

**Civil Court of the City of New York
County of Queens**

Part 32

Index Number 145230/08

Motion Cal # 1 **Motion Seq. #** _____

Papers Submitted to Special Term on: 3/26/12

ABF FREIGHT SYSTEM, INC.,

Plaintiff,

against

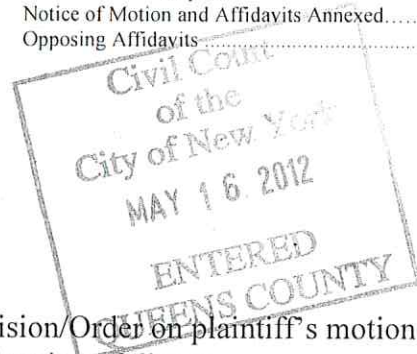
ACCARDI ELECTRIC MOTOR CO., INC.
d/b/a ACCARDI COMPANY,

Defendants.

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Opposing Affidavits.....	<u>2</u>



Upon the foregoing cited papers, the Decision/Order on plaintiff's motion for summary judgment and dismissing defendant's counterclaims is as follows:

To grant summary judgment it must clearly appear that no triable issue of fact is presented (Miceli v Purex Corp., 84 AD2d 562; Moskowitz v Garlock, 23 AD2d 943). The court need not resolve issues of fact or determine matters of credibility, but must determine whether such issues exist. (Bronson v March, 127 AD2d 810; Bracie v Yeshiva Univ., 88 AD2d 823.)

In support of its motion for summary judgment, plaintiff submits the affidavit of John Kukar, the accounts receivable manager for plaintiff. Mr. Kukar's affidavit establishes the following: Defendant engaged the services of plaintiff on twenty two separate occasions between 8/20/2007 and 11/30/2007 to ship various machinery. Plaintiff mailed invoices totaling \$14,747.89 to plaintiff which remain unpaid. At no point did plaintiff object to any of the invoices in dispute. Plaintiff further established that the invoices, bills of lading and delivery receipts are business records of the plaintiff. Plaintiff also includes a copy of its rules which provides that "Freight charges that are not paid within the credit period and for which ABF acquires the use of an outside collection agency and/or attorney to effect collections will be subject to a late payment penalty of thirty percent (30%) of the unpaid amount." Plaintiff has therefore established a prima facie entitlement to summary judgment in the amount of \$19,172.26.

In opposition defendant submits the affidavit of Jack Accardi, a former officer of the now defunct Accardi Electric Motor Co. which establishes the following: On two occasions, Accardi Electric contracted with ABF to have certain materials delivered at a certain time. On the first occasion, plaintiff breached the shipping contract by failing to deliver by 7:00 AM on 10/25/07. The shipment did not arrive until 2:30 PM causing defendant to have to expend \$10,124.00 in overtime pay. On the second occasion, defendant claims that they expended \$3,796.66 caused by plaintiff's late delivery. Defendant makes no mention of the contracted time for delivery related to the second occasion. As a result of these late deliveries, defendant claims an estimated

\$100,000 in lost business. Defendant also claims that the thirty percent penalty is unenforceable under New York State law.

Plaintiff, a common carrier operating in interstate commerce, is governed by the Carmack Amendment, codified at 49 U.S.C. 14706. The Carmack Amendment preempts all state law and common law claims and provides the exclusive remedy for loss or damage in interstate transit Adams Express Co. v. Croninger, 226 U.S. 491 (1913). The amendment was expanded to all types of contact damages under Moffitt v. Bekins Van Lines, 6 F.3d 305 (5th Cir. 1993) and Hall v. North American Van Lines, Inc., 476 F.3d 683 (9th Cir. 2007). Consistent with the Carmack Amendment, plaintiff published its Special Rules and Special Service Charges, which established a nine month period to file claims against ABF and a two year and one day period from declination of the claim to file suit, which are the minimum periods allowed by the Carmack Amendment. Defendant failed to file a claim within the nine month period following the disputed shipment. As such, plaintiff's counterclaims are time barred, See, Consolidated Rail Corp. v. Primary Industries Corp., 868 F.Supp. 566 (S.D.N.Y. 1994). Furthermore, plaintiff's rules specifically disclaim any liability for incidental and consequential damages. Defendant is also prohibited from offsetting the amounts it claims to be owed against the costs for the shipments which plaintiff admits were properly delivered, instead defendant is required to file a formal claim for those amounts. As for plaintiff's claim that the thirty percent liability for collection costs is an unenforceable penalty, the court is satisfied that it is not a penalty but a reasonable determination of the costs of legal and collection costs.

Therefore, defendant has failed to raise a triable issue of fact to rebut plaintiff's prima facie case. Summary Judgment is hereby granted to the plaintiff in the amount of \$19,172.26 with interest from August 20, 2007 and defendant's counterclaims are hereby dismissed. This constitutes the decision and order of the court.

May 8, 2012

Date



HON. BARRY A. SCHWARTZ
Judge, Civil Court