breach of contract action, United Metro Energy Corp. (“Plaintiff”) moves for summary judgment pursuant to CPLR 3212. In reply, defendants K&V Realty Corp. and 2109 First Avenue Realty Corp. (collectively, “Defendants”) oppose the motion. For the reasons set forth below, the Court grants Plaintiff’s motion in its entirety.

**BACKGROUND FACTS**

Plaintiff is a supplier of fuel oil and services heating systems in commercial buildings. Defendants are the owners of two neighboring mixed-use commercial and residential buildings in Manhattan. Plaintiff began supplying heat oil to Defendants in May 2014; prior to that, Defendants had ordered oil from the Hess Corporation (“Hess”) (NYSCEF doc No. 38, ¶ 7). In January 2014, Defendants’ account was sold by Hess to Direct Energy Business LLC (“Direct Energy”), but Hess continued supplying the oil (*id.* at ¶ 10). When Plaintiff took over as the oil supplier, it purchased a list of customer accounts receivable and any corresponding debt from Direct Energy, one of which was Defendants’ account (*id.* at ¶ 8). Plaintiff made deliveries to Defendants through May 2015, and it claims that payments for the last six deliveries remain

outstanding. Plaintiff has now moved for summary judgment on the outstanding payments for both the sum owed on the account receivable it purchased from Direct Energy, totaling \$40,668.16, as well as the payments for the outstanding deliveries, totaling \$21,396.56. Defendants oppose the motion and argue that numerous issues of fact exist. They claim they were overcharged by Hess and dispute the amounts that have already been paid to Plaintiff. Defendants also argue that Plaintiff's affidavits are insufficient and contain numerous factual errors.

### DISCUSSION

Summary judgment is granted when “the proponent makes ‘a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,’ and the opponent fails to rebut that showing” (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). Here, since each side seeks summary judgment, each side bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v Iannucci*, 35 Misc 3d 1217(A) (Sup. Ct., N.Y. County 2012), *aff'd*, 102 AD3d 563 [1st Dept 2013], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Alvarez, supra*, *Zuckerman v City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v Filstein*, 35 AD3d 184 [1st Dept 2006]).

Here, the Court finds summary judgment is an appropriate remedy for Plaintiff as Defendants have failed to establish any triable issues of fact in their opposition. The affidavit submitted by the principal of both defendant corporations makes numerous unsubstantiated claims that do not suffice as meritorious issues warranting a denial of summary judgment. Defendants claim that Plaintiff's affidavit regarding the corresponding debt on the account receivable was submitted by an individual who was not an employee of Direct Energy at the time of the deliveries and thus has no actual knowledge of the debt (NYSCEF doc No. 57, ¶ 3). However, Defendants offer no basis for this assertion. Defendants also claim that the business records for Plaintiff and Direct Energy were improperly both certified by Plaintiff's employee, but the record reflects that the records were separately certified. Defendants also offer no evidence substantiating their claims that they stopped accepting the oil, disputed the prices they were being charged, or that they started accepting oil from another provider during the time period at issue (*id.* at ¶ 6). Defendant also claims that Plaintiff's affidavit states that "#6 fuel oil" was delivered, which is an improper type of fuel oil (the proper fuel oil type is categorized as "#2"). However, Plaintiff has attested that the use of the "#" was a typo, as the affidavit meant to refer to the 6 fuel oil deliveries at issue (NYSCEF doc No. 55, ¶ 6).

Defendants' affidavit also claims that a payment of \$11,455.73 was made to resolve the entire debt owed to Plaintiff. However, Plaintiff has refuted that assertion, establishing that the payment was actually made to settle debt for deliveries at another building owned by Defendants located in the Bronx, which is entirely unrelated to this matter (NYSCEF doc No. 57, ¶ 11). Defendants finally argue that they made a payment in June 2015 for \$2,315.47 for which they received no credit. However, no proof of payment or other sort of verification is offered for this alleged payment and it therefore has no bearing on the matter of Defendants' liability for the

outstanding sums (*id.* at ¶ 13). Defendants also contradict themselves throughout the affidavit, both denying there was an agreement in place with Plaintiff and also claiming they were overcharged and had previously disputed the prices. As Defendants have not raised any substantiated claims regarding issues of fact that would preclude summary judgment, the Court finds Plaintiff is entitled to the amounts owed on both the account receivable from Direct Energy, as well as the outstanding payments for its last six deliveries to Defendants.

### CONCLUSION


Based on the foregoing, it is hereby

ORDERED that Plaintiff United Metro Energy Corp.'s motion for summary judgment is granted in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Plaintiff United Metro Energy Corp., and as against Defendants K&V Realty Corp. and 2109 First Avenue Realty Corp., jointly and severally, in the amount of \$62,064.72, plus pre-judgment interest at the statutory rate of 9% from June 14, 2015, the total amount of which to be calculated by the Clerk ; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: June 20, 2019



Hon. Carol R. Edmead, J.S.C.

**HON. CAROL R. EDMEAD**  
J.S.C.