

Civil Court of the City of New York
County of New York
Part

Index Number 22981/07
Motion Cal. # _____ Motion Seq. # _____

Arthur Edelson

Claimant(s)/Plaintiff(s)/Petitioner(s)
against

Home Depot U.S.A. Inc

Defendant(s)/Respondent(s)

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>
Order to Show Cause and Affidavits Annexed....	_____
Answering Affidavits	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits	_____
Other.....	_____

Upon the foregoing cited papers, the Decision/Order on this Motion to grant

Summary judgment

is as follows:

see annexed decision

Civil Court
of the
City of New York
MAR 10 2009
ENTERED
NEW YORK COUNTY

Date

3/4/09

Judge, Civil Court

HON. PETER H. MOULTON

**CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK**

-----X
ARTHUR EDELSON,

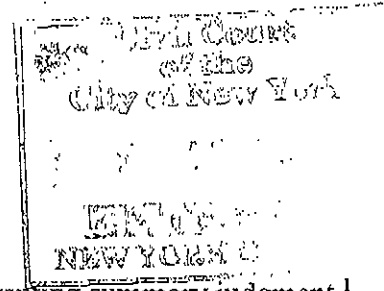
Plaintiff,

-against-

Index No.:22981/07

HOME DEPOT U.S.A., INC.,
-----X

Peter Moulton, J.



Defendant moves for an order pursuant to CPLR 3212 granting summary judgment.¹

FACTS

In September 2005, plaintiff purchased a kitchen from Home Depot Expo. The purchase included the demolition and removal of plaintiff's existing kitchen, delivery of new goods and their installation. The purchase and transaction was memorialized in a contract. In December 2005, defendant delivered the goods to plaintiff's home. According to defendant, on December 27, 2007, defendant's subcontractor began the construction. On June 15, 2006, the construction was completed.

Plaintiff commenced this case arguing that due to the delay in completing the construction, he was completely deprived of the use of his kitchen, dining room, living room and other areas of his home. He also alleges that he suffered from defendant's storing its supplies in his home. In addition, plaintiff asserts that he and his wife were forced to eat all of their meals out of their home.

¹In determining this motion, the court reviewed the following documents: 1) defendant's motion for summary judgment and memorandum of law, 2) plaintiff's affirmation in opposition and memorandum of law, and 3) defendant's reply memorandum of law.

On its motion for summary judgment, defendant argues that the case should be dismissed because plaintiff fails to provide any evidence of his damages. Specifically, defendant asserts that plaintiff cannot maintain this action because there is no proof that the four month delay in the construction completion caused him to incur \$25,000.00 in damages. Defendant admits that the construction took longer than anticipated, but asserts that plaintiff lacks any evidence of measurable damages which would entitle him to any relief.

DISCUSSION

Summary judgment should only be granted when no triable issues of fact are presented (Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395). In order to prevail on a motion for summary judgment the movant must present a prima facie case demonstrating entitlement to judgment as a matter of law (Prince v. DiBenedetto, 189 AD2d 75). When a prima facie case has been established, the respondent must produce evidentiary proof in admissible form sufficient to require a trial material questions of fact (Zuckerman v. City of New York, 49 NY2d 557).

In the case at bar, defendant has presented a prima facie case, showing that it performed its duties under the contract entered into by the parties. However, plaintiff has not met his burden of presenting any evidence in admissible form that would require a trial. Specifically, plaintiff claims that defendant breached the contract, but fails to present any evidence supporting this claim. While plaintiff has shown that he was inconvenienced by the delay in installing his new kitchen, he has not submitted one receipt or invoice attesting to the damages he has claimed. Moreover, the contract has no language stating that should defendant's work fail to end on the estimated date plaintiff would be entitled to relief. Defendant states that he plans to present such evidence at trial. However, on a motion for summary judgment, one must lay bear their proof (see Zuckerman supra). Plaintiff has

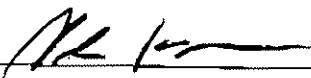
already had the opportunity to testify at his deposition. At that time, he failed to state with any particularity the damages he has allegedly suffered. Absent such evidence from plaintiff, defendant's motion for summary judgment is granted.

CONCLUSION

Defendant's motion for summary judgment is granted. The clerk shall enter a judgment in favor of defendant, dismissing the complaint. This constitutes the decision and order of the court.

Dated:

3/7/09



J.C.C.

HON. PETER H. MOULTON