248 U.S. 132 (1918)

UNITED STATES
v.
SPEARIN.
SPEARIN
v.
UNITED STATES.

Nos. 44, 45.

Supreme Court of United States.

Argued November 14, 15, 1918.

Decided December 9, 1918.

APPEALS FROM THE COURT OF CLAIMS.

133*133 *Mr. Assistant Attorney General Thompson* for the United States.

Mr. Charles E. Hughes, with whom *Mr. Frank W. Hackett* and *Mr. Alfred S. Brown* were on the brief, for Spearin.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Spearin brought this suit in the Court of Claims, demanding a balance alleged to be due for work done under a contract to construct a dry-dock and also damages for its annulment. Judgment was entered for him in the sum of $141,180.86; (51 Ct. Clms. 155) and both parties appealed to this court. The Government contends that Spearin is entitled to recover only $7,907.98. Spearin claims the additional sum of $63,658.70.

First. The decision to be made on the Government's appeal depends upon whether or not it was entitled to annul the contract. The facts essential to a determination of the question are these:

Spearin contracted to build for $757,800 a dry-dock at the Brooklyn Navy Yard in accordance with plans and specifications which had been prepared by the Government. The site selected by it was intersected by a 6-foot brick sewer; and it was necessary to divert and relocate a section thereof before the work of constructing the dry-dock could begin. The plans and specifications provided that the contractor should do the work and prescribed the dimensions, material, and location of the section to be 134*134 substituted. All the prescribed requirements were fully complied with by Spearin; and the substituted section was accepted by the Government as satisfactory. It was located about 37 to 50 feet from the proposed excavation for the dry-dock; but a large part of the new section was within the area set aside as space within which the contractor's operations were to be carried on. Both before and after the diversion of the 6-foot sewer, it connected, within the Navy Yard but outside the space reserved for work on the dry-dock, with a 7-foot sewer which emptied into Wallabout Basin.

About a year after this relocation of the 6-foot sewer there occurred a sudden and heavy downpour of rain coincident with a high tide. This forced the water up the sewer for a considerable distance to a depth of 2 feet or more. Internal pressure broke the 6-foot sewer as so relocated, at several places; and the excavation of the dry-dock was flooded. Upon investigation, it was discovered that there was a dam from 5 to 5 1/2 feet high in the 7-foot sewer; and that dam, by diverting to the 6-foot sewer the greater part of the water, had caused the internal pressure which broke it. Both sewers were a part of the city sewerage system; but the dam was not shown either on the city's plan, nor on the Government's plans and blue-prints, which were submitted to Spearin. On them the 7-foot sewer appeared as unobstructed. The Government officials concerned with the letting of the contract and

construction of the dry-dock did not know of the existence of the dam. The site selected for the dry-dock was low ground; and during some years prior to making the contract sued on, the sewers had, from time to time, overflowed to the knowledge of these Government officials and others. But the fact had not been communicated to Spearin by anyone. He had, before entering into the contract, made a superficial examination of the premises and sought from the civil engineer's office at the Navy 135*135 Yard information concerning the conditions and probable cost of the work; but he had made no special examination of the sewers nor special enquiry into the possibility of the work being flooded thereby; and had no information on the subject.

Promptly after the breaking of the sewer Spearin notified the Government that he considered the sewers under existing plans a menace to the work and that he would not resume operations unless the Government either made good or assumed responsibility for the damage that had already occurred and either made such changes in the sewer system as would remove the danger or assumed responsibility for the damage which might thereafter be occasioned by the insufficient capacity and the location and design of the existing sewers. The estimated cost of restoring the sewer was $3,875. But it was unsafe to both Spearin and the Government's property to proceed with the work with the 6-foot sewer in its then condition. The Government insisted that the responsibility for remedying existing conditions rested with the contractor. After fifteen months spent in investigation and fruitless correspondence, the Secretary of the Navy annulled the contract and took possession of the plant and materials on the site. Later the dry-dock, under radically changed and enlarged plans, was completed by other contractors, the Government having first discontinued the use of the 6-foot intersecting sewer and then reconstructed it by modifying size, shape and material so as to remove all danger of its breaking from internal pressure. Up to that time $210,939.18 had been expended by Spearin on the work; and he had received from the Government on account thereof $129,758.32. The court found that if he had been allowed to complete the contract he would have earned a profit of $60,000, and its judgment included that sum.

The general rules of law applicable to these facts are well 136*136 settled. Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. *Day* v. *United States,* 245 U.S. 159; *Phoenix Bridge Co.* v. *United States,* 211 U.S. 188. Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. *Simpson* v. *United States,* 172 U.S. 372; *Dermott* v. *Jones,* 2 Wall. 1. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. *MacKnight Flintic Stone Co.* v. *The Mayor,* 160 N.Y. 72; *Filbert* v. *Philadelphia,* 181 Pa. St. 530; *Bentley* v. *State,* 73 Wisconsin, 416. See *Sundstrom* v. *New York,* 213 N.Y. 68. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work, as is shown by *Christie* v. *United States,* 237 U.S. 234; *Hollerbach* v. *United States,* 233 U.S. 165, and *United States* v. *Utah &c. Stage Co.,* 199 U.S. 414, 424, where it was held that the contractor should be relieved, if he was misled by erroneous statements in the specifications.

In the case at bar, the sewer, as well as the other structures, was to be built in accordance with the plans and specifications furnished by the Government. The construction of the sewer constituted as much an integral part of the contract as did the construction of any part of the dry-dock proper. It was as necessary as any other work in the preparation for the

foundation. It involved no separate contract and no separate consideration. The contention of the Government that the present case is to be distinguished from the *Bentley Case, supra,* and other similar cases, on the ground that the contract with reference to the sewer is purely collateral, is clearly without 137*137 merit. The risk of the existing system proving adequate might have rested upon Spearin, if the contract for the dry-dock had not contained the provision for relocation of the 6-foot sewer. But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site,[1] to check up the plans,[2] and to assume responsibility for the work until completion and acceptance.[3] The obligation to examine the site did not impose upon him the duty of making a diligent enquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the Government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract. Neither § 3744 of the Revised Statutes, which provides 138*138 that contracts of the Navy Department shall be reduced to writing, nor the parol evidence rule, precludes reliance upon a warranty implied by law. See *Kellogg Bridge Co.* v. *Hamilton,* 110 U.S. 108. The breach of warranty, followed by the Government's repudiation of all responsibility for the past and for making working conditions safe in the future, justified Spearin in refusing to resume the work. He was not obliged to restore the sewer and to proceed, at his peril, with the construction of the dry-dock. When the Government refused to assume the responsibility, he might have terminated the contract himself, *Anvil Mining Co.* v. *Humble,* 153 U.S. 540, 551-552; but he did not. When the Government annulled the contract without justification, it became liable for all damages resulting from its breach.

Second. Both the main and the cross-appeal raise questions as to the amount recoverable. The Government contends that Spearin should, as requested, have repaired the sewer and proceeded with the work; and that having declined to do so, he should be denied all recovery except $7,907.98, which represents the proceeds of that part of the plant which the Government sold plus the value of that retained by it. But Spearin was under no obligation to repair the sewer and proceed with the work, while the Government denied responsibility for providing and refused to provide sewer conditions safe for the work. When it wrongfully annulled the contract, Spearin became entitled to compensation for all losses resulting from its breach.

Spearin insists that he should be allowed the additional sum of $63,658.70, because, as he alleges, the lower court awarded him (in addition to $60,000 for profits) not the difference between his proper expenditures and his receipts from the Government, but the difference between such receipts and the *value* of the work, materials, and plant (as reported by a naval board appointed by the defendant). 139*139 Language in the findings of fact concerning damages lends possibly some warrant for that contention; but the discussion of the subject in the opinion makes it clear that the rule enunciated in *United States* v. *Behan,* 110 U.S. 338, which claimant invokes, was adopted and correctly applied by the court.

The judgment of the Court of Claims is, therefore,

Affirmed.

(MR. JUSTICE McREYNOLDS took no part in the consideration and decision of this case.)

[1] "271. *Examination of site.* — Intending bidders are expected to examine the site of the proposed dry-dock and inform themselves thoroughly of the actual conditions and requirements before submitting proposals."

[2] "25. *Checking plans and dimensions; lines and levels.* — The contractor shall check all plans furnished him immediately upon their receipt and promptly notify the civil engineer in charge of any discrepancies discovered therein. . . . The contractor will be held responsible for the lines and levels of his work, and he must combine all materials properly, so that the completed structure shall conform to the true intent and meaning of the plans and specifications."
[3] "21. *Contractor's responsibility.* — The contractor shall be responsible for the entire work and every part thereof, until completion and final acceptance by the Chief of Bureau of Yards and Docks, and for all tools, appliances, and property of every description used in connection therewith. . . ."

43 N.Y.2d 260 (1977)

Benjamin H. Freedman, Appellant,

v.

Chemical Construction Corporation, Respondent, et al., Defendants.

Court of Appeals of the State of New York.

Argued November 11, 1977.

Decided December 15, 1977.

Gene Crescenzi for appellant.

Donald M. Crook and *Fredrick E. Sherman* for respondent.

Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur.

262*262Chief Judge BREITEL.

In an action on an alleged oral agreement to pay plaintiff a 5% fee for his participation in the obtaining by defendant of a $41 million construction contract, defendant moves under CPLR 3212 for summary judgment based on the Statute of Frauds (General Obligations Law, § 5-701, subds 1, 10). Plaintiff's claim arises out of his asserted role, varyingly described, in procuring for defendant a contract to build a chemical plant in Saudi Arabia. Supreme Court denied the motion; a unanimous Appellate Division reversed; and plaintiff appeals.

There are two issues. The first is whether a motion for summary judgment based on the New York Statute of Frauds may be defeated by plaintiff's general averment, without more, that the parties agreed to be governed by the law of Saudi Arabia. Assuming, however, that no such agreement is properly asserted, and that New York law applies, the second 263*263 issue is whether the fee agreement for obtaining the construction contract is within the Statute of Frauds (General Obligations Law, § 5-701). In particular, at issue is whether, within the meaning of subdivision 1 of the cited statute, the agreement "[b]y its terms [was] not to be performed within one year", and, whether within the meaning of subdivision 10, relating to business brokers and finders, plaintiff's alleged activities as an intermediary amounted to negotiation of a "business opportunity".

The order of the Appellate Division should be affirmed, and the complaint stand dismissed. Having failed to present any evidentiary facts that the parties manifested an intention that Saudi law would govern, plaintiff raises no triable issue of fact. Applying the New York Statute of Frauds, the suit is barred (General Obligations Law, § 5-701). Subdivision 1 of the statute does not bar the claim because the alleged agreement was "By its terms", even if not as a practical matter, performable within a year. Since, however, arranging, directly or indirectly, for defendant to negotiate with Saudi officials and to effect the Saudi contract is "negotiating * * * a business opportunity" within the meaning of subdivision 10, the claim is barred.

Some time in 1961 plaintiff, Benjamin H. Freedman, met in New York City with David Fulton, an officer of defendant Chemical Construction Corporation. Both Freedman and the corporation do business in New York. Freedman, a self-described retired industrialist, allegedly arranged the meeting to interest Chemical in constructing in Saudi Arabia a plant that would convert flared off natural gas into fertilizer. According to Freedman, after a series of meetings with Fulton in New York, Freedman and his Syrian associate, Issa Nakhleh, negotiated with Saudi officials at Chemical's request. Freedman contends that as a result of these negotiations Chemical was removed from the Arab blacklist and, in December, 1966, awarded the sought-after contract. The plant is said to have been completed in 1970. Intraoffice memoranda prepared by Fulton and correspondence between Chemical and Saudi officials included in the record supply at least some evidence of the alleged events.

At the heart of the case is Freedman's assertion, denied by Chemical, that upon completion of the proposed plant he was to be paid a 5% fee, or $2.05 million, for his services. No one 264*264 disputes that there was no writing of any kind to evidence the agreement.

Precisely what Freedman did on Chemical's behalf, other than approaching Chemical and interesting Nakhleh in the endeavor, is unclear. Freedman admitted in his examination before trial that he did not visit Saudi Arabia until 1973, at which point the plant was already operating. Although there is a general statement in his opposing affidavit that he had written letters to Saudi Arabian officials, and that he had forwarded Chemical's proposal to a member of the Saudi royal family, his testimony at the examination before trial is contradictory. The complaint supplies no additional information. Any negotiating in Saudi Arabia was apparently done by Nakhleh, a Syrian lawyer who traveled in the Middle East.

This action followed Chemical's refusal to honor the claimed fee agreement. Chemical, raising the Statute of Frauds, moved for summary judgment. Freedman, seeking to avoid the statutory bar, alleges that the purported oral agreement included an understanding that Saudi law would apply. Saudi law, presumably, has no equivalent writing requirement.

It is elementary that conclusory assertions will not defeat summary judgment. The opponent of a properly made summary judgment motion must present evidentiary facts sufficient to raise a triable issue of fact (e.g., *Shaw v Time-Life Records*, 38 N.Y.2d 201, 207; *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 N.Y.2d 285, 290; 4 Weinstein-Korn-Miller, NY Civ Prac, par 3212.12, p 32-173).

Supported by nothing in Freedman's affidavit in opposition to summary judgment, or in his examination before trial, the contention that the parties had intended, let alone agreed, that Saudi law would govern does not create a triable issue. The one vague reference to Saudi law in Freedman's examination before trial related only to a purported agreement between Nakhleh and Chemical, an agreement with which Freedman, again in the examination before trial, emphatically disavowed any "connection". For the same reason, it is of little persuasive value that in a separate action for another 5% fee brought by Nakhleh in Federal court a triable issue was held to exist (*Nakhleh v Chemical Constr. Corp.*, 359 F Supp 357, 359). Summary judgment is thus a proper remedy, 265*265 assuming, of course, that the New York Statute of Frauds applies.[*]

Turning, then, to section 5-701 of the General Obligations Law, the relevant Statute of Frauds, Chemical relies on subdivisions 1 and 10 to bar the claim.

Subdivision 1 renders unenforceable an oral agreement which "[b]y its terms is not to be performed within one year from the making thereof". True, as Chemical asserts, it was unlikely that Freedman's efforts to obtain the construction contract and Chemical's payment, due only upon completion of the plant, would occur within one year. In fact, Freedman admits it took over three years for his own performance and another six until the plant was

built. It matters not, however, that it was unlikely or improbable that a $41 million plant would be constructed within one year. The critical test, instead, is whether "by its terms" the agreement is not to be performed within a year. (*North Shore Bottling Co. v Schmidt & Sons*, 22 N.Y.2d 171, 175-176; *Nat Nal Serv. Stas. v Wolf*, 304 N.Y. 332, 335.) Since neither party has contended that the alleged agreement contained any provision which directly or indirectly regulated the time for performance, the agreement is not within the bar of subdivision 1.

A writing is also required, under subdivision 10 of the statute, if the agreement "[i]s a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. 266*266 `Negotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman." The statute, which has had its difficulties in interpretation, applies to various kinds of intermediaries who perform limited services in the consummation of certain kinds of commercial transactions. The historical controversy whether it applied to finders as distinguished from brokers is settled to include both (*Intercontinental Planning v Daystrom, Inc.*, 24 N.Y.2d 372, 378; *Minichiello v Royal Business Funds Corp.*, 18 N.Y.2d 521, 524-527, cert den 389 US 820). Freedman does not argue otherwise. What he does contend, however, is that the kind of services he rendered under the agreement did not amount to negotiation of a "business opportunity". In effect, he would sharply limit the scope of the term "business opportunity" and exclude enterprises which were hardly intended to be excluded.

Until 1949, there was no requirement that agreements with business brokers be in writing. To protect principals from "unfounded and multiple claims for commissions", and in response to the substantial number of cases involving sales of businesses and business opportunities, the predecessor to subdivision 10 of section 5-701 was enacted (L 1949, ch 203; 1949 Report of NY Law Rev Comm, p 615).

Since enactment of the statute, however, the scope of the term "business opportunity" has been differentially applied (see, e.g., *Lounsbury v Bethlehem Steel Corp.*, 53 Misc 2d 151, 152-156 [does not include contract to sell floating dry dock]; *National Performing Arts v Guettel*, 46 Misc 2d 411, 413-414 [includes contract to sell or lease packaged productions to theatre owners]; *Sorge v Nott*, 22 AD2d 768, revg 34 Misc 2d 545 [includes contract to procure purchaser of working interest in oil wells]; 1964 Report of NY Law Rev Comm, p 178, n 26). The scope is still to be fully resolved.

Too broad an interpretation would extend the writing requirement to unintended situations. For instance, the typical stockbroker's dealings might be covered. (See *Lounsbury v Bethlehem Steel Corp.*, *supra*, p 153; see, generally, 1949 Report of NY Law Rev Comm, pp 634-636.)

267*267Too restrictive an interpretation would defeat the purpose of the legislation. Because in some circumstances the important services of an intermediary may be accomplished in the course of a few and even momentary conversations, false or exaggerated claims can be asserted easily and disproved only with difficulty. It is this type of situation to which the statute is addressed. (See *Minichiello v Royal Business Funds Corp.*, 18 N.Y.2d 521, 527, *supra*.) Most important, too restrictive an interpretation would ignore the many situations

which in common parlance are described as "business opportunities."
For this case it is not necessary nor would it be proper to attempt to resolve the ultimate scope of the term "business opportunity". Freedman's purported role was, concededly, limited and transitory. He was not involved, nor was he supposed to be, in negotiation of the construction contract terms. He was to use his "connections", his "ability", and his "knowledge" to arrange for Chemical to meet "appropriate persons" and somehow to procure for it the opportunity to build the multimillion dollar plant. Yet, as observed earlier, it is just this kind of situation to which the statute is addressed.
The term, as used in the statute, may not cover every situation which in common parlance might be called a "business opportunity". But where, as in the instant case, the intermediary's activity is so evidently that of providing "know-how" or "know-who", in bringing about between principals an enterprise of some complexity or an acquisition of a significant interest in an enterprise, the statute is entitled to be read both in accordance with its plain meaning, its evident purpose, and to accomplish the prevention of the mischief for which it was designed.
The alleged agreement, therefore, was for services rendered in negotiating a "business opportunity", and, in the absence of a writing, so easily obtained in a proper case, is unenforceable. Defendant is entitled to summary judgment.
Accordingly, the order of the Appellate Division should be affirmed, with costs, and the complaint stand dismissed.
Order affirmed, with costs.
[*] One caveat, however, is in order. Even if the parties had agreed that Saudi law would govern the purported oral agreement, that the New York Statute of Frauds is thereby avoided does not necessarily follow. As a general matter, the parties' manifested intentions to have an agreement governed by the law of a particular jurisdiction are honored (see, e.g., *Compania de Inversiones Internacionales v Industrial Mtge. Bank of Finland*, 269 N.Y. 22, 26; Restatement, Conflict of Laws 2d, § 187). It is as though the law of the selected jurisdiction were incorporated into the agreement by reference (see Restatement, Conflict of Laws 2d, § 187, Comment *c*). But where, as with the Statute of Frauds, the issue arguably cannot be controlled by voluntary agreement, there is some question whether, in the absence of a reasonable basis for choosing the law of the jurisdiction designated by the parties, their choice of law will be honored (see Restatement, Conflict of Laws 2d, § 187, subd [2], par [a]; Comment *f;* cf. *A. S. Rampell, Inc. v Hyster Co.*, 3 N.Y.2d 369, 382-383; *Nakhleh v Chemical Constr. Corp.*, 359 F Supp 357, 359-360, *supra*; see, generally, Statute of Frauds and Conflicts of Law, Ann., 47 ALR3d 137).

66 A.D.3d 938 (2009)
888 N.Y.S.2d 142

BARBARA BRIDGES, Respondent,
v.
WYANDANCH COMMUNITY DEVELOPMENT CORPORATION et al., Appellants. (Action No. 1.)
LULA JOHNSON, Respondent,
v.
WYANDANCH COMMUNITY DEVELOPMENT CORPORATION et al., Appellants. (Action No. 2.)

2008-07080.

Appellate Division of the Supreme Court of New York, Second Department.

Decided October 27, 2009.

939*939 DILLON, J.P., FLORIO, BELEN and ROMAN, JJ., concur.

941*941 Ordered that the order is affirmed, with one bill of costs to the plaintiffs payable by the appellants appearing separately and filing separate briefs.

As the owner of real property located at 88 Nicholls Street in Wyandanch (hereinafter the premises), the defendant Wyandanch Community Development Corporation (hereinafter WCDC) contracted with the defendant PDL, Inc. (hereinafter PDL), to have PDL perform certain renovations to a house located on the premises (hereinafter the house). Prior to beginning the renovations, James Wallace, the director of WCDC, turned off the supply of electrical power to the house and instructed PDL to secure plywood boards over the basement and first floor windows in order to deter theft. Thereafter, PDL subcontracted with Oliver Bridges (hereinafter Bridges), the decedent of the plaintiff Barbara Bridges, to paint the interior of the house. Bridges, in turn, hired Latonya Johnson (hereinafter Johnson), the decedent of the plaintiff Lula Johnson, as an assistant. In order to illuminate the first floor of the house so that painting could be completed, PDL installed a gasoline-powered generator in the basement of the house and connected it to the electrical circuit breaker in the house. Wallace was aware that the generator was being used to supply electricity to the house. On August 7, 2003, several days after Bridges and Johnson began painting, they were discovered dead in the house, with the doors locked and the windows covered with plywood. The cause of death was determined to be asphyxiation caused by carbon monoxide poisoning.

In two separate actions, the plaintiff Barbara Bridges and the plaintiff Lula Johnson asserted causes of action to recover damages for wrongful death and the conscious pain and suffering of their respective decedents. After the Supreme Court directed 940*940 the actions to be jointly tried, WCDC and Wallace moved, inter alia, for summary judgment dismissing both complaints insofar as asserted against them, and PDL cross-moved, among other things, for summary judgment dismissing both complaints insofar as asserted against it. In the order appealed from, the Supreme Court denied the motion and cross motion for summary judgment. We affirm the order insofar as appealed from.

Where, as here, the plaintiffs' injuries arose not from the manner in which the work was being performed but, rather, from an allegedly dangerous condition on the property, a property owner will be liable under a theory of common-law negligence, as codified by Labor Law § 200, "when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice" (*Chowdhury v Rodriguez,* 57 AD3d 121, 128 [2008]; *see Piazza v Frank L. Ciminelli Constr. Co., Inc.,* 2 AD3d 1345, 1349 [2003]). As the owner of the premises, WCDC failed to demonstrate that, as a matter of law, it did not have actual or constructive notice of the dangerous condition on the premises and, thus, it failed to establish its prima facie entitlement to judgment as a matter of law (*see Algood v 2160-2164 Caton,* 4 AD3d 442 [2004]; *cf. Markey v C.F.M.M. Owners Corp.,* 51 AD3d 734, 736-737 [2008]; *Clarke v Brooklyn Union Gas Co.,* 297 AD2d 779 [2002]; *Perez v City of New York,* 168 AD2d 227 [1990]). Additionally, Wallace's administratrix failed to demonstrate

that, as a matter of law, Wallace, as a director of WCDC, did not personally participate in the allegedly negligent act which created the dangerous condition and caused the death of the decedents (*see* *Aguirre v Paul,* 54 AD3d 302, 304 [2008]; *Greenway Plaza Off. Park-1 v Metro Constr. Servs.,* 4 AD3d 328, 329 [2004]; *Bellinzoni v Seland,* 128 AD2d 580 [1987]; *Clark v Pine Hill Homes,* 112 AD2d 755 [1985]).

Similarly, PDL, as the general contractor, may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and actual or constructive notice of the dangerous condition (*see* *Van Salisbury v Elliott-Lewis,* 55 AD3d 725, 726 [2008]; *Keating v Nanuet Bd. of Educ.,* 40 AD3d 706 [2007]). Here, PDL, which installed the generator in the basement of the boarded-up house, failed to demonstrate that, as a matter of law, it did not have control over the work site or notice of the dangerous condition on the premises.

Accordingly, the Supreme Court properly denied the motions and cross motions for summary judgment.

71 Misc.2d 443 (1972)

Cable-Wiedemer, Inc., Plaintiff,
v.
A. Friederich and Sons Company, Defendant.

County Court, Monroe County.

October 3, 1972

Santoro, Mittleman & Pietropaoli (*Nicholas R. Santoro* of counsel), for plaintiff. Liebschutz, Sutton, De Leeuw, Clark & Lewis (*Frank R. Monfredo* of counsel), for defendant.

444*444DAVID O. BOEHM, J.

The plaintiff has brought this action against the defendant to recover a claimed balance due for labor and materials furnished to the defendant and now brings this motion for summary judgment.

Defendant is the general contractor for the remodeling of a public school in the City of Rochester and contracted with the plaintiff as a subcontractor for the installation of kitchen equipment. The plaintiff's complaint alleges full performance and satisfactory completion, including acceptance by the architect as required in the contract, and demands judgment for the balance of $3,200 retained by the defendant. The defendant's answer consists of a general denial.

In support of its motion for summary judgment, the plaintiff has annexed to the motion papers a letter dated April 12, 1972 from the architect addressed to the plaintiff advising that the entire project had not yet received final approval or acceptance nor had final payment been made to the defendant, but the lack of such final approval did not involve the kitchen equipment or installation and therefore they were approved and accepted.

In opposition, the defendant asserts in a reply affidavit that it has instituted its own action against the Board of Education of the City of Rochester for the final balance due the defendant by reason of its own contract with the Board of Education regarding the same school.

The answer of the Board of Education in that action, a copy of which is attached to the defendant's papers, among other affirmative defenses, alleges that the architect has not issued a certificate of completion for the work performed on the project as required by the contract and the money sued for is not due until the certificate is issued.

Defendant therefore argues that since the subcontract of the plaintiff is included in the contract between the plaintiff and the Board of Education, and since that contract requires final approval and acceptance of the architect as a condition of payment to the defendant, it is also a condition of payment to the 445*445 plaintiff. Since this condition has not as yet been met, the defendant says, it is not liable to plaintiff at this time.

The defendant further argues that the letter written by the architect to the plaintiff is not legally sufficient to satisfy the contract and, further, that by trade custom and usage the general contractor always withholds moneys retained from a subcontractor pending final approval and acceptance of the total job.

The defendant's position regarding trade usage is not included in its pleadings and superficially touched on in its answering papers. It was brought out mainly in its oral argument.

There is no reason to resort to trade practices or evidence of custom for an interpretation when the contract is unambiguous (*Matter of Western Union Tel. Co. [ACA]*, 299 N.Y. 177, 184). Even if there were, such trade usage would have to be demonstrated by something more than oral argument. "The existence and scope of such a usage are to be proved as facts." (Uniform Commercial Code, § 1-205, subd. [2].)

New York permits parol evidence of the trade custom to explain the meaning of a contract term and defendant has referred the court to *Fuller v. Robinson* (86 N.Y. 306) as one among the many authorities for the rule. Nevertheless, such evidence, if it is to be used to defeat a motion for summary judgment, should at the very least be contained in an opposing affidavit, not in counsel's argument. The only reference to it in the opposing affidavit is a single sentence: "In the ordinary course of the construction trade, retainer is not only withheld by general contractor from the subcontractor pending final approval and acceptance, but is and in this case has been withheld by the owner, Board of Education, from Friederich." This single reference to custom and usage in the construction trade is otherwise unsupported in the answering papers.

Accepting the defendant's position would seem to lead to anomalous results. It would mean that if a subcontractor's materials or labor were fully and satisfactorily completed, he would

nevertheless have to wait for final payment simply because the work or material of another subcontractor or of the general contractor is unsatisfactory or incomplete. Although the subcontractor has no control over the work of the general contractor or the other subcontractors, he, the defendant argues, is nevertheless bound by their delay or incompetence. Neither the language of the contract, nor the law, requires such a result. Indeed, the very case to which the court is referred by the defendant holds that trade usage will not be permitted to accomplish an unfair purpose (*Fuller v. Robinson*, 86 N.Y. 306, *supra*).

446*446If such a result were intended, it should have been explicitly spelled out in the contract. The court should not be called upon at this time to engraft that meaning into it. In all events, the express terms of the contract would control trade usage (Uniform Commercial Code, § 1-205, subd. [4]).

Paragraph "ELEVENTH" of the contract between plaintiff and defendant provides that defendant, upon approval and payment of its certificates by the "Architect, Engineer and/or Owner [Board of Education]" shall pay to the plaintiff "the value of the work done by him and for his materials * * * in the amount allowed to Friederich on account of the subcontractor's said work and materials * * * less a retainer of 10%." It then goes on to say: "Any balance due the subcontractor shall be paid within 30 days (90 days, if the owner is a division or commission of the State of New York) after *his* work is finally approved and accepted by the Architect and/or Engineer or when final payment is made to Friederich by the owner." (Emphasis supplied.)

Thus, although a subcontractor will not be paid at all until the general contractor's certificates have been approved by the architect, engineer and/or owner, the 10% retainer from such payments must be paid to the subcontractor "after his work is finally approved and accepted by the Architect and/or Engineer."

The meaning and intent are quite clear. The word "his" refers to the subcontractor, not the general contractor. The meaning may not be changed by an attempt to invoke trade custom.

The defendant calls attention to paragraph "FIRST" of the contract to support its position that the subcontractor must wait for his retainer payment as long as the contractor does. However, all that paragraph "FIRST" does is to require the plaintiff to provide the materials, labor and appliances necessary to complete the work to everyone's satisfaction and in accordance with the conditions and specifications of the contract between the defendant and the Board of Education. It does not control the manner of payment for performance as between the plaintiff and the defendant. Paragraph "ELEVENTH" does that and, as indicated, it calls for payment of any retainer to plaintiff after his work is finally approved and accepted.

It is also argued by the defendant that the requirement for final approval as contemplated in the contract is not satisfied by a letter from the architect to the subcontractor, but that such final approval can only be evidenced by a certificate sent to the 447*447 general contractor. However, final approval need not be given in any particular way. The contract does not require a particular form nor does it require notice to the general contractor. Final approval need only be given in a manner sufficient to clearly indicate the architect's approval. There

is no rigid formalistic procedure required and the letter from the architect on its own stationery, signed by a partner, satisfies the requirement.

In *Hughes Co. v. Sapphire Realty Co.* (11 N Y 2d 17, 18), the Court of Appeals pointed out that, when a written notice, in this case a certificate as called for by the contract, is issued, it is "conclusive and decisive on the rights of the parties" unless it is shown to have been obtained by fraud or mistake, even though the form of the certificate may not be in the precise language of the contract.

Although the defendant's answer admits the existence of a contract, it denies that plaintiff fully and satisfactorily performed, and denies owing any money to plaintiff. However, in its reply affidavit signed by the secretary of the corporation, the defendant inferentially admits that there is retainage due the plaintiff, for on page 3 of the affidavit, it states, "In essence, the retainer currently withheld by the Board of Education on this project includes that portion which would become due Cable-Wiedemer Inc. upon final approval and acceptance of the architect."

In addition, there is attached to and made a part of the same reply affidavit a copy of the defendant's summons and complaint in its action against the Board of Education which alleges that the work has been finally completed and accepted by the Board of Education and the retainage in the amount of $85,802.80 which is still withheld by the board is now due and payable. As part of the moving papers, these pleadings may be looked to for the purposes of the motion and the defendant's affidavit and complaint clearly show that the denial in its answer that the plaintiff fully performed is one of form rather than substance.

The plaintiff has received the final approval required by its contract with the defendant. It is entitled to payment. No question is raised in the papers as to the amount of $3,103.10 which the plaintiff claims is due. This balance is not disputed.

As the defendant's affidavit correctly notes: "The central issue in this proceeding is whether or not the conditions of the subcontract between plaintiff and defendant regarding final payment have been met." This issue is decided in favor of the plaintiff and it is, therefore, entitled to summary judgment.

Motion granted.