Namasco Corp. v New York Hotel Trade Council
2007 NY Slip Op 31741(U)
June 19, 2007
Supreme Court, New York County
Docket Number: 0601606/2004
Judge: Herman Cahn
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SCANNED ON 6/21/2007

[* 1]

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

PRESENT: Cahn
Justice

PART 49m

Namasco Corp et al

INDEX NO. 601606/04

MOTION DATE 4/30/07

- v -

MOTION SEQ. NO. 005

The New York Hotel et al

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

FILED
JUN 21 2007
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE ......

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/19/07

[signature] J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

--x

NAMASCO CORPORATION, d/b/a KLOCKNER METAL PROCESSING,

Plaintiff,

-against-

Index No. 601606/04

THE NEW YORK HOTEL TRADE COUNCIL, HOTEL ASSOCIATION OF NEW YORK CITY HEALTH CENTER, INC., MEMORIAL TO THE HOLOCAUST, HARLEM CENTER, LLC, and C. RAIMONDO & SONS CONSTRUCTION CO., INC.,

Defendants.

FILED
JUN 2 1 2007
COUNTY CLERK'S OFFICE
NEW YORK

--x

NAMASCO CORPORATION, d/b/a KLOCKNER METAL PROCESSING,

Plaintiff,

-against-

Index No. 602358/05

PECKER IRON WORKS, INC.,

Defendant.

--x

PECKER IRON WORKS, INC.,

Third-Party Plaintiff,

-against-

Index No. 590801/05

A LIVING MEMORIAL to the HOLOCAUST: MUSEUM OF JEWISH HERITAGE,

Third-Party Defendant.

--x

Herman Cahn, J.:

Third-party defendant A Living Memorial to the Holocaust: Museum of Jewish Heritage

(The Museum) moves for (1) summary judgment on the first cause of action in the third-party complaint; (2) partial summary judgment on the second cause of action in the third-party complaint; (3) summary judgment on its third counterclaim for breach of contract against third-party plaintiff Pecker Iron Works, Inc.; and (4) summary judgment dismissing the complaint as against it. Defendant/Third-Party plaintiff Pecker Iron Works, Inc. cross moves for partial summary judgment on its first cause of action in its third-party complaint for breach of contract, for the contract balance of $326,361.00.

BACKGROUND

Third-party defendant Museum is a not-for-profit educational corporation, whose mission is to honor those who died in the Holocaust (Museum's Rule 19-a Statement, ¶ 2). Defendant/Third-party plaintiff Pecker is a steel fabricator and erector. Plaintiff Namasco Corporation (Namasco) is a subcontractor hired by Pecker to do a portion of Pecker's work on the project, for the Museum.

In December 2001, the Museum undertook to expand its East Wing, which involved the construction and development of approximately 82,000 square feet (the Project) (id., ¶ 3). The Museum awarded Pecker the job of manufacturing and supplying the structural steel for the Project for a contract price of $3,129,000.00 (the Contract) (id., ¶ 4). Pecker's work involved the installation of structural steel, decks, trusses and specific stairs in the East Wing, among other things. The formal written contract was executed on June 13, 2002 (Pecker Iron Works' Rule 19-a Statement, ¶ 3). On March 19, 2002, Pecker entered into a subcontract with plaintiff Namasco Corporation for the fabrication and detailing of the structural steel (the Subcontract) for $1,442,657.00 (id., ¶ 5).

Various Provisions in the Museum-Pecker Contract:

The Contract between Pecker and the Museum, drafted by the Museum, contained provisions limiting the time within which claims could be brought. It provided, in relevant part, in Section 1.2.3, regarding "Limitations of Claims," that:

> No action arising out of this Agreement shall be maintained by [Pecker] against [the Museum] (except a third party action, counterclaim or cross claim) unless such action is commenced within twelve (12) months after the date on which [Pecker's] Work is scheduled to be complete as per the Construction Schedule annexed to this Agreement as Exhibit H, as such date is extended under this agreement.

Weingarten Aff, Exh. A.

In Article 15, the "Miscellaneous" provisions, Section 15.2, entitled "Claims For Damages," provides, in part, that no action shall be maintained by Pecker against the Museum "upon any claim arising out of or based on the Contract Documents or by reason of any act or omission or any requirements relating to the giving of notices or information, unless such action . . . shall be commenced within one (1) year after the Substantial Completion of the Work." It further provides that Pecker "shall cause each Subcontractor [sic] to contain like provisions to this Section 15.2, and a provision requiring like provisions to be contained in subcontracts of any tier" (Weingarten Aff., Exh. A at A-24).

Further, with regard to "Contractor's Claims," the Contract sets forth notice provisions related to compensation for extra work. In Article 8, the Contract provides that Pecker, as the Contractor, shall give notice to the Museum of any claim against it, including, for example, claims for an increase in the Contract price, extensions in the time to perform, or for compensation for the value of construction or services outside the scope of the Contract (id., Section 8.1.1, at A-20).

Section 8.1.2 (a) provides that such claims shall be made as provided in Article 4 (id., Section 8.1.2 [a], at A-20). Section 8.1.2 (b) provides that Pecker shall give written notice of all claims for additional compensation for extra work before it begins performance, and that notice shall be given within five days after Pecker has knowledge of the circumstances giving rise to the claim. Subsection (c) provides that "[f]ailure by [Pecker] to give notice of a claim reasonably within the time specified shall constitute a waiver by [Pecker] of such claim" (id., Section 8.1.2 [c] at A-20). It further provides that the "notice of claim shall contain [Pecker's] best good faith estimate of the costs or delays involved in the claim," and that, not later than 30 days after the notice of claim, Pecker "shall submit to the Museum a detailed statement of claim quantifying the specific dollar amount . . . sought and specifying the precise basis of the claim" (id.).

Article 4 of the Contract contains various provisions regarding changes in the work. Pursuant to Section 4.2, the Museum could change the scope of the work or Pecker's time of performance by written change order and, if applicable, the change in the contract price resulting from such change would be determined in accordance with Sections 4.6 and 4.7 respectively. The Museum could also authorize or direct by written field order minor departures from the scope of the work that do not result in any change in the contract price, and that extend Pecker's time of performance, or that could give rise to any other claim by Pecker (id., Sections 4.2; 4.3, A-13-A-14). Section 4.5.2 provides that Pecker shall have no claim for compensation for extra work ordered pursuant to Article 4, unless it advises the Museum in writing of its claim before performing such work (id., Section 4.5.2, at A-14). The Contract provides that Pecker is not entitled to additional compensation for overtime unless agreed to in writing in advance by the Museum (id., Section 4.4, at A-14). The procedures for determining the amount of payment for

scope changes is set forth in Section 4.6; Section 4.7 provides for payment for delay changes. Specifically, with regard to delay changes, the Contract provides that any additional payment shall be the sum of the increased cost of labor and materials incurred, as set forth in Section 4.6.1 [c], and that Pecker "shall not be entitled to any additional compensation or damages, whether direct, indirect, consequential, incidental or otherwise, by reason of any delay" (id., at A-15).

Provisions of the Pecker-Namasco Contract:

The Subcontract between Pecker and Namasco provided that for a total price of $1,442,657.00 Namasco would perform steel detailing and fabrication for the Museum Project, with time being of the essence. The steel was to be ready for delivery by May 30, 2002 (Weingarten Aff., Exh. C), which delivery date was later revised to June 13, 2002 (id.). Namasco's bid was based on particular structural drawings dated January 10, 2002 with specifically noted addendums (id.). The Subcontract provided that design drawing delays and/or revisions "shall require an adjustment in contract price and production schedule to be advised by [Namasco] upon determination of the impact(s) to originally mutually agreed upon terms and conditions" (id. at 2).

Pecker's Claims:

Pecker claims that it and its subcontractors achieved substantial completion of the work on or about April 2003 (Pecker's Rule 19-a Statement, ¶ 6). They claim, however, that they have not been paid for amounts due under the contract, many of which arose due to work change orders made during the progress of the Project. They seek payments for numerous items of extra work and changes on the Project, beyond the scope of the original plans and specifications. Pecker claims, for example, that the original plans and specifications did not show moment connections, which are more rigid steel connections, but that the Museum's engineer issued supplemental drawings

directing Pecker to install them, which Pecker did. Pecker claims the Museum accepted the incorporation of the various extra work into the Project, and on a number of occasions agreed to and did pay for the changes. It claims that it has documented its written change order requests as to the nature and cost of each change order during the Project and, thus, the Museum should make payments on them in accordance with the Contract.

The Various Actions:

On July 22, 2003, Pecker commenced an action in the Supreme Court, New York County, entitled Pecker Iron Works, Inc. v Namasco Corp. et al., Index No. 602335/03 (Zweibel, J.), against, among others, the Museum and Namasco for breach of contract related to the construction. (The Museum's Rule 19-a Statement, ¶ 7; Abraham Aff., Exh. D). Pecker and Namasco brought an arbitration proceeding before the American Arbitration Association, and the court action was thereupon stayed (Pecker's Rule 19-a Statement, ¶¶ 14-15).

On September 3, 2004, because Pecker had not yet served a summons and complaint against the Museum, it sought an extension of time to serve under CPLR 306-b (id., ¶ 16). While Pecker was granted an extension, the Museum moved to vacate that order. On May 16, 2005, Pecker's action was dismissed as against the Museum, pursuant to CPLR 3211 (a) (8), on the ground that Pecker failed to properly serve the Museum within the time limits provided in CPLR 306-b (Abraham Aff., Exh. F).

On December 16, 2004, Namasco commenced this action under Index No. 601606/04 against, among others, the Museum, for unjust enrichment and in quantum meruit, seeking recovery for non-payment of certain change orders requested on the Museum Project in the amount of $996,701.23 (Abraham Aff., Exh. J).

[* 8]

On June 29, 2005, Namasco commenced the action, entitled Namasco Corporation v Pecker Iron Works, Inc., Index No. 602358/05 (Pecker's Rule 19-a Statement, ¶ 19). In this complaint, Namasco brought suit against Pecker for non-payment for the change orders requested on the Museum Project valued at $996,701.23, and sought recovery based on breach of contract and unjust enrichment (Abraham Aff., Exh. M). On July 20, 2005, Pecker entered into a liquidating agreement with Namasco, in which Pecker agreed to prosecute Namasco's extra work claims against the Museum and pay Namasco whatever money Pecker recovered on such claims (Pecker Rule 19-a Statement, ¶ 20; see Abraham Aff., Exh. H).

On August 1, 2005, Pecker commenced its action against the Museum (Index No. 590801/05), seeking recovery of the balance it claims under the Contract, in the amount of $326,361.00 (the first cause of action), as well as seeking recovery of amounts due Pecker and its subcontractors (Namasco, and another subcontractor, Glassmar) in the combined amount of $1,397,542.42 (the second cause of action) (Abraham Aff., Exh. G; Pecker's Rule 19-a Statement, ¶ 21). Pecker also sought indemnification from the Museum in the event Namasco recovers a judgment against Pecker in the amount of $996,701.23 (the third cause of action).

On a prior motion to dismiss, the Museum challenged the third-party complaint on several grounds. First, it urged that the first and second causes of action should be dismissed as time barred (Notice of Cross Motion, Exh. G). It contended that, while the normal statute of limitations for such breach of contract claims would be six years under CPLR 213 [2], the Contract between the within parties contained a one-year limitations provision, in Article 1.2.3, which expired before these claims were brought. It argued that the first claim was "an independent and personal claim for alleged payments due Pecker under the Contract and, even though it is asserted in a 'third party

complaint' it is barred" by the contractual limitation period (id., Exh. G at 8). It further argued that the second claim was also barred by the Contract's limitations period because Namasco could only stand in the shoes of Pecker in suing the Museum for payment and, since Pecker's claim was time barred, the Namasco claim was therefore time barred as well (id. at 8-9). Finally, the Museum contended that the third cause of action should be dismissed because that claim was not a true third party claim and because Pecker had no right to indemnification under the Contract. On May 10, 2006, this Court (Ramos, J.) dismissed the third cause of action for indemnification, but denied the branches of the motion seeking dismissal based on the contractual limitations period (Notice of Cross Motion, Exh. H, Tr. at 18). The Museum has filed a notice of appeal from Justice Ramos' decision, and apparently is in the process of perfecting its appeal.

The Museum answered the third-party complaint, denying the material allegations and asserting several counterclaims for indemnification (the first and second counterclaims), breach of contract (third counterclaim) and negligence (the fourth counterclaim).

The Motions

The Museum now moves for summary judgment dismissing the third-party complaint on several grounds. First, it seeks dismissal of the first cause of action as time barred under the contractual limitations period. It urges that this claim represents only Pecker's direct claims against the Museum and is barred by the contractual limitations period set forth in both Article 1.2.3 and Article 15.2.

Second, it seeks dismissal of the second claim to the extent it duplicates the first claim for Pecker's direct claim for money due it under the Contract. It further seeks dismissal of that claim as unsupported by the evidence relied upon by Pecker and Namasco. It contends that the claims for

extra payment by Namasco (Weingarten, Aff., Exh. B, Namasco Change Orders) were improperly submitted by Pecker, and not in accordance with the Contract's notice requirements in Sections 8.1 and 4.5.2, which are conditions precedent to maintaining a claim for extra work. Thus, it specifically seeks summary judgment dismissing the second cause of action as to Namasco Change Orders # 6A, 8A, 12A, 14A, 18A, 23A, 24, 25, 26, 27, 28, 29, 35, 38, 39, 40, 41, 42 and 43. Further, to the extent that the claims are for delay damages, they are barred by Sections 8.2.2 and Article 4.7 of the Contract. It contends that Pecker is entitled to delay damages only to the extent that the Museum approved an extension of the Contract time and, then, only for materials and labor costs related to such delay. Thus, it asserts that Namasco Change Orders # 6A, 8A, 12A, 14A, 18A, 21A, 23A, 24, 38, 39, 40 and 42 should be dismissed.

The Museum also seeks dismissal of the main complaint by Namasco as against it on the grounds that it cannot plead the elements of unjust enrichment and quantum meruit, and that a subcontractor cannot maintain an action based on a quasi-contractual right when there is a valid agreement between the general contractor and the subcontractor.

Finally, the Museum seeks summary judgment on its counterclaim for breach of contract against Pecker on the ground that Pecker violated a provision of the Contract, Section 15.2, requiring it to include a contractual limitations period in any contracts Pecker entered into with subcontractors on the Project and Pecker failed to include such a provision.

In opposition, Pecker argues that its claims are not barred by the contractual limitations period, because that provision in Article 1.2.3 specifically excepts a "third party action, counterclaim and cross claim," and its complaint is a third party action. It also argues that the Museum's contentions here are the same contentions it made to this court on the earlier motion to

dismiss, which were specifically rejected. Thus, Pecker urges that it is law of the case that the contractual limitations period does not bar these claims. It further urges that this shortened limitations provision is strictly construed and it is entitled to take advantage of the exception to the one year limitations created by the Museum's own lawyers in drafting the Contract.

With respect to the Museum's counterclaim for breach of contract, Pecker argues that even if it had inserted a limitations period such as Article 15.2 in its subcontract with Namasco, this would have had no impact on the Museum – Namasco would have just commenced this action earlier. It further asserts that even if it had inserted such a clause, Pecker could have waived its application in connection with a settlement with Namasco by entering into a liquidating agreement.

On the merits of its and its subcontractors' extra work claims in its second cause of action, Pecker contends they are not barred by the Contract's notice requirements in Article 4.5.2 and 8.1, because the Museum waived those requirements by paying numerous change order requests without requiring prior written notice by directing Pecker and the subcontractors to perform the extra work and accepting the benefits of the extra work. At the least, Pecker argues, there are issues of fact as to whether the Museum by its conduct during the course of the Project waived the notice requirements. Finally, Pecker urges that it and Namasco substantially complied with the notice requirements. With regard to Change Order 42, Pecker contends that it is not for delay damages but for extra work and that, despite a "no damages for delay" clause, it may recover for delay damages because the work was not contemplated in the original design documents and was the product of the Museum's grossly negligent conduct.

The Cross Motion

Pecker cross-moves for partial summary judgment as to the first claim in its third party

complaint for the Contract balance of $326,361.00. It contends that the Museum's own scheduling expert, Stier Anderson, LLC, a law firm "with expertise in forensic services," was retained to assess the impact of the alleged steel delays on the Project. It was reported in the "Executive Summary" of the Museum's Building Committee meeting minutes, dated April 1, 2005, that "Stier concluded the performance of the steel contractor [Pecker] did not have any impact on the schedule," and that "delays to the steel did not contribute to any delay in the overall completion in the Project" (Notice of Cross, Exh. B, MJH00439). Accordingly, Pecker contends the Museum's delay claim against Pecker is meritless, and there is no basis for its refusal to pay Pecker the Contract balance.

In opposition to Pecker's cross motion, the Museum contends that because of delays caused by Pecker, the work required under the Contract, which was required to be completed by July 30, 2002, was not actually completed until the Spring of 2003. It asserts that to keep the other trade work going, while waiting for Pecker to complete the structural steel work, and to mitigate any further delays, the Museum was forced to pay $529,971 for temporary heat and protection to allow the other trades to work through the winter (Weingarten Aff. in Further Support, ¶ 11-12). It points to a letter from Eileen Weingarten, project manager for the Project, dated June 13, 2003, in which she asserts that Pecker's delays caused delays to other contractors on the Project, and seeking reimbursement for $529,971 for costs associated with late, faulty or missing work (Weingarten Aff. in Further Support, Exh. A). The Museum admits that Stier Anderson concluded that while Pecker delayed its structural steel work, this work was not on the critical path of the Project and did not cause a delay to the overall schedule of the Project (id., ¶ 21), but points to Stier Anderson's finding that the late installation of steel and decking caused a delay in pouring the superstructure concrete (id.). It urges that, at the least, genuine issues of fact exist regarding Pecker's entitlement to

[* 13]

payment on the balance.

Namasco's Arguments:

Namasco argues that the Museum is not entitled to summary judgment on Namasco's claims for payment for various extra work orders for two reasons. First, it contends that its quasi contractual claims cannot be dismissed just because there is a valid contract between the Museum and Pecker. It argues that there is an exception to that rule where, as here, the Museum expressly consented to pay Namasco's performance, or, at the least, the circumstances give rise to an obligation on the part of the property owner to pay for such performance. It asserts that the Museum continuously expressed to Namasco that it would pay for the additional work and materials that it requested from Namasco. It submits the affidavit of its senior project manger for the Project, Kevin Halloran, who attests that Namasco participated in weekly phone conferences with the Museum from January 18, 2002 through July 22, 2002, in which the Museum incorporated new obligations into the scope of Namasco's work; that Namasco had direct communications with the Museum's project manager, regarding the impact of revisions and changes on the Project; and that the Museum wrote letters approving various extra work change orders by Namasco, and approving the amounts for payment (Halloran Aff., ¶¶ 14-22). Halloran further attests that the Museum made alterations and negotiated with Namasco for additional labor and services, submitting proof of the 22 change orders involving Namasco's work for which the Museum is seeking summary judgment, and the backup documentation for such change orders (Halloran Aff., ¶¶ 24-62; Halloran Aff. Exh. H). Namasco urges that this evidence demonstrates that the Museum made direct representations to Namasco that it was assuming full responsibility for paying Namasco, and creates a genuine issue of fact precluding summary judgment dismissing

its claims for unjust enrichment and in quantum meruit.

DISCUSSION

A. Summary Judgment on Third Counterclaim

The branch of the Museum's motion seeking summary judgment on its third counterclaim against Pecker for breach of contract, is granted as to liability. The Contract required, in Section 15.2, that Pecker include in its subcontracts a contractual limitations period providing that actions or proceedings on any claim arising out of or based upon that contract "shall be commenced within one (1) year after the Substantial Completion of the Work" (Weingarten Aff., Exh. A at A-24). The Museum has demonstrated, and Pecker fails to present any evidence to the contrary, that Pecker did not include such a provision in its Subcontract with Namasco. Pecker's argument that Namasco would have simply commenced its present action sooner and, therefore, including such a provision would not have made a difference, is speculative and not persuasive. Accordingly, it has breached Section 15.2, and the Museum is entitled to summary judgment of liability on this counterclaim. As to the amount of damages suffered by the Museum, the issue can not yet be decided. One of the items of damage may well be the Museum's fees and expenses incurred in defending against Namasco's claims. These amounts can not yet be ascertained.

B. Summary Judgment and the Third Party Complaint

1. Timeliness and Law of the Case

The branch of the Museum's motion seeking dismissal of the first and part of the second cause of action of the third party complaint because they are time barred, however, is denied pursuant to the law of the case doctrine.

The purpose of the law of the case doctrine is to prevent relitigation of legal issues that

have already been determined at an earlier stage of the proceeding (Martin v City of Cohoes, 37 NY2d 162, 165 [1975]; Brownrigg v New York City Hous. Auth., 29 AD3d 721, 722 [2d Dept 2006]). The doctrine only applies to legal determinations that were necessarily resolved on the merits in a prior decision (see Thompson v Cooper, 24 AD3d 203, 205 [1st Dept 2005]; Baldasano v Bank of New York, 199 AD2d 184, 185 [1st Dept 1993]). Where a party has been afforded a full and fair opportunity to litigate an issue, a court's decision on that issue becomes the law of the case, precluding further litigation (Hass & Gottlieb v Sook Hi Lee, 11 AD3d 230, 231 [1st Dept 2004]; Shawangunk Conservancy, Inc. v Fink, 305 AD2d 902, 903 [3d Dept 2003]; Gee Tai Chong Realty Corp. v GA Insurance Co. of New York, 283 AD2d 295, 296 [1st Dept 2001]; GG Managers, Inc. v Fidata Trust Co. New York, 215 AD2d 241, 241 [1st Dept], lv dismissed 87 NY2d 896 [1995]). It applies where a court dismisses a claim on statute of limitations grounds on a prior CPLR 3211 motion, and the same limitations grounds are set forth as the basis for a summary judgment motion (GG Managers, Inc. v Fidata Trust Co. New York, 215 AD2d at 241).

The Court's May 10, 2006 decision by Justice Ramos denied the Museum's prior CPLR 3211 motion to dismiss the first and second claims of the third party complaint based on the contractual limitations period set forth in Section 1.2.3 of the Contract. That decision was not appealed. In that motion, the Museum made virtually the identical arguments made here. The Court necessarily resolved, on the merits, the issue of whether the contractual limitations period set forth in the Contract barred these claims. It is clear that the Museum was provided a full and fair opportunity to litigate this issue. Moreover, there is no significant distinctions between the relief sought by the Museum in its prior motion and the present one. Thus, that decision is law of the case requiring denial of the branch of the Museum's summary judgment motion on the first

and second claims in the third party complaint in which it similarly seeks dismissal of those claims on limitations grounds (see In re Duell, 306 AD2d 223 [1st Dept 2003]; GG Managers, Inc. v Fidata Trust Co. New York, 215 AD2d at 241).

2. Extra Work Claims

The branch of the Museum's motion seeking summary judgment dismissal of the second cause of action to the extent it seeks recovery for extra work claims is denied. First, on its argument that the second cause of action seeks the same damages sought in the first cause of action, a review of the third party complaint and Pecker's opposition papers show that the second cause of action only seeks recovery based on the claims of Pecker and its subcontractors Namasco and Glassmar for extra work they performed on the Project. It does not include Pecker's claimed balance due on the Contract of $326,361.30.

Second, the Museum's contention that this cause of action may be dismissed as a matter of law, because the extra work claims were not made in accordance with the Contract's notice requirements, is rejected. Pecker has demonstrated that there are factual issues as to whether the Museum waived the Contract provisions set forth in Sections 8.1.2 and 4.5.2, requiring written authorization or notice of claims for extra work. Where parties to an agreement demonstrate a mutual departure from that agreement, that modification can be enforced (see Barsotti's, Inc. v Consolidated Edison Co. of New York, Inc., 254 AD2d 211, 212 [1st Dept 1998]). Specifically, "oral directions to perform extra work, or the general course of conduct between the parties, may modify or eliminate contract provisions requiring written authorization or notice of claim" (id. at 212 [citation omitted]). This oral modification to a written contract, even where the contract contains a provision barring such modification, may be valid where the modification is fully

executed or where it is partially performed and the performance is unequivocally referable to the oral modification (see Garofalo Elec. Co. v New York Univ., 270 AD2d 76 [1st Dept], lv dismissed 95 NY2d 825 [2000]; see also Rose v Spa Realty Assoc., 42 NY2d 338, 343-344 [1977]; Austin v Barber, 227 AD2d 826, 828 [3d Dept 1996] [conduct of parties shows mutual departure from written contract; oral modification provision in the General Obligations Law does not apply]). Where a property owner orally directs extra work to be performed at a construction site (outside the scope of the contract), and consents to upgrades and the performance of the extra work, without requiring strict compliance with contract provisions requiring written protest, authorization or notice regarding such extra work, there may be issues as to waiver and estoppel for the trier of fact (Joseph F. Egan, Inc. v City of N.Y., 17 NY2d 90, 91 [1966] [defendant's conduct in settling all but two out of 91 claims for extra work compensation, without requiring strict compliance with contractual protest or notice provisions, raises enough evidence for the jury to decide the issues of waiver and estoppel]; Tucker v AM Sutton Assocs., 16 AD3d 670, 671 [2d Dept 2005] [project owner consented to upgrades and modifications, without requiring written authorization as provided in contract, and such consent may constitute waiver of written authorization requirement]; Brooklyn Navy Yard Cogeneration Partners, L.P. v PMNC, 277 AD2d 271, 272 [2d Dept 2000] [while agreement clearly required contractor to give notice of their intent to file the extra work claims at issue, factual issue remains as to whether owner waived requirement]; Howdy Jones Constr. Co. v Parklaw Realty, Inc., 76 AD2d 1018, 1019 [3d Dept], appeal denied 51 NY2d 836 [1980] [recovery for extra work outside contract scope recoverable even though the request was not in writing]; see also United States for Use and Benefit of Evergreen Pipeline Constr. Co. v Merritt-Meridian Constr. Corp., 95 F3d 153, 165 [2d

Cir 1996] [extra work claim allowed where extra work outside scope, orally directed, notwithstanding requirement of written authorization; there may be waiver directly or by implication]).

In moving for summary judgment, the Museum vaguely states that Pecker "routinely failed to provide the Museum with notice prior to performing additional or extra work," that it would merely provide, months later, "a summary notice" with attached invoices, and that the Museum never waived or modified the notice requirements (Weingarten Aff., ¶¶ 15-17). In response, Pecker asserts that the Museum directed it and its subcontractors to perform numerous items of extra work on the Project, beyond the scope of the Contract, and accepted the incorporation of this extra work (Pecker Aff., ¶¶ 60-67). It specifically points to a number of change order requests, including Change Orders 1, 3, 4 ,10, 11, 13-16, 19, 20, 30-33, 36 and 37, which were paid by the Museum, without the Museum's requiring compliance with the Contract's notice provisions, as evidence of the Museum's waiver of those provisions. In addition, Pecker points to other informally directed extra work claims as proof of such waiver, specifically extra work Change Order 24 (see Weingarten Aff., Exh. B, Tab 24), involving steel moment connections (Pecker Aff., ¶ 61). Elliot Pecker, Pecker's vice president, states that the Project's original plans did not call for such connections but that, during the course of the Project, the Museum's engineer issued supplemental drawings which directed Pecker to install these connections at an additional cost (id.). He further states that the Museum hired an engineering claims consultant, Greyhawk North America, to evaluate a number of Pecker's larger change orders, including moment connections at the bulkhead level and that Greyhawk found that Pecker was entitled to extra compensation for the additional moment connections (id., ¶ 63; Pecker Aff., Exh. J at 2). He gives further

examples of extra work orally directed by the Museum, such as a direction to Pecker to provide additional steel, and a direction to Namasco to truck certain steel (as opposed to using the cheaper rail shipment), for which the Museum accepted the benefits, and did not require that Pecker comply strictly with the Contract notice provisions (Pecker Aff., ¶¶ 65-67; Pecker Aff., Exhs. K-L).

This evidence, taken together, raises a triable issue as to whether the Museum orally, and sometimes in writing, directed extra work to be performed outside the scope of the Contract, and whether the parties' conduct with respect to the various extra work directed constitutes a waiver of the contractual notice requirement. Pecker has presented sufficient proof that, with respect to many change orders, the notice requirement was not adhered to by the Museum, and yet Pecker was paid for that extra work. It has also presented proof that the plans and specifications for the Project changed as the Project progressed and that the Museum acknowledged and permitted the execution of informal changes to the work. In addition, Pecker has more than partially performed the extra work. It claims it fully performed the work set forth in the change orders at issue (see Rose v Spa Realty Assoc., 42 NY2d 338, 343-344 [1977]). If an oral modification of the Contract and execution can be proven, the written notice requirement might be obviated and Pecker might be entitled to compensation for the extra work. This is an issue for the trier of fact (see Joseph F. Egan, Inc., 17 NY2d at 91; Tucker, 16 AD3d at 671; Brooklyn Navy Yard Cogeneration Partners, L.P., 277 AD2d at 272; Barsotti's, Inc., 254 AD2d at 212). This proof of oral modification, the conduct of the parties throughout the contract, and Pecker's performance, also raises triable issues as to modification of the general no waiver provision (Article 9).

The Museum's reliance on Promo-Pro Ltd. v Lehrer McGovern Bovis, Inc. (306 AD2d

221 [1st Dept], lv denied 100 NY2d 628 [2003]), is misplaced. Promo-Pro Ltd. involved a contract for a public improvement where the public agency, the New York City Housing Authority, was the owner. The contract contained a notice of claim provision, which mandated strict compliance and set forth the consequences for noncompliance. The court affirmed dismissal of the complaint for failure to comply with this provision (id. at 222). It distinguished the provision in the Barsotti's case (254 AD2d 211, supra), and, instead, relied upon other cases similarly involving construction contracts in which a public entity was a party to the contract, and which involved nearly identical contract provisions (see e.g. A.H.A. General Constr. v New York City Hous. Auth., 92 NY2d 20 [1998] [public contract, and contractor only showed past practice or conduct between the parties with respect to agreements other than the one at issue]; Morelli Masons, Inc. v Peter Scalamandre & Sons, Inc., 294 AD2d 113 [1st Dept 2002] [public contract, and no evidence of clear relinquishment of right to rely on contract provision by a mutual departure based on course of conduct or oral agreement]). The Barsotti's case distinguished the A.H.A. General Constr. v New York City Hous. Auth. (92 NY2d 20) case partly on the ground that Barsotti's involved a private, not a public contract. Similarly, the Morelli Masons case distinguished Barsotti's on the same basis (294 AD2d at 113).

The Museum's reliance on MRW Constr. Co. v City of New York (223 AD2d 473 [1st Dept], lv denied 88 NY2d 803 [1996]) is unavailing for the same reason. That case, like the others mentioned above, involved a public contract with nearly identical notice and documentation requirements (id. at 473; see also Roy C. Knapp & Sons, Inc. v County of Putnam, 212 AD2d 770, 771 [2d Dept 1995] [public contract with similar notice of claim requirements]). Thus, the branch of the Museum's motion for partial summary judgment seeking dismissal of

Pecker's claims for failure to comply with the Contract's notice requirement is denied.

3. Delay Damages

The Museum seeks dismissal of the portion of the second cause of action to the extent that it seeks delay damages. This branch of its motion is granted to the extent that Change Orders 6A, 8A, 12A, 14A, 18A, 21A, 23A, 38, 39, 40 and 42 are barred by the Contract.

Section 8.2.2 of the Contract provides:

> If the [Pecker's] performance under this Agreement is delayed for any reason not falling within ¶ 8.1.2 [any cause beyond the control of the (Museum) or (Pecker)] and not resulting from any fault or failure on the part of [Pecker], [Pecker's] sole remedies shall be (a) an extension of [Pecker's] time for performance for a period equal to period of such delay and (b) an adjustment of the Contract Price to cover the actual additional costs resulting from such delay to the extent provided in § 4.7.

Weingarten Aff., Exh. A, § 8.2.2, at A-20-21.

Section 4.7 of the Contract, entitled "Payment for Delay Changes," provides in relevant part:

> If [Pecker's] time for performance is extended under circumstances also entitling [Pecker] to an increase in the Contract Price, the amount of any additional payment shall be the sum of the increased cost of labor and materials incurred by [Pecker] as a result of the delay . . . Except as provided in this § 4.7, [Pecker] shall not be entitled to any additional compensation or damages, whether direct, indirect, consequential, incidental or otherwise, by reason of any delay.

Weingarten Aff., Exh. A, § 4.7, at A-15.

Section 4.4 of the Contract, entitled "Overtime," provides that Pecker is not entitled to "additional compensation for work performed outside normal working hours unless agreed to in writing in advance by the [Museum]" (id., § 4.4, at A-14). Section 6.2.2 also provides that Pecker

is responsible for all costs of maintaining the construction schedule, including overtime, weekends, holidays and shift work (id., § 6.2.2, at A-17).

The Museum claims that Pecker is not entitled to recover on certain change orders (Weingarten Aff., Exh. B, Change Orders 6A, 8A, 12A, 14A, 18A, 21A, 23A, 24, 38, 39, 40 and 42), because it never authorized Pecker to extend the time to perform and it never approved delay damages or overtime payments to Pecker or Namasco. It then argues with regard to Change Order 42 that Pecker is seeking "impact costs" of $310,847.50 due to the shifting of shop production schedules, and resulting lost production time and inefficiency costs. These "impact costs," the Museum argues are consequential in nature, and are not permitted under Section 4.7.

In response, Pecker argues, only with respect to Change Order 42, that these impact cost damages are more in the nature of claims for extra work rather than delay damages. It then urges that it has presented proof that these impacts to Namasco's work were not contemplated by the original design, and were the product of grossly negligent conduct of the Museum and its design team.

The Museum has demonstrated, and Pecker fails to raise a triable issue that Change Orders 6A, 8A, 12A, 14A, 18A, 21A, 23A, 38, 39 and 40 are not compensable under the Contract provisions. These change orders clearly seek recovery of overtime. Section 4.4 unambiguously prohibits recovery of overtime payments, unless agreed to by the Museum in advance and in writing. In addition, Section 6.2.2 provides that Pecker is responsible for costs of maintaining the schedule, including overtime costs. The Museum presents undisputed evidence that it did not approve these requests for overtime and, thus, they are barred by the Contract.

Change Order 42 specifically seeks "unforseen cost impacts related to schedule delays,

schedule acceleration and cumulative disruptions" (Weingarten Aff., Exh. B, Change Order 42 at 1). This change order is barred by the delay clause in Section 8.2.2. It explicitly seeks consequential damages for "production time loss costs impact," "lost production cost," as well as overtime costs. These are not the "increased cost of labor and materials" incurred by Pecker as a result of the delay (see Section 4.7 of Contract), and, thus, are not recoverable. Contrary to Pecker's argument, they are not claims for extra work, but for consequential damages resulting from delay.

Pecker's argument that even if Change Order 42 is seeking delay damages, it is not barred by that exculpatory clause because the Museum has been grossly negligent, is completely unsupported. It is well settled that "no-damage-for-delay" clauses are enforceable in New York (Corinno Civetta Constr. Corp. v City of New York, 67 NY2d 297 [1986]; Kalisch-Jarcho, Inc. v City of New York, 58 NY2d 377 [1983]). There are four exceptions to the enforcement of such clauses:

> Generally, even with such a clause, damages may be recovered for (1) delays caused by the contractee's bad faith or willful, malicious, or grossly negligent conduct, (2) uncontemplated delays, (3) delays so unreasonable that they constitute an intentional abandonment of the contract by the contractee, and (4) delays resulting from the contractee's breach of a fundamental obligation of the contract.

Corinno Civetta Constr. Corp., 67 NY2d at 309.

Pecker's summary and conclusory statement that the delay damages sought in Change Order 42 were impacts not contemplated in the original design documents and were the product of the Museum's grossly negligent conduct, fails to raise a genuine issue of material fact. Although an exculpatory clause will not exonerate a party from its acts of gross negligence, a determination

of gross negligence requires a finding of something more than active interference, i.e., willfulness, maliciousness, or bad faith (see Kalisch-Jarcho, Inc., 58 NY2d 377). Pecker has failed to provide any evidence demonstrating the Museum's alleged gross negligence. Similarly, its claim that the impacts to Namasco's work on the Project specifically sought in Change Order 42 were not contemplated is not supported with any evidence.

Change Order 24

With regard to Change Order 24, the only remaining change order challenged by the Museum in this branch of its motion, however, the Museum has failed to demonstrate that the damages sought are barred by the delay damages provisions. This change order seeks payment for a one week schedule addition to the project schedule and additional materials, labor and detailing costs. It states that these costs were incurred because of the addition of 45 moment connections at the bulkhead "per reaction drawings from engineer and beam size changes per revised CAD file B105s" (Weingarten Aff., Exh. B, Tab 24). Unlike the other change orders discussed above, this change order does not seek overtime charges or consequential damages. It seeks additional labor and materials costs as permitted under Sections 8.2.2 and 4.7 of the Contract. Thus, it is not barred by these provisions in the Contract, and the Museum has failed to provide a basis to dismiss the claim as to Change Order 24.

Other Change Orders

Finally, the Museum summarily challenges a number of change orders (2, 6, 7, 8, 9, 12, 14,18, 21, 23, 24, 35, 41 and 43) for failing to meet the documentation requirement in Section 8.1.2. It asserts that the documentation must contain a detailed statement of the claim, quantifying the specific dollar amount and the precise basis of the claim. This challenge is rejected. The

Museum has failed to make a prima facie showing of its entitlement to dismissal as a matter of law. It appears that many of the change orders do set forth the statement of claim, its basis and the estimated dollar amount. Whether the underlying documentation was sufficient for determining the necessity and propriety of the charges cannot be determined on these papers.

Accordingly, the second cause of action is dismissed to the extent that it seeks recovery for Change Orders 6A, 8A, 12A, 14A, 18A, 21A, 23A, 38, 39, 40 and 42. The motion to dismiss is otherwise denied.

C. Summary Judgment on Complaint

The final branch of the Museum's motion seeks summary judgment dismissing Namasco's Complaint against the Museum for unjust enrichment and quantum meruit. It argues that, as a property owner which contracts with a general contractor, it is not liable to Namasco, a subcontractor, on a quasi-contract theory, unless the Museum expressly consented to pay for Namasco's performance. The Museum contends that even if Namasco has a valid contract with Pecker covering compensation for extra work, there is no contract between Namasco and the Museum, and Namasco cannot demonstrate that the Museum expressly agreed to pay for the extra work Namasco is seeking to recover in the Complaint. In addition, it argues that the furnishing, fabricating and delivery of steel by Namasco was for the benefit of Pecker, which was responsible for the completion of the steel work on the Project, not for the Museum, and that the Museum never expressly requested the benefit of Namasco's performance.

In opposition, Namasco contends that the evidence it submits shows that the Museum expressly consented to pay for Namasco's performance, or, at the least, there are triable issues as to whether it so consented, or whether the circumstances give rise to an obligation on the

Museum's part to pay for Namasco's performance. It urges that the cases relied upon by the Museum are distinguishable because, here, it can demonstrate that it performed the extra work at the direction of the Museum's agent and/or as a result of the Museum's acts or omissions, and that the Museum expressed a willingness to pay Namasco for such work.

This branch of the Museum's motion is denied. Quantum meruit and unjust enrichment are quasi-contract claims. A quasi-contract is an obligation implied by law to prevent the unjust enrichment of one party, and to permit the other party to be compensated in the interest of equity. To recover in quantum meruit, a plaintiff must show (1) that it performed services in good faith, (2) that the defendant accepted the services, (3) that plaintiff expected to be compensated for such services and (4) the reasonable value of the services (see Sergeants Benevolent Assn. Annuity Fund v Renck, 19 AD3d 107, 111-12 [1st Dept 2005]; Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp., 296 AD2d 103, 108 [1st Dept 2002]; Martin H. Bauman Assocs., Inc. v H & M Intern. Transport, Inc., 171 AD2d 479, 483-84 [1st Dept 1991]). The services must be performed at the behest of the defendant, and it is not enough that the defendant received a benefit from the plaintiff's activities (Joan Hansen & Co., 296 AD2d at 108). The existence of a valid and enforceable written contract covering the same matter precludes recovery for unjust enrichment, unless the claim is predicated on conduct not covered by the contract (Sergeants Benevolent Assn. Annuity Fund, 19 AD3d at 112). Thus, "recovery in quasi-contract outside the existing contract may be had if a party has rendered additional services upon extra-contractual representations by the other party" (U.S. East Telecomm., Inc. v U.S. West Communications Servs., Inc., 38 F3d 1289, 1297 [2d Cir 1994]).

Generally, where there is an express contract between a contractor and a subcontractor, the

subcontractor cannot recover in quasi-contract against the owner, for work performed in furtherance of the subcontract, because they are not in privity and the subcontractor has a contract with the general contractor for such work. "The theory is that the additional services performed by the subcontractor under change orders are for the benefit of the general contractor who is responsible for the completion of the improvement, not for the benefit of the owner" (Schuler-Haas Elec. Corp. v Wager Constr. Corp., 57 AD2d at 707, 708 [4th Dept 1977]). A subcontractor, however, can sustain such a claim where it can show that the owner has expressly assented to pay for the subcontractor's performance or there are circumstances giving rise to such an obligation (see Perma Pave Contracting Corp. v Paerdegat Boat and Racquet Club, Inc., 156 AD2d 550, 551 [2d Dept 1989]; Westinghouse Elec. Supply Co. v R.P. Brosseau and Co., 156 AD2d 851, 853 [3d Dept 1989]; see also M. Paladino, Inc. v Flintlock Constr. Servs., LLC, 15 Misc 3d 127(A) [App Term 1st Dept 2007]). The inquiry is whether the owner has acted in such a way as to incur obligations to the subcontractor outside the contractual structure (U.S. East Telecomm., Inc., 38 F3d at 1297). The subcontractor must show more than the mere consent to and acceptance of the improvements placed on the owner's property by the subcontractor (Perma Pave Contracting Corp., 156 AD2d at 551; see also Amana Elevation Corp. v Ydrohoos-Aquarius, Inc., 664 NYS2d 88, 89 [2d Dept 1997], lv denied 91 NY2d 806 [1998]). It must present evidence in opposing summary judgment that, at the least, raises a triable issue as to whether the owner was willing to pay the subcontractor for the additional work, and assented to such obligation, either expressly or based on the circumstances (see e.g. Westinghouse Elec. Supply Co.,156 AD2d at 853 (summary judgment denied; triable issue raised as to whether property owner assented to payment of general contractor's debt to subcontractor).

Viewing the proof in the light most favorable to Namasco, the party opposing summary judgment, triable issues of fact are raised. Namasco has presented evidence of its direct communications with the Museum in weekly conference calls (Halloran Aff., Exhs. A- B), in which the Museum expressly and impliedly directed Namasco to make various changes in the Project which resulted in the change orders for which it seeks recovery. Kevin Halloran, Namasco's senior project manager for the Project, attested, based on his personal knowledge, that the Museum "expressly and impliedly directed [Namasco] to perform the additional detailing work and that [Namasco] would be paid for said work" (Halloran Aff., ¶ 27). He affirmed that all the detailing extras set forth in the change orders (Halloran Aff., Exh H) were required and requested , in many instances directly by the Museum, in order to accelerate the Project schedule, and the change orders included the additional time needed due to changes and additions made to the shop drawings by the Museum (Halloran Aff., ¶ 29). Hallloran states that the construction contracts required that all steel work and drawings comply with the American Institute of Steel Construction Code of Standard Practice (AISC), but that the Museum's structural drawings did not in a number of respects, requiring additional time to correct, complete and review (see Halloran Aff., Exh. J). Halloran asserts that Namasco informed the Museum of this, which then directed Namasco to do what was necessary to procure the proper drawings, incurring time delays and additional costs (Halloran Aff., ¶¶ 30-38). He states that this type of change and additional work persisted throughout the project (Halloran Aff., ¶ 39; id., Exh. J). Halloran further states that changes by the Museum with regard to shipping methods for the steel were made directly by the Museum to Namasco, and that the Museum represented that "it would pay [Namasco] for said costs" (Halloran Aff., ¶ 47). With regard to extra materials, Halloran states that "[a]ll requests for

extra materials set forth in [Change Orders 2, 7, 24, 35, and 41] were made directly by the Museum to [Namasco]" (id., ¶ 49), and that Namasco was directed to move forward with this additional work, and did so based on the reliance that the Museum would compensate it for this work (id., ¶ 54). Again, Halloran asserts that Namasco's actions "were based on requests made directly by the Museum, and the Museum's assurances, both express, and implied that [Namasco] would be paid for all said costs" (id., 62).

The representations set forth in Halloran's affidavit, that Namasco "would get paid" for the extra costs and work, are ambiguous and this ambiguity gives rise, at the least, to the possibility of an undertaking by the Museum to pay Namasco directly (see Westinghouse Elec. Supply Co., 156 AD2d at 853; U.S. East Telecomm., Inc., 38 F3d at 1299 [owner's promise to subcontractor that it would "get paid" was in the nature of a guaranty of the contractor's debt to the subcontractor, and it was reasonable for jury to conclude that subcontractor completed job in reliance at least in part, on owner's promise that it would get paid, and thus equity required that owner pay subcontractor for reasonable value of services]). The evidence of the continuous direct communications between the Museum and Namasco regarding the changes required to move the Project forward supports Namasco's assertions that the Museum incurred an obligation to pay for Namasco's performance of this extra work (cf. Perma Pave Contracting Corp., 156 AD2d at 551 [no evidence of direct dealings between owner and subcontractor, and no evidence that owner expressed a willingness to pay subcontractor]).

Contrary to the Museum's contention the Museum's reliance on the Perma Pave Contracting Corp. (156 AD2d 550) and the Mariacher Contracting Co. v Kirst Constr., Inc. (187 AD2d 986 [4th Dept 1992]) cases is unavailing as those cases are distinguishable on their facts. In

Perma Pave Contracting Corp., the court specifically found that there was no evidence that the owner expressed a willingness to pay the subcontractor for the work at issue. In fact, the court found that the owner and subcontractor had no direct dealings at all (156 AD2d at 551). Here, in contrast, Namasco has presented evidence that it had direct dealings with the owner through weekly conference calls from January 18, 2002 through July 22, 2202 in which they both participated and in which Namasco asserts that the Museum expanded Namasco's scope of work and expedited administration of the Project (Halloran Aff., Exh. A; Abraham Aff., Exh. J, Compl. ¶ 57). It further presents an e-mail from Namasco to the Museum's project manager regarding the status of the Project, and other direct communications regarding the scope of the work, how quickly it needed to be done and additional work required by revised shop drawings (see Halloran Aff., ¶¶ 24-54) to support its claim. In addition, as discussed above, Halloran attests that the Museum expressly and impliedly directed Namasco to perform the additional steel detailing work, and that the Museum represented that it would pay for the extra costs for the extra work it was directing Namasco to do (Halloran Aff., ¶¶ 27, 35, 38, 45-47, 57, 62, 68).

Similarly, in the Mariacher Contracting Co. case, the subcontractor admitted at trial that the owner never responded to the subcontractor's demands for payment for its additional work, and that if the owner wanted additional work it requested its contractor to do the work, who would then request the subcontractor to do the work (Mariacher Contracting Co., 187 AD2d at 987). The record also established that the subcontractor's requests for payment were made to the contractor, not the owner (id.). Here, again, there is proof of the Museum's direct communications with Namasco, as well as its payment on some of Namasco's extra work orders, which raise triable issues of fact and make this matter factually distinguishable from the

Mariacher Contracting Co. case. Accordingly, summary judgment dismissing Namasco's Complaint as against the Museum is denied.

D. Cross Motion for Partial Summary Judgment

The cross motion for partial summary judgment on the first claim in the third party complaint is denied.

Pecker's cross motion for partial summary judgment seeks judgment in the amount of the final payment due on its Contract with the Museum. It contends that it has completed its work on the Project and is entitled to the Contract balance of $326,361.00.

In opposition, the Museum contends that correspondence between the parties raises factual issues with regard to Pecker's entitlement to payment. It asserts that Pecker failed to complete its work by July 31, 2002, as required in the Contract. Instead, the work was not completed until the Spring of 2003. It contends that Section 7.3 of the Contract, entitled "Owner's Right to Withhold Payments," provides that it may withhold payments from the contract price to mitigate its damages caused by Pecker's delays. It contends that it suffered over $529,971.00 in costs as a result of late, faulty or missing work. It asserts that correspondence from Ms. Weingarten, one of the Museum's project managers, to Pecker, dated June 13, 2003 (Weingarten Aff. in Further Support, Exh. A), supports its assertion of Pecker's delays, and raise a triable issue on Pecker's claim.

In response, Pecker claims that the Museum's consultant, Stier Anderson, LLC, which was retained to evaluate delay issues, concluded that the steel erection was not on the critical path for the Project and that delays to the steel did not contribute to any delay in the overall completion of the Project. It further asserts that various Museum Building Committee Meeting minutes contain

admissions by the Museum that Pecker should be paid its Contract balance.

The cross motion is denied. The Contract provides in part, in Section 7.3, that the Museum may withhold from any payment due Pecker backcharges incurred by the Museum in accordance with Section 2.21.1 (under which, if Pecker fails to fulfill a contract obligation, the Museum, after 48 hours written notice, may carry out those obligations, directly or through others, and charge the cost to Pecker), as well as amounts necessary to secure performance of the work in accordance with the Contract, if the Museum reasonably determines that Pecker has delayed the progress of the work or the Project (Weingarten 3/26/07 Aff., Exh. A, Contract § 7.3 [c], at A-19). Under the Contract, Pecker's work was to be substantially completed by July 31, 2002, but was not actually completed until the spring of 2003 (Weingarten Aff. in Further Support, ¶ 11). Thus, it is undisputed that the work was not completed within the time required by the Contract. While Pecker has presented some evidence that it did not delay the Project, through the submission of the portion of the Stier Anderson report in which Stier Anderson noted that the steel delay did not delay the overall Project, the Museum has presented conflicting proof, raising a triable issue. Ms. Weingarten's letter, as well as her affidavit in opposition, affirms that Pecker's delays delayed the commencement of other trade work, including the concrete and exterior enclosure of the Project (Weingarten Aff. in Further Support., ¶ 11; id., Exh. A). According to Ms. Weingarten, in order to keep the trade work going and to avoid any further delays, the Museum purchased temporary heat and protection to allow the other trades to do their work, originally scheduled for late summer and fall, during the winter (id., ¶¶ 12-14). She attests that the Museum paid approximately $529,971 for the temporary heat and protection (id., ¶¶ 12, 15; see also id., Exh. A). Ms. Weingarten submits her letter of June 13, 2003 to Pecker in which she states that the "F.J. Sciame

[Construction Co., the Museum's manager for the Project] schedules . . . show how the late delivery of steel pushed the weather sensitive trades into the winter months and made it necessary to buy temporary heat and enclosures that otherwise would not have been required" (Weingarten Aff. in Further Support, Exh. A at 1). In response to Pecker's offer of the Stier Anderson report, Ms. Weingarten also quoted a portion of that report in which Stier acknowledged that both Pecker and another contractor shared responsibility for the delay in pouring the slab concrete, and were back charged for the cost of temporary heat (Weingarten Aff. in Further Support, ¶ 21). This proof raises issues of material facts regarding Pecker's entitlement to payment on the Contract balance. Contrary to Pecker's contentions, the Museum's Building Committee Minutes are not admissions, but appear to evidence discussions to set aside and budget certain amounts for potential claims by Pecker, and settlement offers (Pecker Aff., Exhs. D - E). Thus, partial summary judgment is denied to Pecker on its first cause of action in its third party complaint for the Contract balance of $326,361.00.

In sum, summary judgment of liability is granted to the Museum on its counterclaim against Pecker for breach of Contract § 15.2, and summary judgment is granted to the Museum dismissing the second cause of action to the extent that it seeks delay damages and overtime in Change Orders 6A, 8A, 12A, 14A, 18A, 21A, 23A, 38-40 and 42. Summary judgment is denied to the Museum (1) as to the first and part of the second cause of action on statute of limitations grounds; (2) on the second cause of action for recovery for extra work; and (3) as to the Namasco complaint as asserted against the Museum. The cross motion for partial summary judgment is denied.

Accordingly, it is

ORDERED that the motion for summary judgment is granted (1) to the extent of granting partial summary judgment of liability in favor of third party defendant the Museum and against third party plaintiff Pecker Iron Works, Inc. on the Museum's third counterclaim for breach of Contract § 15.2, and the amount of the damages shall be determined at the trial herein; and (2) to the extent of dismissing the second cause of action of the third party complaint as to Change Orders 6A, 8A, 12A, 14A, 18A, 21A, 23A, 38, 39, 40 and 42, and is otherwise denied; and it is further

ORDERED that the cross motion for partial summary judgment is denied; and it is further

ORDERED that the action shall continue as to the remaining claims.

Dated: June 19, 2007

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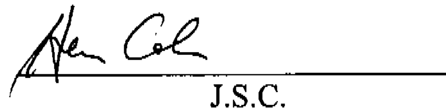

J.S.C.

FILED

JUN 21 2007

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