

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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NEW YORK CITY INDUSTRIAL DEVELOPMENT
AGENCY,

Plaintiff, **SUMMONS**

-against-

Index No. _____

SMITH ELECTRIC VEHICLES CORP.,

Defendant.

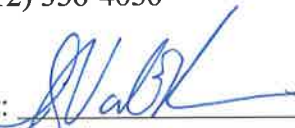
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TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer on plaintiff's undersigned attorney within twenty (20) days after the service of this summons, exclusive of the day of service, or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New York. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in this complaint. Plaintiff designates New York County as the place of trial in accordance with CPLR § 503(a).

Dated: New York, New York
October 31, 2016

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
100 Church Street
New York, New York 10007
(212) 356-4050

By: 
INGA VAN EYSDEN
Assistant Corporation Counsel

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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NEW YORK CITY INDUSTRIAL DEVELOPMENT
AGENCY,

Plaintiff,

-against-

SMITH ELECTRIC VEHICLES CORP.,

Defendant.

VERIFIED COMPLAINT

Index No. /16

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Plaintiff New York City Industrial Development Agency (“NYCIDA” or “the Agency”), by its attorney, ZACHARY W. CARTER, Corporation Counsel of the City of New York, alleges as follows:

Preliminary Statement

1. In this action, NYCIDA seeks to recover over \$404,624.60 due from defendant as a result of its default under a lease agreement with NYCIDA and a related guaranty agreement. Defendant guaranteed the performance of its obligations under the lease agreement (“Agency Lease”), which was part of an industrial incentive program that offers eligible companies certain real estate tax and other tax benefits in connection with their construction, renovation, or equipping of manufacturing facilities. Defendant derived substantial financial benefits under that program in connection with its renovation and equipping of premises located in the Bronx, New York, to be used for the design, manufacture, sale and service of electric vehicles. Defendant breached the Agency Lease and the guaranty agreement (“Guaranty”) by (1) failing to make payments in lieu of real estate taxes, (2) failing

to complete project improvements by the required completion date, and (3) failing to obtain insurance, all required by the Agency Lease. As a consequence of these events, defendant was obligated to repay the public benefits conferred upon it under the Agency Lease, but has failed to do so. Accordingly, plaintiff NYCIDA is entitled to payment from defendant of the payments in lieu of taxes and is entitled to recapture the public benefits conferred upon defendant, as well as unpaid administrative fees, each with applicable interest as provided under the Agency Lease.

The Parties

2. Plaintiff NYCIDA is a public benefit corporation created under the laws of the State of New York, having its principal office at 110 William Street, New York, New York 10038.

3. Upon information and belief, defendant Smith Electric Vehicles Corp. (“Smith”) is a Delaware corporation, having its principal office at 12200 Ambassador Drive, Suite 326, Kansas City, Missouri, 64163.

Jurisdiction and Venue

4. This Court has jurisdiction over defendant pursuant to CPLR § 301.

5. Venue in New York County is based upon plaintiff’s principal place of business and pursuant to the provisions of Section 3.3 of the Guaranty discussed below.

Background

6. The New York State Industrial Development Agency Act, Title I of Article 18-A of the General Municipal Law, Chapter 24 of the Consolidated Laws of New York, as amended (“the Enabling Act”), authorized the creation of industrial development agencies in the cities, towns and counties of the State of New York (the “State”) to promote the health and economic welfare of the people of the State. NYCIDA is a public benefit corporation and was

established by Chapter 1082 of the 1974 Laws of New York, as amended from time to time (together with the Enabling Act, the “Act”), for the benefit of the City of New York (the “City”) and its inhabitants.

7. In order to foster economic development and promote job creation in the City, NYCIDA provides financial assistance to qualifying commercial projects for the purpose of encouraging businesses to move to or remain in the City. To further this goal, the Act empowers NYCIDA to enter into certain financing transactions with eligible project companies that, due to NYCIDA’s interest in the property, may include grants of exemptions for such projects from State and City mortgage recording and sales and use taxes, as well as the contractual right to make payments to NYCIDA on behalf of the City in lieu of real property taxes to the City (“PILOT payments”). NYCIDA requires the recipients of these benefits to complete and operate a designated qualified “project” under the Act within the five boroughs of the City for the duration of the financing transaction and to maintain a particular type of business at the project site, to meet its economic development and job creation goals.

The Smith Electric Vehicle Project

8. On or about August 1, 2012, NYCIDA entered into one such industrial incentive program transaction with defendant (“the Project”) to provide financial assistance in the form of certain real estate and other tax benefits (“public benefits”) to defendant to further economic development in the City.

9. The Project, as specified in the Agency Lease, consisted of the renovation and equipping of leased premises within an approximately 90,000 square foot building on an approximately 70,000 square foot parcel of land and two 5,000 square foot vacant lots, all for the design, manufacturing, sale and servicing of electric vehicles (the “Facility Realty”). The

Facility Realty was located at 275-295 Locust Avenue, Bronx, New York, being Section 10, Tax Block 2598, Lots 46, 74 and 78.

10. In connection with the Project, Smith, NYCIDA and 295 Locust Associates (the owner of the property, who was made a party to certain lease documents with NYCIDA to allow NYCIDA to pass through to 295 Locust Associates public benefits) (the "Owner") respectively entered into the following agreements, all dated as of August 1, 2012: 1) a Prime Lease Agreement between the Owner and NYCIDA, recorded in the Office of the City Register at CRFN 2012000337670, pursuant to which the Owner leased the facility to NYCIDA ("the Prime Lease"); (2) an Overlease Agreement between NYCIDA and the Owner, recorded in the Office of the City Register at CRFN 2012000337671, pursuant to which NYCIDA subleased the facility to the Owner ("the Overlease"); (3) a Lease Agreement between the Owner and Smith, a memorandum of which was recorded in the Office of the City Register at CRFN 2012000337672, pursuant to which the Owner sub-subleased the facility to Smith ("the Commercial Lease"); (4) a Company Lease Agreement between Smith and NYCIDA, recorded in the Office of the City Register at CRFN 000337673, pursuant to which Smith further subleased the facility to NYCIDA ("the Company Lease"); (5) the Agency Lease Agreement between NYCIDA and Smith, recorded in the Office of the City Register at CRFN 2012000337674, pursuant to which NYCIDA further subleased the facility to Smith; and (6) a Guaranty Agreement from Smith to NYCIDA ("the Guaranty").

11. Due to the structure of the financing transaction and because real property in which NYCIDA holds a leasehold interest is exempt from real property taxes, the Facility Realty, as defined in the Agency Lease, was not subject to real property taxes during the term of such Agreement. Instead, pursuant to Section 5.1 thereof, Smith was entitled to make certain

PILOT payments in amounts less than the full real property taxes that would otherwise have been levied on the Facility Realty.

The Occurrence of Events of Default and Recapture Events Under the Agency Lease

12. Pursuant to Sections 1.1 and 3.3 of the Agency Lease, Smith was obligated to complete the Project by no later than January 31, 2014 (“the Completion Date”).

13. Pursuant to Section 5.1 of the Agency Lease, Smith was obligated to make semi-annual PILOT payments on a schedule, beginning on July 1, 2013.

14. Pursuant to Section 8.1 of the Agency Lease, Smith was obligated to maintain specified insurance coverage and to submit evidence of such coverage to NYCIDA.

15. On October 31, 2013, a Project Manager in the Compliance Department of the New York City Economic Development Corporation (“NYCEDC”), on behalf of NYCIDA, visited and conducted a compliance investigation of the Facility Realty.¹ He observed that it appeared that construction had not commenced, and noted that no workers were present. A security guard confirmed that the Facility was empty inside and stated that he had rarely seen anyone at the Facility.

16. On four occasions between October 2013 and January 2014, NYCIDA attempted to contact Smith regarding its obligations under the Agency Lease, with no response from Smith. By a Notice of Noncompliance dated January 10, 2014 (“the January 10 Notice”) NYCIDA advised Smith that (1) four types of insurance coverage required under the Agency Lease had expired as of September 1, 2013, and that Smith had failed to submit evidence of continued coverage as required, and (2) Smith had failed to remit payment of delinquent PILOT in the amount of \$102,325.73. The January 10 Notice advised Smith that its failure to submit

¹ NYCEDC provides compliance and other staff services for NYCIDA, which does not employ its own staff.

the required insurance and make the required PILOT payment within 10 days might result in a default under the Agency Lease. Smith failed to respond to the January 10, 2014 Notice or to submit the required evidence of insurance or pay the PILOT amount due.

17. By a further Notice of Non-Compliance dated January 17, 2014 (“the January 17 Notice”), NYCIDA again advised Smith that it had failed to comply with the insurance coverage and PILOT payment requirements of the Agency Lease.

18. The January 17, 2014 Notice also noted that the Project Completion Date was January 31, 2014, that Smith was obligated to submit a Project Completion Certificate to verify that the Project Work was completed, and that failure to complete the Project Work might result in termination, suspension, and or permanent revocation of benefits.

19. By letter dated February 12, 2014 (“Notice of Event of Default”), NYCIDA advised Smith that certain Events of Default had occurred under Section 9.1 of the Agency Lease, in that Smith had failed to pay the PILOT amount due, failed to submit proof of insurance coverage, and failed to complete the Project by the Completion Date.

20. Section 9.1(a) of the Agency Lease provides that “Failure of the Lessee [Smith] to pay PILOT in accordance with Section 5.1 on or before the due date provided in the PILOT Bill and the amount required in a PILOT Bill” constitutes an Event of Default.

21. Section 9.1(e) of the Agency Lease provides that the “Failure of the Lessee to observe and perform any covenant or agreement on its part to be performed under Section 8.1 (Insurance) and continuance of such failure for a period of ten (10) days after receipt by the Lessee of written notice specifying the nature of such default from” NYCIDA constitutes an Event of Default.

22. Section 9.1(c) of the Agency Lease provides that “The occurrence of a Recapture Event” constitutes an Event of Default. A Recapture Event is defined in Section 5.4 of the Agency Lease and includes when “the Lessee shall have failed to complete, or caused to be completed, the Project Improvements by the Completion Date.” Upon the occurrence of a Recapture Event prior to the Operations Commencement date, NYCIDA is entitled to recover 100% of the public benefits Smith received, plus interest.

23. In the Notice of Event of Default, NYCIDA advised Smith that as of February 1, 2014, the amount due to NYCIDA, including the unpaid PILOT, recapture, and penalty and interest thereon, was \$152,010.11, and demanded payment of such amount. .

24. Smith failed to pay any part of the amount due. Pursuant to Section 9.2 of the Agency Lease, NYCIDA terminated each of the Prime Lease, the Company Lease, the Agency Lease, and the Overlease by separate Termination Agreements, all dated as of February 17, 2015, acting on its own behalf and as Smith’s appointed agent and attorney-in-fact. The Termination Agreements were recorded in the Office of the City Register at respectively CRFN 2015000089095 (Prime Lease); CRFN 2015000089096 (Company Lease); CRFN 2015000089097 (Agency Lease); and CRFN 2015000089094 (Overlease Agreement). Following these lease terminations, the Facility was placed back on the full real estate tax rolls. By letter to Smith dated the same date (“Notice of Demand for Payment”), NYCIDA demanded payment of the recapture and unpaid PILOT, with interest and penalties. As of that date, the amount due was \$339,886.09. NYCIDA further advised Smith that interest and penalties would continue to accrue.

25. To date, Smith has failed to make any payment of the recapture or the unpaid PILOT. As of July 29, 2016, the amount due, with accrued interest, was \$404,624.60.

26. Pursuant to Sections 5.4(e), 9.2(b), and 10.4 of the Agency Lease, Smith's obligations to pay the unpaid PILOT and recapture survive the termination of the Agency Lease.

Defendant's Default Under the Guaranty Agreement

27. Pursuant to Section 3.1 of the Guaranty, Smith, as Guarantor, unconditionally guaranteed to NYCIDA the full and prompt payment of all rental payments under the terms of the Agency Lease and the full and prompt performance of Smith's obligations, covenants and agreements under the terms of the Agency Lease ("the Guaranteed Obligations").

28. The Guarantor further irrevocably and unconditionally guaranteed that upon the occurrence of a default of any of the Guaranteed Obligations under the Agency Lease, the Guarantor would promptly make such payments or effect compliance with such obligations.

29. The Guaranty also provides that it was entered into for the benefit of NYCIDA. Section 3.7 of the Guaranty states:

Benefit and Enforcement. This Guaranty is entered into by the Guarantor for the benefit of the Agency, and the Agency is entitled to all rights and remedies as may exist at law or in equity or otherwise to enforce performance and observance of this Guaranty.

30. Pursuant to the provisions of Section 3.4(a) of the Guaranty, an Event of Default exists and continues under the Guaranty when "the Guarantor defaults in the payment or performance of any Guaranteed Obligation referred to in Section 3.1 and such default continues for more than (3) three Business Days after written notice thereof has been given to the Guarantor by the Agency."

31. Pursuant to Section 3.5 of the Guaranty, Smith "expressly waive[d] presentment, demand, protest and notice of non-payment and further waive[d] notice from the

Agency of its acceptance and reliance on this Guaranty or of any action taken or omitted in reliance hereon, and of any default by the Guarantor in the Guaranteed Obligations.”

32. More than three business days have passed since Smith received notice of the Events of Default under the Agency Lease, and said Guarantor has not paid the PILOT amount due or repaid the public benefits conferred upon Smith.

33. Accordingly, defendant as Guarantor remains liable for the full repayment of the public benefits conferred by virtue of the Agency Lease and for the amount of unpaid PILOT due and owing to NYCIDA.

Calculation of the Amount Due

34. Recapture. NYCIDA is entitled to recapture the public benefits conferred on defendant, together with interest as provided in the Agency Lease. Smith obtained a PILOT benefit, the difference between the applicable real property tax that would have been assessed on the Facility Realty and the lower PILOT amount Smith was entitled to pay under the Agency Lease. The principal amount of the PILOT benefit is \$27,561.76. Interest on that amount, as provided in Section 5.4(c)(iii) of the Agency Lease, accrued beginning when Smith made its first PILOT payment, and as of July 29, 2016 was \$ 8,201.93, for a total amount due of \$35,763.69. Interest will continue to accrue until the full amount is paid.

35. Unpaid PILOT. NYCIDA is also entitled to recover the amount of PILOT that remains unpaid, together with interest as provided under the Agency Lease. The principal amount of unpaid PILOT is \$275,384.20. Penalty and interest on that amount, as provided in Section 5.1(g) of the Agency Lease, began to accrue as of the date each semi-annual PILOT bill was due, and as of July 29, 2016 was \$93,476.72, for a total amount due of \$368,860.92. Interest will continue to accrue until the full amount is paid.

36. Attorneys' Fees. Pursuant to Section 9.6 of the Agency Lease and Section 3.5 of the Guaranty, Smith is also liable for the expenses incurred by NYCIDA in enforcing Smith's performance, including reasonable attorneys' fees.

AS AND FOR A FIRST CAUSE OF ACTION

37. Plaintiff repeats and realleges the allegations set forth in the preceding paragraphs as though fully set forth herein.

38. Pursuant to the Agency Lease, defendant is liable for the recapture of PILOT benefits and unpaid PILOT, together with applicable interest as set forth therein.

39. Defendant has failed to pay any of such amounts due and owing to NYCIDA under the Agency Lease.

40. Plaintiff NYCIDA is entitled to judgment against defendant in an amount not less than \$404,624.60, plus all applicable interest from July 29, 2016 until the judgment is paid, together with NYCIDA's reasonable expenses of enforcing the Agency Lease, including attorneys' fees.

AS AND FOR A SECOND CAUSE OF ACTION

41. Plaintiff repeats and realleges the allegations set forth in the preceding paragraphs as though fully set forth herein.

42. Pursuant to the Guaranty, defendant unconditionally guaranteed the payment of the recapture of benefits, and unpaid PILOT, as Guaranteed Obligations.

43. Plaintiff NYCIDA is entitled to judgment against defendant for the Guaranteed Obligations, in an amount not less than \$404,624.60, plus all applicable interest from July 29, 2016 until the judgment is paid, together with NYCIDA's reasonable expenses of enforcing the Guaranty, including attorneys' fees.

WHEREFORE, plaintiff New York City Industrial Development Agency demands judgment:

(1) On the First Cause of Action against defendant in an amount to be determined at trial, but not less than the principal amount of \$302,945.96, together with interest and penalties in the amount of \$101,678.64 as of July 29, 2016, for a total amount of \$404,624.60, and with such additional interest as agreed to in the Agency Lease; and

(2) On the Second Cause of Action against defendant in an amount to be determined at trial, but not less than the principal amount of \$302,945.96, together with interest and penalties in the amount of \$101,678.64 as of July 29, 2016, for a total amount of \$404,624.60, and with such additional interest as agreed to in the Agency Lease and the Guaranty, and

(3) NYCIDA's reasonable expenses of enforcing the Agency Lease and the Guaranty, including attorneys' fees; and

(4) Awarding plaintiff New York City Industrial Development Agency such other and further relief as the Court may deem just and proper.

Dated: New York, New York
October 31, 2016

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for Plaintiff
100 Church Street, Room 20-87
New York, New York 10007
(212) 356-4050

By: 

INGA VAN EYSDEN
Assistant Corporation Counsel

VERIFICATION

STATE OF NEW YORK)
 SS.:
COUNTY OF NEW YORK)

SHIN MITSUGI, being duly sworn, deposes and says:

I am a Senior Vice President of the New York City Economic Development Corporation (“NYCEDC”), and the Director of Compliance for the New York City Industrial Development Agency (“NYCIDA”), the plaintiff herein, and I have read the foregoing verified complaint and know the contents thereof and the same is true to my knowledge, based upon information obtained from records of the plaintiff and the City of New York and statements made by certain officers, agents and employees of the New York City Economic Development Corporation and the City of New York, except as to matters therein stated to be alleged on information and belief and as to those matters I believe them to be true.



Sworn to before me this
25th day of October, 2016.



NOTARY PUBLIC

RICHARD TOM
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01TO5008816
QUALIFIED IN KINGS COUNTY
COMMISSION EXPIRES 06/17/2019

Index No.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NEW YORK CITY INDUSTRIAL DEVELOPMENT
AGENCY,

Plaintiff,

-against-

SMITH ELECTRIC VEHICLES CORP.,

Defendant.

VERIFIED COMPLAINT

ZACHARY W. CARTER

*Corporation Counsel of the City of New York
Attorney for Plaintiff
100 Church Street
New York, N.Y. 10007*

*Of Counsel: Inga Van Eysden
Tel: (212) 356-4050
Matter #: 2015027004*

Due and timely service is hereby admitted.

New York, N.Y., 20.....

....., Esq.

Attorney for.....