

*Case Name:*  
**Kal-Trading Inc. v. Plastics Processing Inc.**

**Between**  
**Kal-Trading Inc., (Plaintiff), and**  
**Plastics Processing Inc., (Defendant)**

[2006] O.J. No. 2127

148 A.C.W.S. (3d) 713

Court File No. CV-05008304-00

Ontario Superior Court of Justice

**T.P. O'Connor J.**

May 29, 2006.

(10 paras.)

*Civil procedure -- Judgments and orders -- Summary judgments -- Debt or liquidated demand -- Effect of counterclaim -- Plaintiff obtained summary judgment to recover full payment for goods sold and delivered -- Defendant alleged that goods sold by the plaintiff were defective -- Defendant resold the goods to its customers for profit -- Defendant counterclaimed against plaintiff for possible claims by its customers arising from defective goods -- Defendant's damages were considered speculative such that it was not entitled to legal or equitable set-off.*

**Statutes, Regulations and Rules Cited:**

Courts of Justice Act,

Ontario Rules of Civil Procedure, Rule 53.03(1)

**Counsel:**

Paul H. Starkman, for the Plaintiff

Angus MacKinnon, for the Defendant

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## **ENDORSEMENT**

**1 T.P. O'CONNOR J.** (endorsement):-- The plaintiff seeks summary judgment in the amount of U.S. \$69,000.35 for non-payment by the defendant for goods sold and delivered. The defendant presented cheques as payment of the plaintiff's invoices and then stopped payment on them, alleging some of the product delivered was defective. However, the defendant had sold the goods to its customers at a profit and had been paid in full. Although some customers then complained about the quality of some of the product, specifically LDPE film, none has brought any legal action to recover any damages.

**2** The defendant now concedes that partial judgment may issue in the amount of U.S. \$27,513.42, being the amount of cheques which paid invoices unrelated to the alleged defective LDPE film and upon which it stopped payment. Thus, there remains U.S. \$32,486.93 still at issue.

**3** The defendant resists summary judgment on the balance of U.S. \$32,486.93 arguing the plaintiff has not established there is no genuine issue for trial. Specifically, it says there are issues relating to representations by the plaintiff as to the fitness of the product and issues as to whether there were breaches of a warranty. The defendant argues these issues require resolution at a trial. Further, the defendant says it has and will suffer damages if it must reimburse its customers for the defective product. However, as noted, no customer has yet pressed any claim in this regard.

**4** The defendant has counterclaimed for damages for any amount it must reimburse its customers and for damage to its reputation as a supplier of quality products.

**5** An issue in the matter is whether the LDPE film delivered complies with a sample examined and accepted by the defendant before the orders were placed. The defendant was satisfied with the sample that it knew contained up to 3% contaminants. The film was sold by the plaintiff on an "as is with no return" basis. The defendant does not know the extent to which, if any, the film sold and delivered to its customers was inconsistent with the sample it examined. A purported expert's report respecting the quality of the film cannot be accepted by the court as evidence. It does not comply with Rule 53.03(1). It is not signed by anyone, nor are the qualifications of an expert set out.

**6** In this matter, I make the following findings of fact:

- (a) The defendant examined a sample of the goods before it placed an order for them.
- (b) It accepted delivery and tendered payment of the plaintiff's invoices.

- (c) It resold the goods to its customers at a profit and was paid in full by them.
- (d) There is no evidence the goods did not comply with the samples examined.
- (e) The defendant received some complaints from its customers as to the quality of the goods they received.
- (f) Fearing it may be required to accept the return of some of the goods and reimburse the complaining customers, it stopped payment on some of the cheques it rendered to the plaintiff, totalling U.S. \$69,000.35.
- (g) Approximately 18 months after the last of the transactions at issue, the defendant has not been required to reimburse any customers, nor are there any actions pending for repayment.
- (h) The defendant has produced no evidence of any damages it has suffered.

**7** The defendant, in essence, seeks a set-off for possible unliquidated damages that it may incur in the future. Its possible damages are speculative at best, and after the passage of over 18 months, they are growing more speculative as time goes by.

**8** A legal set-off requires mutual debts, the amounts of which are ascertained or ascertainable. The plaintiff owes the defendant no such debts. Nor is the defendant entitled on these facts to an equitable set-off. Its claim is unliquidated. It tendered cheques that were dishonoured. In *Iraco Ltd. v. Staiman Steel Ltd.*, [1986] O.J. No. 242 (Ont. H.C.), where the facts are very similar to the case at bar, Holland J. reviewed the English and Canadian cases on equitable set-off. He concluded that "... equitable set-off probably does not apply to bills of exchange ...". The Court of Appeal upheld the motions judge. In *Marketing Products Inc. (c.o.b. Great Lakes Audio and Video) v. 1254719 Ontario Ltd. (c.o.b. Tech Electronic Services)*, [2000] O.J. No. 5092 2 S.C.R. 193, MacPherson J.A. for the Ontario Court of Appeal confirmed the decision in *Iraco* as being the law in Ontario.

**9** There will be judgment for the plaintiff in the amount of U.S. \$69,000.35 plus pre and post judgment interest in accordance with the *Courts of Justice Act*. The defendant is at liberty to continue the prosecution of its counterclaim. Its request that this judgment be stayed pending a determination of the counterclaim is denied.

**10** Unless settled, the parties may address the court in writing on costs within 30 days of the date of this judgment.

T.P. O'CONNOR J.

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