Class 8 cases

37 Ill.2d 273 (1967)
226 N.E.2d 630

HAROLD A. MILLER et al., Appellees and Cross-Appellants, v. LYLE V. DeWITT et al., d/b/a DeWITT-AMDAL & ASSOCIATES, Appellants.

No. 39428.

Supreme Court of Illinois.

Opinion filed January 19, 1967.
Rehearing denied March 27, 1967.

274*274 275*275 GIFFIN, WINNING, LINDNER & NEWKIRK, of Springfield, (ALFRED F. NEWKIRK, of counsel,) for appellants.

GRENIAS & OWEN, of Decatur, for appellees HAROLD A. MILLER, ELLIS FURRY and DONALD E. ENGEL.

EARL S. HODGES, of Springfield, (SAMUEL C. PATTON, of counsel,) for appellee Maroa Community Unit School District.

LE FORGEE, SAMUELS, MILLER, SCHROEDER & JACKSON, of Decatur, (CARL R. MILLER, JERALD E. JACKSON, and ROBERT W. OHLSEN, of counsel,) for appellee Fisher-Stoune, Inc.

HEYL, ROYSTER, WOEKLER & ALLEN, of Peoria, and YATES, FISK, HAIDER & BURKE, of Chicago, (LYLE W. ALLEN, and TOM L. YATES, of counsel,) for *amici curiae.*

Affirmed in part and reversed in part and remanded.

Mr. JUSTICE UNDERWOOD delivered the opinion of the court:

The plaintiffs, Harold A. Miller, Ellis Furry and Donald E. Engel were injured as the result of the collapse of the roof of a school gymnasium on which they were working as employees of a contractor, Fisher-Stoune, Inc. They brought this action to recover for their injuries against the supervising architects, Lyle V. DeWitt and Russell M. Amdal, d/b/a DeWitt-Amdal & Associates, and the 276*276 owner, Maroa Community Unit School District No. 2, alleging common-law negligence by the architects and a violation of the Structural Work Act by both the architects and the school district. The architects filed a third-party complaint against the contractor which was dismissed on the contractor's motion before any evidence was heard. At the trial the jury returned verdicts against the architects and for the plaintiffs, Miller, Furry and Engel, in the amounts of $30,000, $90,000 and $5,000 respectively. The

jury also found for the defendant school district, and judgments were entered on the verdicts.

The architects appealed from the verdicts against them and from the order dismissing their third-party complaint. Plaintiffs cross-appealed from the judgments against them in favor of the school district. The Appellate Court for the Fourth District in an exhaustive opinion affirmed all the actions of the trial court. (*Miller* v. *DeWitt,* 59 Ill. App.2d 38.) The case comes before us on the certification of the appellate court that the case involves a question of such importance that it should be decided by this court. Ill. Rev. Stat. 1965, chap. 110, par. 101.32.

At the outset this case presents a novel issue of first impression before this court relating to the obligations of architects who undertake both the design and supervision of construction. Stated briefly it is the position of defendant architects, and various associations of architects who have filed a brief as *amici curiae,* that a supervising architect has neither the right nor the duty to control the methods used by the contractor but has only the duty to see that the construction when completed meets the plans and specifications contracted for by the owner.

Plaintiffs insist, however, that under the facts of this case the architects had a duty to prevent the contractor from carrying out the work in a faulty manner.

This question must be posed in its proper factual context. 277*277 Prior to April 14, 1959, Maroa Community Unit School District No. 2 decided to remodel and enlarge the gymnasium at the high school and contracted with defendant architects for architectural services in connection therewith. Pursuant thereto, the architects prepared the necessary plans, specifications and proposed contracts, and caused bids to be received which resulted in the letting of three contracts, one to Fisher-Stoune, Inc., for the general construction work, one for the plumbing and heating, and one for the electrical work.

The plans for the remodeling job called for the removal of the west wall of the gymnasium; the removal of a proscenium truss from that point to the new west wall of the new gymnasium; the removal of two steel columns in the old west wall, which together with the proscenium truss originally supported the west ends of four east-west roof trusses; the substitution of a new north-south main-bearing truss into which would be fastened the west ends of the old roof trusses and the east ends of the trusses in the new structure. The plans showed the reaction at each end of the main-bearing truss, which would be the total weight to be supported by that truss upon completion of the new and remodeled building. This weight was the total of the weight of the new roof and the weight of the old roof, including both the dead load (weight of the structure itself) and the live load (snow, gymnasium equipment attached to the roof, impact from the use of such equipment, *etc.*). The weight of the new roof could be computed from the information shown on the plans; and by subtracting that figure from the total reaction shown on the plans the weight of the old roof could be obtained.

Late in April, 1960, Byron Beals, superintendent for the contractor, after making personal observation of the original structure and examining the plans, determined to shore up the west ends of the east-west trusses during the 278*278 transition by means of columns of tubular steel scaffolding placed approximately under the west ends of each of the said four

east-west trusses, plumbed and snugged up against said trusses with timbers. This system was followed, with each of the columns of shoring being identical, and similarly placed. The columns were tied together only by a nailing strip to hold up a canvas tarpaulin, and a 2 x 4 strip covered with plywood and covering approximately the lower four feet on the inside.

On the morning of May 3, 1960, an ironworker crew employed by Fisher-Stoune, Inc., which included the three plaintiffs, Paul Shaffer, and their foreman, Nate Vandervoort, came to the scene and started the removal of the proscenium arch and the steel columns at the west end of the old gymnasium, the brick wall having theretofore been removed. They first erected two steel columns at the west end of the new gymnasium, then disconnected the two center east-west roof trusses from the proscenium truss, and the proscenium truss from the two steel columns, and moved it to its new location. It was stipulated that when the two center east-west roof trusses were disconnected from the proscenium truss, all of that part of the roof load which had theretofore been supported by the west ends of such two center east-west trusses was transferred respectively to the shores thereunder. This occurred at approximately 11:00 A.M.

About 1:00 P.M. operations were commenced to remove the north steel column. A crane was placed in the area of the new building, with a derrick or boom extending over in the vicinity of that column. A steel cable with a loop or eye at each end, called a choker, was then wound around the column above the center, and with one loop threaded through the other and then hooked to the boom. At that time, a "strain" was taken on the cable by the crane operator sufficient to take up the slack and take the kinks out of the choker for the purpose of holding the column from 279*279 falling down when it was disconnected. The heads of the bolts connecting the north roof truss to the webbing of the north column were then cut off; and while the plaintiff Miller, with an acetylene torch, was cutting off the base of the column, one of the other plaintiffs was out on the truss, knocking the bolts out. When the last bolt was knocked out, the crane took the column away and the plaintiffs moved over to repeat the process on the south column.

It was stipulated that upon the removal of the north column, that part of the roof theretofore supported by the west end of the north truss was transferred to the shore thereunder. The time was then approximately 2:00 P.M.

The method of removal of the south column was similar. The crane was moved to the south and the boom extended over to the vicinity of that column at an angle. The choker was then attached to the column at a point which was variously testified to as being some five to eleven feet from the top. A "strain" was then taken on it sufficient to take up the slack and take out the kinks in the steel cable. Plaintiff Miller proceeded to cut off the base of the column and then stepped back to the east against the tarpaulin to see if he could see daylight underneath and thus determine that it was cut clear through. There is a dispute in the evidence as to whether or not a second additional strain was taken at that time.

While Miller was cutting the column off at the bottom, plaintiff Furry was out on the south of the east-west trusses, knocking the bolts out at the top where the west end of the truss was fastened into the east webbing of the column. Plaintiff Engel was standing on the roof watching. At the approximate time that Furry knocked out the last bolt, the roof collapsed. The force of the air and the movement of the tarpaulin knocked Miller out into the new part of the the building and entangled him in the tarpaulin. Engel rode the roof down. Furry was

caught under some of the steel purlins and pinned therein.

280*280 The relevant provisions of the contract between the architects and the school district were as follows:

"The Architect agrees to perform, for the above named work, professional services as hereinafter set forth.

*** * ***

"The Parties hereto further agree to the following conditions:

"1. *The Architect's Services:* The Architect's professional services consist of the necessary conferences, the preparation of preliminary studies, working drawings, specifications, large scale and full size detail drawings, for architectural, structural, plumbing, heating, electrical, and other mechanical work; obtaining approval of governmental agencies having jurisdiction over certain phases of the work consisting of Fire Marshal, Health Department, County Superintendent of Schools, and Department of Education; assistance in the drafting of forms of proposals and contracts; the issuance of Certificates of Payment; the keeping of accounts, and the general administration of the construction contracts, and supervision of the work.

*** * ***

"6. *Supervision of the Work:* The Architect will endeavor to guard the Owner against defects and deficiencies in the work of the contractors, but he does not guarantee the performance of their contracts. The supervision of an Architect is to be distinguished from the continuous personal superintendence to be obtained by the employment of a clerk-of-the-works.

"When authorized by the Owner, a clerk-of-the-works acceptable to both Owner and Architect shall be engaged by the Architect at a salary satisfactory to the Owner, and paid by the Owner, upon presentation of the Architect's monthly statements."

The construction contract between Fisher-Stoune, Inc. and the school district provided, in its relevant parts, as follows:

"Article I. *Scope of the Work.*

"The General Contractor shall furnish all of the materials and perform all of the work to complete the General work shown on the drawings and described in the specifications entitled `Second Addition to Maroa High School, Community Unit School District No. 2, Macon & DeWitt Counties, Illinois'.

*** * ***

"Article 6. *The Contract Documents.*

"The General Conditions of the Contract, the Specifications and the Drawings, together with this Agreement, form the Contract, and they are as fully a part of the Contract as if attached or herein repeated.

281*281 "12. *Protection of Work and Property.*

"The Contractor shall continuously maintain adequate protection of all his work from damage and shall protect the owner's property from injury or loss arising in connection with this Contract. He shall make good any such damage, injury or loss, except such as may be directly due to errors in the Contract Documents or caused by agents or employees of the Owner, or due to causes beyond the Contractor's control and not to his fault or negligence. He shall adequately protect adjacent property as provided by law and the Contract Documents.

"The Contractor shall take all necessary precautions for the safety of employees on the work, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed. He shall erect and properly maintain at all times, as required by the conditions and progress of the work, all necessary safeguards for the protection of workmen and the public and shall post danger signs warning against the hazards created by such features of construction as protruding nails, hoists, well holes, elevator hatchways, scaffolding, window openings, stairways and falling materials; and he shall designate a responsible member of his organization on the work, whose duty shall be the prevention of accidents. The name and position of any person so designated shall be reported to the Architect by the Contractor.

*** * ***

"13. *Inspection of Work:*

"The Architect and his representatives shall at all times have access to the work wherever it is in preparation or progress and the Contractor shall provide proper facilities for such access and for inspection.

"If the specifications, the Architect's instructions, laws, ordinances or any public authority requires any work to be specially tested or approved, the Contractor shall give the Architect timely notice of its readiness for inspection, and if the inspection is by another authority than the Architect, of the date fixed for such inspection, required certificates of inspection being secured by the Contractor. Inspections by the Architect shall be promptly made, and where practicable at the source of supply. If any work should be covered up without approval or consent of the Architect, it must, if required, by the Architect, be uncovered for examination at the Contractor's expense.

*** * ***

"14. *Superintendence: Supervision:*

"The Contractor shall keep on his work, during its progress, a competent superintendent and any necessary assistants, all satisfactory 282*282 to the Architect. The superintendent

shall not be changed except with the consent of the Architect, unless the superintendent proves to be unsatisfactory to the Contractor and ceases to be in his employ. The superintendent shall represent the Contractor in his absence and all directions given to him shall be as binding as if given to the Contractor. Important directions shall be confirmed in writing to the Contractor. Other directions shall be so confirmed on written request in each case.

"The Contractor shall give efficient supervision to the work, using his best skill and attention. He shall carefully study and compare all drawings, specifications, and other instructions and shall at once report to the Architect any error, inconsistency or omission which he may discover, but he shall not be held responsible for their existence or discovery.

*** * ***

"15. *Changes in the Work:*

*** * ***

"In giving instructions, the Architect shall have authority to make minor changes in the work, not involving extra cost, and not inconsistent with the purposes of the building, but otherwise, except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written order from the Owner signed or countersigned by the Architect, or a written order from the Architect, stating that the Owner has authorized the extra work or change, and no claim for an addition to the contract sum shall be valid unless so ordered.

*** * ***

"19. *Correction of Work Before Final Payment:*

"The Contractor shall promptly remove from the premises all work condemned by the Architect as failing to conform to the Contract, whether incorporated or not, and the Contractor shall promptly replace and re-execute his own work in accordance with the Contract and without expense to the Owner and shall bear the expense of making good all work of other contractors destroyed or damaged by such removal or replacement.

*** * ***

"38. *Architect's Status:*

"The Architect shall have general supervision and direction of the work. He is the agent of the Owner only to the extent provided in the Contract Documents and when in special instances he is authorized by the Owner so to act, and in such instances he shall, upon request, show the Contractor written authority. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the Contract.

"As the Architect is, in the first instance, the interpreter of the conditions of the Contract and the judge of its performance, he shall side neither with the Owner nor with the Contractor,

but 283*283 shall use his powers under the contract to enforce its faithful performance by both.

* * *

"39. *Architect's Decisions:*

"The Architect shall, within a reasonable time, make decisions on all claims of the Owner or Contractor and on all other matters relating to the execution and progress of the work or the interpretation of the Contract Documents.

"The Architect's decisions, in matters relating to artistic effect, shall be final, if within the terms of the Contract Documents.

"Except as above or as otherwise expressly provided in the Contract Documents, all the Architect's decisions are subject to arbitration.

* * *

"55. *Protection:*

* * *

"*Bracing, Shoring and Sheeting:* The Contractor shall provide all bracing, shoring and sheeting as required for safety and for the proper execution of the work, and have same removed when the work is completed.

* * *

"VII-2. *Scope of the Work:*

* * *

"*Standards:* All steel shall be designated, fabricated, and erected in accord with the specifications for the Design, Fabrication, and Erection of Structural Steel for Buildings, as amended to date, and the Code of Standard Practice, latest edition, as adopted by the American Institute of Steel Construction, Inc., unless herein specified to the contrary, in which case these specifications shall govern and supersede the standards.

* * *

"VII-20. *Shoring and Alterations:* Existing structural steel shall be carefully shored and braced as required for installation of new connecting steel. Existing truss reused shall be carefully removed, revised and re-erected as called for. Provide new connections for existing trusses and other structural steel members as required by new work."

It appears that the parties agree that architects must exercise reasonable care in the performance of their duties and may be liable to persons who may foreseeably be injured by their failure to exercise such care, regardless of privity.

The principal question is the extent of the architect's duties. It is clear from the evidence that the architects did not prepare detailed specifications for the temporary shoring 284*284 of the gymnasium roof, nor did they compute on the plans the load that would be placed upon the shores, or provide the contractor with a safety factor to be used in the shoring. It also appears that the architects did not oversee and inspect the shoring as used.

As we view the record a finding of negligence on the part of the architects must be based upon one or more of these omissions. As a general rule it has been said that the general duty to "supervise the work" merely creates a duty to see that the building when constructed meets the plans and specifications contracted for. *Clinton* v. *Boehm,* 124 N.Y.S. 789, 139 App. Div. 73; *Garden City Floral Co.* v. *Hunt,* 126 Mont. 537, 255 P.2d 352, 356; *Day* v. *National U.S. Radiator Corp.* 241 La. 288, 128 So.2d 660, 666.

In the present case, however, despite the argument of the architects that the shoring here was a method or technique of construction over which they had no control, we believe that under the terms of the contracts the architects had the right to interfere and even stop the work if the contractor began to shore in an unsafe and hazardous manner in violation of its contract with the owner. Thus, the contract between the owner and the architects provides that the latters' duties include "the general Administration of the construction contract and supervision of the work" (par. 1); "general supervision and direction of the work" (par. 38); and gives them "the authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the contract" (par. 38). The pertinent portions of the contract between the owner and Fisher-Stoune, Inc. provide that the latter "shall take all necessary precautions for the safety of employees on the work" (par. 12) which include the providing of "all bracing, shoring and sheeting as required for safety and for the proper execution of the work" (par. 55). Further, "existing structural steel shall be carefully shored and braced for installation of new connecting steel. Existing truss reused shall be carefully 285*285 removed, revised and re-erected as called for * * *" (par. VII-20). We agree with the architects that they had no duty to specify the method the contractor would use in shoring, but we believe that under the terms of these contracts the architects had the right to insist upon a safe and adequate use of that method. *Cf.* *Charles Meads & Co.* v. *City of New York,* 181 N.Y.S. 704, 706.

The specific allegations of negligence charged against the architects in each of the common-law counts are that they:

"(a) Negligently and carelessly failed to provide for adequate support for the roof of said gymnasium prior to having the structural supports therefor removed;

"(b) Negligently and carelessly failed to calculate a sufficient safety factor to be used in the scaffolding under said roof;

"(c) Negligently and carelessly failed to oversee and inspect the scaffolding as used to determine whether or not it was safe to use;

"(d) Otherwise negligently and carelessly failed to apply to the work aforesaid the degree of skill which would customarily be brought to such work by competent architects in and about this community."

At the close of all the evidence the architects moved that each of these specific allegations be withdrawn from the consideration of the jury, which motion was denied by the trial court.

As to allegations (c) and (d): From a careful examination of the record we conclude that if the architects knew or in the exercise of reasonable care should have known that the shoring was inadequate and unsafe, they had the right and corresponding duty to stop the work until the unsafe condition had been remedied. (*Erhart* v. *Hummonds,* 232 Ark. 133, 334 S.W.2d 869.) If the architects breached such a duty they would be liable to these plaintiffs who could foreseeably be injured by the breach.

286*286 Here it appears that the shoring and removal of part of the old gymnasium roof was a major part of the entire remodeling operation and one that involved obvious hazards. We think that the shoring operation was of such importance that the jury could find from the evidence that the architects were guilty of negligence in failing to inspect and watch over the shoring operation. *Cf.* *Day* v. *National U.S. Radiator Corp.* 241 La. 288, 128 So.2d 660.

Turning next to the counts alleging a violation of the Structural Work Act, (Ill. Rev. Stat. 1963, chap. 48, pars. 60, 69,) the architects contend that the shoring was not within the purview of the act, that there is no evidence that the shores were inadequate, and that the architects were not "in charge of the work," so as to be liable for plaintiffs' injuries. We have examined the record and we find that the opinion of the appellate court adequately disposes of the first two contentions holding that the shoring was within the purview of the act and could be found to have been inadequate.

We also believe that what we heretofore have said regarding the architects' right to stop the work if it were being done in a dangerous manner makes them persons "having charge" within the meaning of the act. (*Larson* v. *Commonwealth Edison Co.* 33 Ill.2d 316.) We therefore conclude that the trial court did not err in refusing to direct a verdict for defendants on the statutory counts.

In view of our determination with respect to allegations (c) and (d) of each of the common-law counts and all of the Structural Work Act counts, it will be unnecessary to discuss allegations (a) and (b) of the common-law counts. Section 68(4) of the Civil Practice Act (Ill. Rev. Stat. 1965, chap. 110, par. 68 (4)) provides: "If several grounds of recovery are pleaded in support of the same demand, whether in the same or different counts, an entire verdict rendered for that demand shall not be set aside or reversed for the reason that any ground is defective, if one or more 287*287 of the grounds is sufficient to sustain the verdict; nor shall the verdict be set aside or reversed for the reason that the evidence in support of any ground is insufficient to sustain a recovery thereon, unless before the case was submitted to the jury a motion was made to withdraw that ground from the jury on account of insufficient evidence and it appears that the denial of the motion was prejudicial."

Examination of the special form of verdict returned by the jury indicates that the architects were found liable under both the common-law counts and the Structural Work Act counts. Since we have held that the jury could have properly found liability to exist under allegations

(c) and (d) of the common-law counts and under the Structural Work Act counts, we do not believe prejudice is present even if allegations (a) and (b) of the common-law counts charge omissions not properly within the ambit of the architects' duty to plaintiffs, which we do not here determine. See *Olson* v. *Kelly Coal Co.,* 236 Ill. 502, 504.

We therefore conclude that the trial court did not err in refusing to direct verdicts for defendant architects.

We are further of the opinion that the appellate court's disposition of the arguments concerning (1) the examination of one Ronald Slater, (2) the propriety of one of plaintiffs' instructions, and (3) questions as to the excessiveness of the verdicts is adequate and correct.

We next consider the propriety of the trial court's dismissal of the architects' third-party complaint against the contractor before the presentation of evidence. The purpose of a third -party action is to permit the determination of the rights and liabilities of all parties before a single tribunal and upon the same evidence. *Blaszak* v. *Union Tank Car Co.* 37 Ill. App.2d 12; Ill. Rev. Stat. 1963, chap. 110, par. 25(2); Historical and Practice Notes to S.H.A., chap. 110, par. 25.

The trial court should not have dismissed the third-party complaint unless it appears from the pleadings that in no 288*288 event would the architects have an action over against the contractor. The contractor insists that such lack of potential recovery is apparent because the contractor cannot be liable for more than workmen's compensation benefits to its employees, and also that it appears that the architects are active wrongdoers who can have no action over in either a scaffolding or negligence case.

The plaintiffs were employees of the contractor, Fisher-Stoune, were injured in the course of their employment and were paid benefits, and therefore could not bring an action directly against their employer. Therefore to allow this third-party action would make Fisher-Stoune liable indirectly where they would not be liable directly. The third-party defendant argues that such a result is precluded by sections 5 and 11 of the Workmen's Compensation Act. (Ill. Rev. Stat. 1963, chap. 48, pars. 138.5, 138.11.) Section 11 provides that compensation under the act, "shall be the measure of the responsibility" of a covered employer. Section 5 provides: "No common law or statutory right to recover damages from the employer or his employees for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act, to anyone wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury."

This question is admittedly not an easy one to answer. One authority on workmen's compensation has called it "the most evenly balanced controversy in all of workmen's compensation law * * *." 2 Larson, Workmen's Compensation Law, par. 76.10 (1961).

The argument of the contractor is not without merit, for, in consideration of limited liability under the workmen's compensation laws, employers have given up many of their prior rights However, we feel that the argument 289*289 in favor of allowing a third party who was not actively negligent to obtain indemnification from an employer who was actively negligent

is the better view. The employee's workmen's compensation recovery is not admissible as evidence in an employee's action against a third party. (*Bryntesen* v. *Carroll Construction Co.,* 27 Ill.2d 566). Thus, if the employee succeeds in this action, he is allowed two recoveries, one from the third party based on a common-law measure of damages. To prevent a windfall when this occurs, section 5(b) of the Workmen's Compensation Act (Ill. Rev. Stat. 1965, chap. 48, par. 138.5(b)) provides:

"Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, however, if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him * * *." Since the employee's recovery in his action against the third party will ordinarily exceed his workmen's compensation award, when the employer utilizes section 5(b) he will be fully indemnified. Consequently, unless a third party who has not been guilty of active negligence can succeed in an action against an employer who has been guilty of active negligence, the third party will be made to bear the ultimate burden of a loss which should fall on the employer. We say this because, while Illinois does not allow contribution among joint tort-feasors, it does allow a passively negligent tort-feasor to obtain indemnification from 290*290 an actively negligent tort-feasor. *Griffiths & Son Co.* v. *National Fireproofing Co.* 310 Ill. 331 ; *Chicago and Illinois Midland Railway Co.* v. *Evans Const. Co.* 32 Ill.2d 600.

It should be noted that in *Griffiths* there was an express indemnification agreement, whereas here there is none. However, there are several appellate court decisions specifically recognizing the propriety of indemnification in cases where the indemnitor has paid workmen's compensation to an injured workman even though no express indemnification agreement existed. (*Krambeer* v. *Canning,* 36 Ill. App.2d 428; *Boston* v. *Old Orchard Business District, Inc.,* 26 Ill. App.2d 324; *Moroni* v. *Intrusion-Prepakt, Inc.,* 24 Ill. App.2d 534). We agree with the rationale of these cases, and thus feel that it is proper to recognize the right of indemnity, even in the absence of a specific agreement providing therefor.

We are cognizant of many cases from other jurisdictions which construe their particular compensation acts as precluding such an action over. However, we are also aware that the provisions of our act are subject to constant scrutiny by the legislature. Since there has been no clarification of the intent of the legislature since the holdings of the appellate courts, we adopt their reasoning and hold that the act does not bar a third party from seeking indemnity from the employer who has paid compensation under the act. *Bell* v. *South Cook County Mosquito Abatement District,* 3 Ill.2d 353; *Modern Dairy Co.* v. *Department of Revenue,* 413 Ill. 55.

However, even if this be so, the contractor insists that since the original complaint and the third-party complaint contain similar allegations of negligence, there can be no indemnity over between two active wrongdoers. We do not agree with this conclusion. While the original complaint does contain allegations of active wrongdoing, this does not constitute

the sole basis for liability on the part of the architects. As we have suggested before, the jury could have 291*291 properly based their verdict on the failure of the architects to stop work or prevent the contractor from performing its duties in an unsafe manner. If the jury could properly find that an injury was directly caused by improper construction methods and techniques used by a contractor, and, as we hold, that the architect was liable only by reason of a failure to stop work on the job, we think that the jury could find that the contractor was an active tort-feasor while the architect's fault was merely passive. (*Chicago and Illinois Midland Railway Co.* v. *Evans Const. Co.* 32 Ill.2d 600, 604-5.) Nor does our earlier determination herein that the architects were properly found liable to plaintiffs under the Structural Work Act alter our disposition with regard to the third-party action. While, in *Gannon* v. *Chicago, Milwaukee, St. Paul and Pacific Ry. Co.,* 22 Ill.2d 305, this court has held that liability under the Structural Work Act properly attaches only to those "having charge of" the operation or construction who have wilfully violated the provisions of the act, this does not mean that persons found liable thereunder are necessarily active wrongdoers. (Wilfully means knowingly (*Gannon*), and a person will be deemed to have known that which he reasonably should have known. (*Schultz* v. *Ericsson Co.,* 264 Ill. 156.)) We agree with the language of the appellate court in *Rovekamp* v. *Central Const. Co.,* 45 Ill. App.2d 441, 449, where it is stated that "[a]lthough the liability imposed by the [Structural Work] Act does not rest upon negligence, there can be degrees of fault among those who, under the Act, are accountable to an injured plaintiff. Who is the more culpable, a party who supervises and coordinates the overall project, or a party who is responsible for the scaffolding and the particular work which produced the injury? Both are in charge of the work, to be sure, but of different phases of the work. Neither can escape liability to the [injured] plaintiff — thus the purpose of the Act is accomplished — but the lesser delinquent, if held accountable 292*292 by the plaintiff, can transfer its statutory liability to the active delinquent, whose dereliction from duty brought about plaintiff's injury."

We accordingly conclude that this is a proper case for a third-party complaint and that the trial court erred in dismissing the architect's third-party complaint on motion without presenting the issue to the jury. (*Griffiths & Son Co.* v. *National Fireproofing Co.,* 310 Ill. 331; *Blaszak* v. *Union Tank Car Co.,* 37 Ill. App.2d 12; *Palmer House Co.* v. *Otto,* 347 Ill. App. 198; *Banks* v. *Central Hudson Gas & Electric Corp.,* 224 F.2d 631 (2d Cir.); *Shell Oil Co.* v. *Foster-Wheeler Corp.,* 209 F. Supp. 931.) On the present state of the record it is therefore necessary to remand this cause for a trial to determine the respective rights and liabilities of the architects and the contractor *inter se.*

With respect to plaintiffs' cross appeal from the judgments entered on the verdicts for the defendant school district owner, we agree with the appellate court that there was a disputed question of fact as to whether the school district could be deemed to have been in charge of the erection and construction under the Structural Work Act so as to make it liable to the plaintiffs. We further agree with the appellate court that, based upon all the evidence, such verdict was not contrary to the manifest weight of the evidence.

For the foregoing reasons, the judgment of the trial court in favor of the plaintiffs and against the defendants, DeWitt and Amdal, is affirmed. The judgment in favor of Fisher-Stoune, Inc., and against the third-party plaintiff, DeWitt and Amdal, is reversed and the cause is remanded for a trial on such action. The judgment for Maroa Community School District No. 2 and against the plaintiffs is affirmed.

Affirmed in part and reversed in part and remanded.

Mr. JUSTICE HOUSE, dissenting:

I am constrained to dissent from the majority. As the 293*293 opinion notes at the outset, the case "presents a novel issue of first impression before this court." It concedes that a finding of negligence on the part of the architects must either be based upon their failure to prepare more detailed specifications for the shoring or their failure to oversee and inspect the shoring method used. The opinion apparently is bottomed on the latter. It imposes a legal duty on an architect not only to prepare plans and specifications, but to inspect the methods employed by the contractor leading up to completion under the general inspection clause of his contract.

I cannot read into the contract a duty which is not imposed by it. The architect's contract used here is a more or less standard form generally used by architects and engineers. It provides for detailed plans and specifications, obtaining approval of various governmental agencies, issuing certificates of payment and general administration. Supervision is limited. The architect contracts to attempt prevention of defects but specifically disclaims a guarantee of the performance by the contractor.

The continuous form of supervision envisioned by the majority opinion is neither contemplated by, nor given under, such a contract. When continuous supervision is required by the owner it is customary for a clerk-of-the-works (resident inspector) to be selected by the owner and architect and paid by the owner. This contract has such a provision and specifically provides that the architect's supervision "is to be distinguished from the continuous personal superintendence to be obtained by the employment of a clerk-of-the-works."

Again, the opinion concedes that architects have no duty to specify the method used to accomplish the finished building, but the belief was stated that the architects "had the right" to insist upon a safe and adequate use of that method. True, but to parlay that "right" into a duty is neither consistent with generally accepted usage nor contemplated by 294*294 the contract. Obviously, the architect did not contract to be present or represented at all phases of construction and he should not be held responsible for methods used by the contractor which may result in injury. Since there is no contractual obligation, liability is fixed by an expansion of the common law.

I find no support for such a radical departure in either this or any other jurisdiction. The cases cited for comparison are usually between contractor and architect or owner and architect, but not for liability of an architect to an employee of the contractor. The general view is stated in *Garden City Floral Co.* v. *Hunt,* 126 Mont. 537, 255 P.2d 352, 357: "To say that he [architect] must supervise the method of doing the work before there is full supervision would place the architect in an entirely different role from that of an architect. * * * As a matter of law the courts recognize that an architect merely supervises the results and does not dictate the methods when not controlled by the specifications."

There are sound reasons for the prevailing view that the architect's primary duty is to provide a sound completed structure in accordance with the owner's requirements, but not to dictate the methods by which the contractor attains that objective. There would be utter

chaos if the contractor or his superintendent were to give an order to use his most efficient equipment and personnel, and the architect attempted to countermand and order that the work be done by another method requiring different equipment and skills. When a contractor bids a job he expects to use his equipment and the special talents and experience of his organization. If the threat existed that the details of carrying out his contract be subject to outside interference, contractors naturally would take that into consideration in fixing their bids. If the duty of architects is expanded to require that they be on the job at all times and prescribe methods of construction or be held liable for the negligence of employees of the contractor, 295*295 they will reflect the added burden in their supervision fees. All of this adds up to an additional and, I think, unnecessary and unwarranted financial burden upon the public without a commensurate benefit. Liability of architects as imposed here is economically unsound.

The huge construction industry in this country has functioned very well without the imposition of liability upon architects and engineers who design, but do not build, structures and other facilities. I see no justification for extending the common law to place liability on architects.

Mr. JUSTICE KLINGBIEL joins in this dissent.

120 Misc.2d 493 (1983)

Marion Welch, Plaintiff,
v.
Grant Development Co., Inc., et al., Defendants.

Supreme Court, Trial Term, Bronx County.

April 22, 1983

Morris, Duffy, Ivone & Jensen (*Irwin H. Haut* of counsel), for Michael Schimenti, defendant. *Michael Dubow* for Grant Development Co., Inc., defendant. Gitlin & Greenberg (*William Greenberg* of counsel), for plaintiff.

WALLACE R. COTTON, J.

Motion by the defendant Schimenti for summary judgment dismissing the plaintiff's complaint, as well as all cross complaints asserted against him, is granted except as to the

cross complaint interposed by the codefendant Grant Development Co.

The defendant, Grant Development Co., desirous of renovating one of its buildings, engaged the defendant, Louis Engel & Co., Inc., as its general contractor, and also retained the services of the defendant, Michael Schimenti, as the architect for the construction project. Plaintiff's intestate was a construction worker employed on the job 494*494 site by the third-party defendant, Afro Wrecking and Demolition Corp., a subcontractor. During the course of renovation, plaintiff's decedent sustained severe personal injuries which led to his death when he allegedly fell through an open interior stairwell. The administratrix of his estate subsequently commenced the instant wrongful death action to recover damages against the owner of the building, the general contractor and the architect.

The plaintiff's theory of liability against the architect is essentially predicated upon the claim that he failed to supervise the work of the general contractor and subcontractors. In addition, the plaintiff further alleges the architect failed to enforce proper safety precautions and detect safety violations to prevent the occurrence of the accident to the plaintiff's decedent. The plaintiff does not allege that her decedent was the victim of architectural malfeasance.

In moving for summary judgment to dismiss the plaintiff's complaint, the architect contends that his contract with the owner of the building under renovation did not impose upon him any duties or obligations of care to the workmen at the job site as alleged by the plaintiff. Therefore, it is his position that he may not be subject to tort liability in the instant action by reason of his alleged failure to perform that which the contract did not require him to perform.

Before analyzing the relevant provisions in the contract in the case at bar in order to ascertain if the architect had a contractual duty to supervise the construction work, including the enforcement of proper safety precautions, it should be observed that a split of authority exists among the various jurisdictions which have considered the question of whether an architect, who is in fact contractually responsible for the supervision of a construction project, is liable for injuries sustained by workmen as a result of unsafe working conditions (see Ann., 59 ALR3d 869). The minority rule imposes liability where the contract vests in the architect extensive supervisory duties, including the right to stop the work (*Swarthout v Beard*, 33 Mich App 395, revd on other grounds 388 Mich 637; *Miller v DeWitt*, 37 Ill 2d 273), whereas the majority rule refuses to find 495*495 liability absent a clear assumption of duty by the architect (*Day v National U. S. Radiator Corp.*, 241 La 288; *Reber v Chandler High School Dist. #202*, 13 Ariz App 133; *Walker v Wittenberg, Delony & Davidson, Inc.*, 241 Ark 525, reh granted 242 Ark 97; *Luterbach v Mochon, Schutte, Hackworthy, Juerisson, Inc.*, 84 Wis 2d 1; *Wheeler & Lewis v Slifer*, 195 Col 291).

In New York, the older cases refuse to fasten liability upon the architect where his failure to properly supervise the work amounted to nothing more than nonfeasance (*Potter v Gilbert*, 130 App Div 632, affd 196 N.Y. 576; *Clinton v Boehm*, 139 App Div 73; *Olsen v Chase Manhattan Bank*, 10 AD2d 539, affd 9 N.Y.2d 829; Allen, Liabilities of Architects and Engineers to Third Parties, 22 Ark L Rev 454, 459-461; Sweet, Site Architects and Construction Workers: Brothers and Keepers or Strangers?, 28 Emory LJ 291, 317, citing *Hamill v Foster-Lipkins Corp.*, 41 AD2d 361).

In an effort to avoid liability under the minority rule, the American Institute of Architects revised its standard form contract with the owners to delete the troublesome words of supervision and inspection. The contract in the case at bar is the product of the various revisions made by the American Institute of Architects. The revised contract portrays the role of the architect as one who only ensures design conformity. The relevant provisions of the contract are as follows:

"§ 2.2.2 The architect will be the Owner's representative during construction and until final payment is due. The Architect will advise and consult with the Owner. The Owner's instructions to the Contractor shall be forwarded through the Architect. The Architect will have the authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified by written instrument in accordance with Subparagraph 2.2.18.

"§ 2.2.3 The Architect will visit the site at intervals appropriate to the stage of construction to familiarize himself generally with the progress and quality of the Work and to determine in general if the Work is progressing in accordance with the Contract Documents. However, 496*496 the Architect will not be required to make exhaustive or continuous on site inspections to check the quality or quantity of the work. On the basis of his on-site observations as an Architect, he will keep the Owner informed of the progress of the Work, and will endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor.

"§ 2.2.4 The Architect will not be responsible for and will not have Control or Charge of Construction, means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and he will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents. The Architect will not be responsible for or have control or charge over the acts or omissions of the contractors, subcontractors, or any of their agents or employees, or any other persons performing any of the Work.

* * *

"§ 4.3.1. The Contractor shall supervise and direct the Work using his best skill and attention. He shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract.

* * *

"§ 10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs with the Work.

"§ 10.2.1 The Contractor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to:

".1 All employees on the Work * * *

"§ 10.2.3 The Contractor shall erect and maintain, as required by existing conditions and progress of the Work, all reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent utilities."

It is evident from reading the aforesaid contractual provisions that the architect has been completely stripped of all supervisory powers and duties. The contract manifests 497*497 an unmistakable intention to place exclusive control over the construction work, and more importantly, the responsibility for protecting workmen against injury, in the hands of the general contractor. Moreover, any contractual right which the architect heretofore had to halt work on the project, which supported liability under the minority rule, was eliminated. Thus, the issue for the court to determine is whether the contract now under review insulates the architect from tort liability to the plaintiff in the instant action.

In the case of *Brown v Gamble Constr. Co.* (537 SW2d 685), the Missouri appellate court had occasion to consider the identical contract in connection with an injured workman's tort claim brought against an architect based upon the same common-law theory as the plaintiff asserts in the instant action. The court refused to find liability against the architect.

In response to the plaintiff's argument that the architect has a duty as a "design professional" to supervise the construction and ensure that safety precautions are taken to protect workers, the court in *Brown v Gamble Constr. Co.* (*supra*, p 687) declared that "architects are under no duty to supervise construction unless they expressly agree to do so * * * A determination in this case as to who was responsible for general supervision of the project and, specifically, for establishing safety measures to protect persons * * * involved is not difficult. By contract, [the general contractor] expressly assumed responsibility for safety precautions during the construction of the [building]. Article 10 of the contract, `Protection of Persons and Property', states that `The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work.' Article 2.2.4 provided: "The Architect will not be responsible for construction means, methods, techniques, sequences of procedures, or for safety precautions and programs in connection with the Work'". Accordingly, the appellate court sustained the lower court's direction of a verdict in favor of the architect (also see *Walters v Kellam & Foley, Mussett, Nicholas & Stevenson, Inc.*, 172 Ind App 207, 225).

498*498Section 2.2.3 of the architect's contract with the owner requires the architect to "visit the site at intervals appropriate to the stage of construction to familiarize himself generally with the progress and quality of the Work and to determine if the Work is progressing in accordance with the Contract Documents." "[T]he primary object of this provision was to impose the duty or obligation on the architects to insure to the owner that before final acceptance of the work the building would be completed in accordance with the plans and specifications; and to insure this result the architects were required to [`visit the site at intervals appropriate to the stage of construction']. Under the contract [the architect] had no duty to supervise the contractor's method of doing the work. In fact, as [an architect he] had no power or control over the contractor's method of performing his contract, unless such power was provided for in the specifications. [His] duty to the owner was to see that before final acceptance of the work the plans and specifications had been complied with, that proper materials had been used, and generally that the owner secured the building it had contracted for". (*Day v National U. S. Radiator Corp.*, 241 La 288, 304-305, *supra.*)

Therefore, in the complete absence of the contractual right to supervise and control the construction work, as well as site safety, the architect cannot be held liable for the death of the plaintiff's decedent (*Vorndran v Wright*, 367 So 2d 1070 [Fla], cert den 378 So 2d 350 [Fla]; *Porter v Stevens, Thompson & Runyan, Inc.*, 24 Wash App 624; *Luterbach v Mochon,*

Schutte, Hackworthy, Juerisson, Inc., 84 Wis 2d 1, *supra; Walker v Wittenberg, Delony & Davidson, Inc.*, 242 Ark 97, *supra; Wheeler & Lewis v Slifer*, 195 Col 291, *supra;* Ann., 59 ALR3d 869, 886, § 6b; see other cases cited by Hoch, Architects Liability For Construction Site Accidents, 30 Univ of Kansas L Rev 429, 433, n 41). "To hold otherwise would make the architect the general safety supervisor at the site, a job which would require his continuous presence in disregard of the express language of his contract" (*Vonasek v Hirsch & Stevens, Inc.*, 65 Wis 2d 1, 11-12).

Furthermore, in opposing the instant motion by the architect, neither the plaintiff nor the codefendants advance 499*499 any reason why the architect, who did not have the right or duty to supervise and control the work, should be held liable to a worker injured during construction when, under the facts in this case, New York law would not impose liability upon another related design professional, the engineer, who, like the architect, is also engaged to assure compliance with construction plans and specifications (*Ramos v Shumavon*, 21 AD2d 4, affd 15 N.Y.2d 610; *Hamill v Foster-Lipkins Corp.*, 41 AD2d 361, *supra; Conti v Pettibone Cos.*, 111 Misc 2d 772, affd 90 AD2d 708).

Plaintiff recently served an amended bill of particulars which, *inter alia*, alleges that the defendant architect failed to adhere to the safety requirements mandated by section 241-a of the Labor Law. Thus, as an alternative theory of liability, plaintiff further argues that the architect is subject to statutory liability for the death of the plaintiff's decedent.

Section 241-a of the Labor Law provides that "[a]ny men working in or at * * * stairwells or buildings in course of construction or demolition shall be protected by sound planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such men, or by other means specified in the rules of the board".

Unlike sections 240 and 241 of the Labor Law, section 241-a is silent in specifying the persons who must obey its command to safeguard workers. However, since the purpose of section 241-a is similar in scope to that of section 241, the sections should be read *in pari materia* (*Horan v Dormitory Auth.*, 43 AD2d 65). Accordingly, the duty mandated by section 241-a devolves upon "all contractors and owners and their agents" (see Labor Law, §§ 240, 241).

But in order to classify the architect as an "agent" of the owner or general contractor for the purpose of casting tort liability upon him under section 241-a, it must be shown that he had the authority to supervise and control the work (cf. *Russin v Picciano & Son*, 54 N.Y.2d 311). However, as previously discussed in examining the relevant provisions in the contract between the owner and the architect, the latter had no duty or power to supervise and control the work. These obligations were specifically reserved to the 500*500 general contractor. Therefore, the architect cannot be subject to liability to the plaintiff for an alleged violation of section 241-a of the Labor Law. Accordingly, the architect is entitled to summary judgment dismissing the plaintiff's complaint against him (*Conti v Pettibone Cos.*, 111 Misc 2d 772, 780, affd 90 AD2d 708, *supra*).

There remains for consideration the disposition of that branch of the architect's motion for summary judgment dismissing all cross claims asserted against him as well.

It is the movant's position, and the court agrees, that since he did not owe a duty to protect the plaintiff's decedent from danger on the work site, he may not be found liable in tort to the plaintiff. However, it does not follow therefrom, as the movant suggests, that the absence of a duty owed to the plaintiff by the architect effectively precludes the codefendants and third-party defendants from seeking contribution or indemnification against him. Although the movant cites *Garrett v Holiday Inns* (86 AD2d 469) in support of his position, the court notes that the holding therein upon which the movant relies was substantially eroded upon appeal by the Court of Appeals in its recent opinion when it reviewed the case (*Garrett v Holiday Inns*, 58 N.Y.2d 253).

The Court of Appeals in *Garrett v Holiday Inns* (*supra*, p 261) pronounced that "[i]f an independent obligation can be found on the part of a concurrent wrongdoer to prevent foreseeable harm, he should be held responsible for the portion of the damage attributable to his negligence, despite the fact that the duty violated was not one owing directly to the injured person". Stated another way, if there is "[no] actionable duty owed by a third party directly to the injured plaintiff, the third party may [nevertheless] be held liable for a proportionate share of the damages on the basis of a breach of duty [owed] to [another party defendant] who must respond directly in damages to the plaintiff" (*Garrett v Holiday Inns*, *supra*, p 264 [JASEN, J., dissenting in part]). Therefore, the inquiry now focuses upon whether or not the movant owed a duty to the cross claimants to protect them from the foreseeable risks of harm, the breach of which would potentially expose them to liability to the plaintiff.

501*501Section 2.2.3 of the architect's contract with the owner provided, in part, "[o]n the basis of his on-site observations as an Architect, he will keep the Owner informed of the progress of the Work, and will endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor". The architect visited the construction area on the date of the accident. During his deposition, the architect admitted that it was his duty to report to the owner any work not being done in a workmanlike manner, including openings in floors which were unprotected. Therefore, if the architect had knowledge of an unprotected open stairwell, the contract required (and he himself so acknowledged) that he report it to the owner. Thus, a triable issue of fact exists in regard to the owner's cross complaint against him for contribution (cf. *Central School Dist. v Flintkote Co.*, 56 AD2d 642 ; cf. *Potter v Gilbert*, 130 App Div 632, affd 196 N.Y. 576, *supra;* cf. *Olsen v Chase Manhattan Bank*, 10 AD2d 539, 544, affd 9 N.Y.2d 829, *supra*).

Although the movant denied actual knowledge of any dangerous working condition when he visited the site on the day of the accident, when the salient facts are peculiarly within the control or possession of the moving party and not available to the other party, as they are here, summary judgment is unavailable (*Santorio v Diaz*, 86 AD2d 926; *Bruno v Home Mut. Ins. Co. of Binghamton*, 91 AD2d 1169).

Accordingly, the movant's motion for summary judgment dismissing the owner's (Grant Development Co., Inc.) cross complaint against him is denied; however, in view of the court's dismissal of the plaintiff's complaint against the movant, he will now assume the status of a third-party defendant upon the trial of the instant action (cf. *Klinger v Dudley*, 41 N.Y.2d 362, 365).

All other cross claims interposed against the movant are dismissed by virtue of the fact no remaining cross claimant has demonstrated the existence of a duty upon the part of the movant to insulate it from liability to the plaintiff (*Garrett v Holiday Inns*, 58 N.Y.2d 253, *supra*).

48 A.D.3d 619 (2008)
852 N.Y.S.2d 363

EATON ELECTRIC, INC., Respondent,
v.
DORMITORY AUTHORITY OF STATE OF NEW YORK, Appellant.

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

Decided February 19, 2008.

620*620 Mastro, J.P., Skelos, Florio and Dickerson, JJ., concur.

Ordered that the order is affirmed, with costs.

The defendant, Dormitory Authority of State of New York (hereinafter DASNY), is a public authority which arranges for the financing of construction projects at not-for-profit institutions including the City University of New York (hereinafter CUNY). With respect to CUNY projects, DASNY also acts as owner of the projects, taking title to the property, contracting for design and construction, and leasing the projects back to CUNY pending

repayment of the amount financed.

On May 10, 1999 the plaintiff entered into a contract with DASNY pursuant to which the plaintiff agreed to perform certain electrical work and furnish all necessary supplies and materials incident to that work for a fixed price of $8,933,000 (hereafter the contract), in connection with a project to renovate the existing library and construct a new addition to that library at Brooklyn College.

Pursuant to the contract, the plaintiff furnished a payment bond and a performance bond in favor of DASNY, as obligee, covering payment for labor, materials, and performance of its obligations under the contract. AXA Global Risks US Insurance Company (hereafter AXA) issued the bonds.

Through no fault of its own, the plaintiff's work pursuant to the contract was delayed, causing it to experience financial difficulties and to seek financial assistance from AXA. AXA agreed to advance funds to the plaintiff in exchange for an assignment, entitled "Assignment of Contrary Moneys" (hereinafter the assignment), pursuant to which the plaintiff agreed to assign its "right, title and interest in and to any and all payments on account of estimates, change orders, extras, claims or bonuses including, but not limited to, the final estimate, final payment and retainage, and any other money now due or hereafter to become due arising out of the Contract between [the plaintiff] and [DASNY], together with all rights of action accrued or which 621*621 may accrue thereunder." From that point forward, the plaintiff continued its performance obligations under the contract and continued dealing directly with DASNY concerning any matters arising out of the contract, while AXA received payments directly from DASNY for the plaintiff's work performed under the contract.

In a notification of construction completion dated August 28, 2002 DASNY accepted the plaintiff's work as completed, with the exception of outstanding punchlist items, which included more than 800 incomplete work items entailing substantial work. CUNY occupied and began using the library on that date.

On August 29, 2002 the plaintiff requested that DASNY reduce the retainage it was permitted to withhold from its monthly partial payments, pursuant to general conditions § 17.01D of the contract, from 5% to 2.5%, based upon DASNY's "beneficial occupancy" of the library. Pursuant to section 1 of the general conditions of the contract, "beneficial occupancy" is defined as "[t]he use, occupancy or operation by the Owner of the work or any part thereof as evidenced by a notification of Beneficial Occupancy executed by the Owner."

In a letter dated January 13, 2003, the plaintiff repeated its request for a reduction of retainage. On February 11, 2003 the plaintiff, using a requisition form provided to it by DASNY's construction manager, Turner Construction Company (hereafter Turner), requested DASNY to pay it one half of the retainage that DASNY was withholding as of that date, which it calculated to be in the sum of $260,351.31. In the form, the plaintiff stated that its work pursuant to the contract work was 99.22% complete.

In a memorandum by Turner's project manager, Frank Yozzo, dated February 19, 2003, Turner informed DASNY's project manager, Eugene Leung, that the plaintiff had completed

99.55% of the work required by the contract, with the remaining amount of DASNY's obligation with respect to that work totaling $40,300.23, and 75% of the punchlist items, with the remaining obligation for the punchlist items valued at no more than $75,000. Yozzo further stated that change orders remained to be processed that were valued at $578,000. Yozzo recommended a reduction of retainage from 5% to 2.5% and the release of a payment to the plaintiff in the sum of $260,351.31.

In a memorandum dated February 20, 2003, Leung calculated that the plaintiff had completed work valued at $10,414,049.59 as of that date, and also recommended a payment to the plaintiff in the sum of $260,351.31.

DASNY's accounts payable office reviewed the requisition and 622*622 increased the amount of retainage to be released from the sum of $260,351.31 to the sum of $262,319.84, based upon its own calculations that took into account a pending progress payment that had not been included in the plaintiff's calculation.

In a letter to AXA dated March 3, 2004, DASNY enclosed forms entitled "RELEASE FORM/REDUCTION OF RETAINAGE" (hereinafter the release) and "CONSENT OF SURETY/ REDUCTION OF RETAINAGE" to be executed by AXA (hereinafter the consent of surety). The release referred to and identified AXA as "Contractor" and stated that, in consideration of the sum of $10,230,468.17, "heretofore or now paid" by DASNY, AXA: "has remised, released and forever discharged and by these presents does for itself, its successors and its assigns, remise, release and forever discharge [DASNY], ... from all claims of liability to the Contractor for anything furnished or performed in connection with, or arising out of the contract ... between [DASNY] and the Contractor ... or out of the work covered by said contract ... including, but not limited to, all claims for extra work or by reason of extra work, labor or materials, or additional work or by reason of additional work, labor, or materials furnished or performed in connection with, relating to, or arising out of the subject matter of said contract, and any prior act, neglect or default on the part of [DASNY]... and all manner of action and actions, cause and causes of action, suits, ... sums of money, ... contracts, ... agreements,... promises, ... damages, judgments, ... claims and demands whatsoever in law or in equity, which against [DASNY]... the Contractor ever had, now had, or which its successors or assigns hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever."

The release contained an exclusion for the portion of the retainage that was not being released, which was in the sum of $262,319.70. This exclusion clause provided spaces in which AXA was to write any additional exclusions for "a claim for damages in the amount of _____ dollars ($ _____) presented to [DASNY]." In these spaces, AXA wrote the terms "N/A" and "0." AXA executed the release on March 7, 2003 and DASNY issued a check to AXA on April 1, 2003 in the sum of $262,319.84.

Pursuant to a statement of claim dated July 30, 2004, the plaintiff submitted a claim to DASNY for payment of the additional sum of $12,467,606 as reimbursement for damages and losses on account of "unanticipated and unforeseen additional costs of labor, materials and vendors [and] additional job supervision, overhead and related project costs." In the statement of claim, the plaintiff also sought a payment of an alleged unpaid balance of the contract price in the amount of $452,810.

623*623 On July 5, 2005 the plaintiff commenced the instant action against DASNY, seeking to recover the amounts stated in its statement of claim. In the first cause of action, the plaintiff sought to recover the alleged unpaid balance of $452,810 for the contract and extra work it had performed and completed. In each of its second, third, and fourth causes of action, the plaintiff sought to recover the sum of $13,000,000, which included the additional costs of labor, materials, and tools; additional job, overhead, and supervisory expenses; additional insurance expenses; loss of use of equipment; additional costs of maintenance and repairs; and other additional costs of construction. The plaintiff asserted that DASNY breached the contract and that the plaintiff's performance of the contract was repeatedly suspended, delayed, and disrupted by DASNY's failure to provide an adequate and complete design for the project or to follow an acceptable coordinated schedule for the project, and by the repeated and continuous material contract changes made by DASNY throughout the course of the project.

DASNY moved for summary judgment dismissing the second, third, and fourth causes of action. The Supreme Court denied the motion, determining that the assignment merely assigned the proceeds of the contract, but not any additional rights under the contract. The court thus concluded that AXA did not have the authority to release the plaintiff's claims against DASNY, including the instant claims. The Supreme Court also determined that, contrary to DASNY's contentions, its payment of the sum of $262,319.84 to AXA did not operate as a "substantial completion" payment pursuant to section 17.01D of the general conditions of the contract, and thus did not render AXA's acceptance of such payment a release of plaintiff's claims pursuant to section 17.02 of the general conditions of the contract. We affirm, although on slightly different grounds.

By the unambiguous terms of the assignment, and contrary to the Supreme Court's findings, the plaintiff did not merely assign to AXA its right to collect the contract proceeds. Indeed, in addition to assigning the right, title, and interest to money due or to become due arising out of the contract, the plaintiff also assigned to AXA "all rights of action accrued or which may accrue thereunder."

Despite this seemingly broad assignment of rights, the plaintiff nevertheless continued to perform and complete its work under the contract without breaching or defaulting upon any contractual obligations. In addition, the plaintiff continued to submit and pursue all claims for additional compensation and delay damages, while AXA merely collected the monies 624 *624 earned by the plaintiff. AXA's written communication with DASNY was limited to the receipt of the monies earned by the plaintiff and the filing of the assignment and release.

It is in this context that AXA's execution of the release must be considered. Indeed, "[t]he meaning and scope of a release must be determined within the context of the controversy being settled" (*Matter of Schaefer,* 18 NY2d 314, 317 [1966]; *see* *Matter of Frankel,* 292 AD2d 526 [2002]). AXA's insertion of the term "N/A," meaning not applicable, in the release with respect to the reservation of rights regarding additional claims creates a latent ambiguity in the release (*see* *Teig v Suffolk Oral Surgery Assoc.,* 2 AD3d 836 [2003]; *Lerner v Lerner,* 120 AD2d 243 [1986]). Indeed, while DASNY contends that, by this insertion, AXA acknowledged that there were no additional claims whatsoever, the plaintiff argues that AXA was merely stating that AXA itself did not have any additional claims, and made the insertion with the understanding that the plaintiff could still pursue certain claims. The plaintiff asserts that this result is warranted since the assignment did not assign all of

its rights to AXA, and the parties had continued to act as though the plaintiff had retained certain rights pursuant to the contract. AXA's interpretation of the release is confirmed by the affidavit of Paul Alongi, Sr., AXA's surety claims manager. Because of the ambiguity, it is appropriate to consider such extrinsic evidence and the surrounding circumstances (*see* *Teig v Suffolk Oral Surgery Assoc.,* 2 AD3d 836 [2003]; *Lerner v Lerner,* 120 AD2d 243 [1986]). Under the circumstances, the release was not intended by the parties to release DASNY from liability for claims that now comprise the plaintiff's second, third, and fourth causes of action, and accordingly, the Supreme Court properly denied DASNY's motion for summary judgment dismissing those causes of action, notwithstanding DASNY's contentions that the release barred such claims.

DASNY also contends that its payment of the sum of $262,319.84 to AXA constituted a "substantial completion" payment, acceptance of which, by operation of sections 17.01D, 17.02, and 17.03 of the general conditions of the contract, constituted a release of "all claims by and all liability to the Contractor for all things in connection with the Work and for every act and neglect of the Owner and others relating to or arising out of the Work." However, in opposition to the defendant's prima facie showing of entitlement to judgment as a matter of law with respect to this issue, the plaintiff raised numerous issues of fact, through correspondence demonstrating the actions and intent of the parties, as well as an affidavit from 625*625 its project manager, as to whether such payment was actually a routine monthly partial payment pursuant to sections 17.01A and E of the general conditions of the contract. Accordingly, for this reason as well, the Supreme Court properly denied DASNY's motion for summary judgment dismissing the plaintiff's second, third, and fourth causes of action.

146 A.D.3d 760 (2017)
2017 NY Slip Op 00155
45 N.Y.S.3d 155

HUIMIN SUN et al., Respondents,
v.
HELEN RUIJIA CAI, Appellant.

2015-09375, Index No. 19703/12.

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

Decided January 11, 2017.

In an action to recover unpaid interest on a promissory note, the defendant appeals from a judgment of the Supreme Court, Queens County (Yablon, Ct. Atty. Ref.), entered October 2, 2015, which, after a nonjury trial and upon a decision of the same court dated June 30, 2015, is in favor of the plaintiffs and against her in the principal sum of $39,714.72.

Dillon, J.P., Hall, Hinds-Radix and Brathwaite Nelson, JJ., concur.

761*761 Ordered that the judgment is affirmed, with costs.

In July 2004, the plaintiffs loaned $140,000 to their niece, the defendant, for the sole purpose of providing her funds to purchase a specific apartment located in Flushing. The loan was evidenced by a promissory note signed by the defendant before a New York

among other things

licensed notary public, and provided, inter alia, that the defendant, in addition to paying back the principal amount of the loan, would also pay interest at a variable rate based upon the prime rate. In February 2012, the defendant sent a letter to the plaintiff Huimin Sun claiming, inter alia, that the interest amortization and calculations were improper. She explained that she was enclosing a check in the amount of $26,341.49, representing the outstanding principal balance and that, when cashed, the debt would be satisfied in full. Prior to Huimin Sun cashing the check, he indorsed the reverse side with the notation "without prejudice and under protest." → raja's advice

In or around September 2012, the plaintiffs commenced this action to recover $39,674.71, which they alleged to be the unpaid interest under the promissory note. The Supreme Court denied the plaintiffs' motion for summary judgment on the complaint, finding that a triable issue of fact existed regarding the calculation of interest, and the matter was referred to a Court Attorney Referee to hear and determine. In a written stipulation dated October 28, 2014, the parties agreed to waive a trial of disputed facts and to have the interest issue decided based upon submitted documents and a stipulation of facts. The stipulation also contained a provision affording the defendant the opportunity to submit a counterproposal to the plaintiffs' interest calculation. However, she failed to do so.

In a decision dated June 30, 2015, the Court Attorney Referee applied New York law to the dispute, determined that the indorsement of the check with the notation of "without prejudice and under protest" preserved the plaintiffs' right to seek the unpaid interest, and concluded that the plaintiffs were entitled to a judgment in the amount of $39,714.72, plus statutory interest from March 1, 2012. Contrary to the defendant's contention that New Jersey law should apply because of the plaintiffs' residence there, the Court Attorney Referee properly determined that New York law governed this transaction. New York had the most significant relationship to the transaction since the note was executed in New York by the defendant, 762*762 a New York domiciliary, and the loan evidenced by the note was given to the defendant by the plaintiffs for the sole purpose of providing the defendant with funds to purchase an apartment located in Flushing (*see* *Zurich Ins. Co. v Shearson Lehman Hutton,* 84 NY2d 309 [1994]; Restatement [Second] of Conflict of Laws §§ 6, 188).

Applying New York law, the Court Attorney Referee properly concluded that the defendant failed to establish that Huimin Sun's cashing of the check in the amount of $26,341.49 constituted an accord and satisfaction. "As a general rule, acceptance of a check in full settlement of a disputed unliquidated claim operates as an accord and satisfaction discharging the claim" (*Merrill Lynch Realty/Carll Burr, Inc. v Skinner,* 63 NY2d 590, 596 [1984]). "The party asserting the affirmative defense of accord and satisfaction must establish that there was a disputed or unliquidated claim between the parties which they mutually resolved through a new contract discharging all or part of their obligations under the original contract" (*Profex, Inc. v Town of Fishkill,* 65 AD3d 678, 678 [2009]). The indorsement of a check with the notation "under protest," or similar wording, constitutes an explicit reservation of rights which precludes an accord and satisfaction (UCC former 1-207 [internal quotation marks omitted]; *see* *Horn Waterproofing Corp. v Bushwick Iron & Steel Co.,* 66 NY2d 321, 332 [1985]; *Metropolitan Knitwear v Trans World Fashions,* 233 AD2d 241, 242 [1996]).

Here, the note contained specific language, inter alia, providing that the defendant would pay both principal and interest on the $140,000 loan. When the defendant sent the

February 8, 2012, letter challenging the calculation of interest and declaring that the check for $26,341.49 satisfied the debt in full, she submitted a partial payment as payment in full of a disputed or unliquidated claim. In response, Huimin Sun's indorsement of the back of the check with the words "without prejudice and under protest" constituted an explicit reservation of rights pursuant to UCC former 1-207, thereby precluding an accord and satisfaction.

Based upon the documentation and stipulated facts submitted to the Court Attorney Referee, including the plaintiffs' calculation of interest due, which was unrefuted by the defendant, the court properly awarded judgment to the plaintiffs in the sum of $39,714.72, plus statutory interest from March 1, 2012.

252 A.D.2d 925 (1998)
676 N.Y.S.2d 301

Kenneth P. Silverman, as Bankruptcy Trustee for E.G. May Company, Inc., Appellant,
v.
Mergentime Corporation/J.F. White, Inc., a Joint Venture, et al., Respondents

Appellate Division of the Supreme Court of the State of New York, Third Department.

July 30, 1998

Mikoll, White, Carpinello and Graffeo, JJ., concur.

Cardona, P. J.

In October 1985, defendant Mergentime Corporation/J.F. White, Inc., a joint venture (hereinafter defendant), entered into a subcontract with E.G. May Company, Inc. (hereinafter plaintiff) for the installation of certain electrical systems at the Croton Reservoir in Westchester County, as part of defendant's contract with New York City for the renovation of two gate-houses 926*926 houses and the construction of a new gatehouse. Plaintiff was to be paid $695,000 in partial payments as the work progressed. The subcontract authorized defendant to make changes in the work performed subject to an agreed-upon equitable adjustment of the subcontract price and required plaintiff to promptly proceed with the performance of the work as changed.

As the project progressed, defendant needed an additional temporary power connection to the local utility company to run construction equipment. It issued change order No. 3 on May 12, 1987[1] instructing plaintiff to provide the additional power connection on a time and material basis. By letter dated June 19, 1987, plaintiff informed defendant that it would perform the work specified in change order No. 3 if it received certain "assurances", namely, that defendant would pay for standby electricians, a noncontractual demand made as an apparent concession to a local electrical union with whom plaintiff had an agreement. Thereafter, plaintiff took no steps to perform the temporary electrical work. On July 8, 1987, defendant notified plaintiff that it would consider plaintiff in default of the subcontract unless it started performing the work by July 12, 1987. Plaintiff did not perform the work and defendant was required to rely on diesel-powered generators. On August 26, 1987, defendant terminated the subcontract and retained another electrical subcontractor who ultimately installed the temporary power without the use of standby electricians and also completed the remainder of plaintiff's work.

Plaintiff commenced this breach of contract action to recover $313,000. Following a nonjury trial, Supreme Court, *inter alia*, determined that plaintiff breached the subcontract and had been fully compensated for work performed. Supreme Court awarded defendant judgment dismissing the complaint and plaintiff appeals.

At the outset, we note that while we possess broad review power in a nonjury trial, we do give deference to the trial court's "assessment of the quality of the evidence and the credibility of the witnesses" (*Callanan Indus. v Olympian Dev.*, 225 AD2d 941, 942; *see*, *J & J Structures v Callanan Indus.*, 215 AD2d 890, 891, *lv denied* 86 N.Y.2d 708). Additionally, we note that "[a] trial court's findings are not to be lightly set aside unless its conclusions could not have been reached based upon any fair interpretation of the evidence" (*Osterhout v Mesivta Sanz of Hudson County*, 226 AD2d 893, 894).

There is support in this record for Supreme Court's findings 927*927 that the parties entered into a single lump-sum subcontract for $695,000 and plaintiff abandoned the job breaching the subcontract. Furthermore, there is proof that plaintiff received adequate compensation for work completed prior to the abandonment.

Contrary to plaintiff's first contention, our examination of the subcontract shows that the parties entered into a single agreement for the payment of a lump sum of $695,000, not two separate contracts of $313,000 and $382,000. While the performance of the subcontract was broken down into two phases, (1) gatehouse 1 and the pole line, and (2) existing gatehouse and the new substructure, the subcontract clearly obligated plaintiff to complete the entire project.

When it signed the subcontract, plaintiff became bound by its terms absent proof of fraud, duress or other wrongful act on defendant's part (*see*, *J & J Structures v Callanan Indus., supra*, at 891). There is no such showing by plaintiff in this record. On the other hand, defendant offered proof that the subcontract specifically contemplated change orders, required prompt performance of any changes[2] and required plaintiff to abide by defendant's labor agreements,[3] which included defendant's decision to use the operating engineers' union to tend the pumps rather than employ standby electricians at extra cost. Defendant also demonstrated that the subcontract specifically gave it the right to take over plaintiff's work, including the tools and materials on the jobsite, if it did not perform its work

in a diligent manner.

Plaintiff seeks to excuse its failure to perform change order No. 3 by claiming that it was merely a proposal which did not provide adequate information to enable it to perform the work. However, there is no proof that plaintiff complained about inadequate information prior to suspending its performance on 928*928 June 19, 1987. Furthermore, the evidence shows that the same information regarding the power requirements was provided to the replacement subcontractor who completed the temporary power connection. Plaintiff also attempts to justify its failure to perform change order No. 3 based on defendant's late payments of pay requisitions submitted by plaintiff. Notably, this excuse was not proffered until after defendant notified plaintiff that it was in breach. Moreover, defendant failed to establish which of its pay requisitions were unpaid prior to June 19, 1987. Thus, upon this record, plaintiff's failure to perform was the result of its insistence upon assurances which defendant was not obligated to give.

In our view, the evidence supports Supreme Court's finding that plaintiff's unilateral suspension of the performance of change order No. 3 constituted an abandonment of the project and a breach of the "clear, complete and unambiguous" terms of the subcontract (*Mazzaroli v Cook Bldrs.*, 188 AD2d 782, 783; *see generally*, *Tri-Mar Contrs. v Itco Drywall*, 74 AD2d 601, 602). We also find ample support in the record for Supreme Court's finding that plaintiff was fully compensated for all work performed prior to the breach. Plaintiff's own financial cost records showed that it incurred a total cost on the project of $327,171.59. Payment records demonstrate that defendant paid plaintiff $329,248 and that plaintiff's Bankruptcy Trustee also received an undisclosed amount from the replacement subcontractor of at least $10,000 for materials left at the jobsite.

Finally, since defendant did not breach the subcontract, we find no merit in plaintiff's further contentions that it was entitled to an additional quantum meruit recovery (*see*, *TriMar Contrs. v Itco Drywall*, *supra*, at 603; *Farrell Heating, Plumbing, Air Conditioning Contrs. v Facilities Dev. & Improvement Corp.*, 68 AD2d 958) or recovery of its lost profits (*see*, *Rogers v Maiorano*, 140 AD2d 596).

Ordered that the judgment is affirmed, with costs.

[1] Notably, two earlier change orders were issued and paid for without incident.

[2] Section 4, entitled "Changes", provides: "The Contractor may at any time by written order of Contractor's authorized representative, and without notice to the Subcontractor's sureties, make changes in, additions to or omissions from the work to be performed and materials to be furnished under this Subcontract, and the Subcontractor shall promptly proceed with the performance of this Subcontract as so changed."

[3] Section 7, entitled "Labor", provides in relevant part: "The Subcontractor, in connection with all work covered by the Subcontract, shall comply with and be bound by any labor agreements executed by the Contractor or on Contractor's behalf to the extent that the provisions of such agreements apply to Subcontractors. Failure at any time to comply with any of the provisions of such agreements will, at the option of the Contractor, be cause for immediate termination of this Subcontract for default and the Contractor shall have all of the rights contained in Section 5 with regard to such termination."

121 A.D.2d 933 (1986)

Buckley & Company, Inc., Respondent-Appellant,
v.
City of New York, Appellant-Respondent

Appellate Division of the Supreme Court of the State of New York, First Department.

July 24, 1986

Concur — Murphy, P. J., Kupferman, Asch, Kassal and Rosenberger, JJ.

Defendant City of New York (City) awarded plaintiff Buckley & Company, Inc. (Buckley) a contract to construct a pumping station. The contract price was $8,442,130. Work on the construction project was to begin in June 1966 and was to be completed in June 1968. Problems, however, developed at the excavation site. A cofferdam designed by the City to prevent seepage into the excavation proved ineffective. This gave rise to repeated delays while alternatives to the cofferdam were devised and implemented. The project was not completed until 1976.

In its third and fourth causes of action, plaintiff seeks to recover damages incurred as a result of the delays eventuated by the City's improper design of the cofferdam. Article 13 of the contract, however, provides: "The Contractor agrees to make no claim for damages for delay in the performance of this contract occasioned by any act or omission to act of the City or any of its representatives, and agrees that any such claim shall be fully compensated for by an extension of time to complete performance of the work as provided herein."

[Delays discussion omitted]

Turning now to plaintiff's second cause of action, it seeks compensation for "extra and additional" work performed by plaintiff at the City's direction "under protest". The City maintains that this work was properly covered by the contract but that, in any case, plaintiff has waived its right to assert a claim for such work. The City's claim of waiver is premised upon articles 27 and 28 of the contract, which prescribe the procedures to be followed with regard to disputed work. Article 28 states clearly that failure to follow these procedures strictly constitutes a waiver of any claim for extra compensation.

It is undisputed that plaintiff has not complied with the disputed work procedures. Despite this, plaintiff urges that its second cause of action is unaffected by the article 28 waiver since the disputed work was not "extra" work but "additional" work caused by unanticipated subsurface conditions. The distinction between "extra" and "additional" work is tenuous in the extreme since the contract defines "extra work" as "work other than that required by the contract at the time of its execution", which definition would seem to be inclusive of "additional work". Yet even if we are to assume that there is a distinction between "extra" and "additional work", it is inconsequential to our disposition of plaintiff's second cause of action. This is because regardless of the manner in which "additional work" incurred due to changed subsurface conditions differs from "extra work", it is compensable under the agreement only by means of a contract modification pursuant to contract section 4 (b). As no contract modification was sought regarding the additional work items in plaintiff's second cause, no claim for "extra and additional" work may now be asserted. This conclusion is compelled by 936*936 our decision in *Naclerio Contr. Co. v Environmental Protection Admin.* (113 AD2d 707, 710 [1st Dept 1985]), where, construing contractual provisions identical to those presently before us, we reasoned: "plaintiff's claims must fall into one of three categories: (1) if the work performed was required by the contract * * * no additional compensation is justified; (2) if extra or disputed work, there must be strict compliance with the requirements of articles 27 and 28 or any claims relating thereto are explicitly waived (*De Foe Corp. v City of New York*, 95 AD2d 793), and there was no such compliance in this case; (3) *if additional work attributable to changed conditions, there must be a contract modification subject to the Commissioner's written approval, with the increase in cost subject to prior written approval of the Comptroller's Chief Engineer, and there was none here. Accordingly, defendant's motion for summary judgment dismissing plaintiff's claims * * * should have been granted."* (Emphasis added.)

Plaintiff's contention that the City, through its resident engineer, waived strict compliance with the procedures required by contract articles 27 and 28 and section 4 (b) is not persuasive as it is supported only by conclusory allegations insufficient to defeat a motion for summary judgment (*see*, *Capelin Assoc. v Globe Mfg. Corp., supra*). Moreover, article 30 of the contract provides expressly that the resident engineer has no power to change the contract terms. (*See*, *Albert Saggese, Inc. v Town of Hempstead*, 100 AD2d 885 [2d Dept 1984], *mod on other grounds* 64 N.Y.2d 908 [1985].)

Finally, plaintiff may not avoid its contractual waiver of delay damages by attempting, as it does in its fourth cause of action, to recover on a quantum meruit basis. The fourth cause alleges merely that the contract was breached by the City and that plaintiff is, therefore, entitled to recover for the fair value of its work less its costs. If the contract was breached, however, plaintiff's proper course is to sue upon the contract for damages. (*Nixon Gear & Mach. Co. v Nixon Gear*, 86 AD2d 746 [4th Dept 1982]; *Levi v Power Conversion*, 47 AD2d 543 [2d Dept 1975]; *Jontow v Jontow*, 34 AD2d 744 [1st Dept 1970].) It must be noted that

plaintiff has fully performed the contract and has been paid in excess of $10,000,000 pursuant to its terms. At this late date, absent fraud or other extreme circumstances so warranting, the contract may not be avoided. Such circumstances not having been demonstrated, the contract, along with its broad exculpatory clause for delay damages resulting from the City's actions or omissions, 937*937 must be enforced.