

**Cause No. 09-09-9999-CV**

ATLAS CORPORATION,	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§	
v.	§	OF DALLAS COUNTY, TEXAS
	§	
SMITH PLASTICS,	§	
Defendant.	§	99th JUDICIAL DISTRICT

**PLAINTIFF'S MOTION TO RECOVER DAMAGES SUFFERED AS A  
CONSEQUENCE OF DEFENDANT'S BREACH OF CONTRACT**

Plaintiff, Atlas Corporation, moves to recover damages suffered as a consequence of Defendant Smith Plastic's breach of a valid, enforceable installment contract between the parties.

**A. Introduction**

1. Plaintiff is Atlas Corporation ("Atlas"), a Texas Corporation; Defendant is Smith Plastics ("Smith"), a Texas Corporation.
2. Atlas and Smith had a written, long-term installment contract ("the agreement") in which Smith would make a monthly delivery of ten thousand (10,000) or more sheets of plastic upon receiving an order for same from Atlas.
3. After delivery of the materials, Smith would invoice Atlas, upon receipt of which Atlas was bound to pay Smith for the shipment within 15 days of the delivery date.
4. Prior to the initiation of Cause No. 09-09-9999-CV, the companies had been satisfactorily conducting business according to the terms of the agreement for approximately eighteen (18) months.

**B. Facts**

5. Smith made a delivery to Atlas for 10,000 sheets of plastic on January 15, 2009.
6. On January 17, 2009, Smith invoiced Atlas for the delivery of materials.
7. By virtue of a paperwork error, Atlas had not forwarded payment to Smith by February 9, 2009, at which time Smith notified Atlas that their payment was five (5) days late.
8. Atlas immediately acknowledged their mistake and forwarded payment on the same date, February 9, 2009.

9. Smith received Atlas's late payment on February 10 and accepted it without objection.
10. On February 12, 2009, Atlas ordered 10,000 sheets of plastic from Smith via email, a means the companies had used numerous times in the past to facilitate timely delivery of the required materials.
11. Smith failed to deliver the materials ordered by Atlas on February 12.
12. When subsequently contacted by Atlas concerning the non-delivery, Smith informed Atlas that they considered the late payment, received on February 10, as a breach of the agreement and that they did not intend to perform under the agreement any longer.
13. At the time of this exchange, the agreement had approximately eighteen (18) months remaining.
14. Atlas suffered a total of **\$274,743.00** in damages, including **\$24,900.00** in attorneys' fees, as a result of Smith's non-delivery of goods, for which they now seek recovery by an order of this court.

### **C. Argument & Authorities**

15. Although Atlas made a payment to Smith that was not in strict compliance to the terms of the agreement, Smith did not have cause to cease performance; hence, Smith's failure to perform on the February 12 order constituted a breach of contract and entitles Atlas to recovery of damages as specified in this motion. Following is the legal foundation for this argument.
16. With respect to the agreement, time was not of the essence. The agreement neither specified that time was of the essence, nor was there anything in the nature of the subject matter, or connected with the purpose, of the contract and the circumstances surrounding it which made it apparent that the parties intended that the contract be performed at or within the time specified. See *Laredo Hides v. H & H Meat*, 513 S.W.2d 210; 1974 Tex. App. LEXIS 2396, for a comprehensive treatment of the authority and application of this issue.
17. Smith waived breach of contract when they accepted Atlas's late payment without objection. A waiver of the time of performance of a contract will result from any act that induces the opposite party to believe that exact performance within the time designated in the contract will not be insisted upon. *Laredo Hides* citing *T. G. Shaw Oil Corporation v. Parker*, 61 S.W.2d 587; 1933 Tex. App. LEXIS 872.
18. Atlas's late payment for the January 15 delivery of goods did not "substantially [impair] the value of the whole [installment] contract" and hence did not give Smith cause to cease performance. Cf. Tex. Bus. & Comm. Code § 2.612(c).
19. Per Tex. Bus. & Comm. Code § 2.711(c), Smith's failure to deliver in response to

Atlas's February 12 order entitles Atlas to recover damages for non-delivery.

20. Smith failed to respond to Plaintiff's demand letter dated March 1, 2009.

**D. Enumeration of Damages**

21. The damages to which Atlas is entitled as a consequence of Smith's breach of the agreement are enumerated in Exhibit One (1). Exhibit One (1) also provides the rationale for the calculation of value of each of the damages.

22. An affidavit attesting to the reasonable attorneys' fees incurred by Atlas in pursuit of its rightful damages in this case is attached as Exhibit Two (2).

**E. Prayer**

23. Plaintiff prays that the Court issue an order granting Atlas Corporation damages in the amount stipulated by this Court, plus an award of attorneys' fees in the amount of **\$24,900.00** as set forth in Exhibit Two (2), plus costs of court incurred, and interest, and all further relief to which Plaintiff may show themselves to be justly entitled.

Respectfully submitted,

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