

EMCO Tech Constr. Corp. v Pilavas

2008 NY Slip Op 31022(U)

April 1, 2008

Supreme Court, Nassau County

Docket Number: 7967-05/

Judge: Ira B. Warshawsky

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MEMORANDUMSUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

EMCO TECH CONSTRUCTION CORP.,

Plaintiff,

INDEX NO.: 017967/2005

-against-

ANTHONY PILAVAS, ANTHONY PILAVAS, M.D.,
OLYMPUS 555 PROPERTIES, LLC,
ZEUS 31 REALTY, LLC, DELPHI REALTY, LLC,
STONEYTOWN DEVELOPMENT, LLC,Defendants.DECISION AFTER TRIAL

Plaintiff, EMCO Tech Construction Corp. ("EMCO"), a building contractor, brought this action against Anthony Pilavas, Anthony Pilavas, M.D., Olympus 555 Properties, LLC, Zeus 31 Realty, LLC, Delphi Realty, LLC and Stonetown Development, LLC for the breach of a construction contract. Dr. Pilavas is the owner of the diverse LLCs. Stonetown Development, one of his LLCs, owns the land upon which the house was built and Mrs. Pilavas is a member of that LLC. The court will refer to all the defendants as "Pilavas" except where and when necessary to be more specific.

Sophocles, one of the great play writes of ancient Greece, wrote in Oedipus Rex that "everything will be made clear with time." Regretfully, in this trial, such clarity was never quite achieved.

The following findings relate to much of the testimony of both Dr. Pilavas and Mr. Michelakis (the owner of EMCO), as well as to documents that pre-date the contract and Rider

(April 3, 2003) and to the testimony of a variety of architects and multiple contractors called by both sides. Dr. Pilavas dealt with architects and builders, but had an aversion to signing contracts. Defendant claims never to have signed the contract or Rider, while plaintiff says defendant signed it and then removed the signed copy from his office. A detailed contract (Exhibits 2 and P), a Rider, (Exhibits 3 and R), (the parties frequently produced the same exhibits, the plaintiff's exhibits are numbered while the defendant's are lettered), and a set of drawings by an architect, Barbieri (Exhibits 34 and B), which described a colonial or Greek revival home, make up the contract. It is a contract for the construction of a home costing over 1.18 million dollars which became 1.514 million dollars after amendment (oral) and Change Orders/Construction Change Directives of which \$754,000 has been paid on the total.

At times the defendant chooses to modify the contract by other documents that pre-date the contract, or by his rendition of conversations between himself and Mr. Michelakis, and by a set of drawings by architect Antonio Leo from May 2003, and plans approved by the Village of Plandome Manor from September 2003 (Exhibit 35). At other times he chooses to adhere to the terms of the contract (i.e. plaintiff's promised completion date) when it serves his needs and neither plaintiff nor defendant can have it both ways. The court finds the contract consists of Exhibits 2 and 3 and the drawings of Barbieri (Exhibit 34). The work was modified by considering other documents as well (Exhibit 35), and the foundation was poured for a house other than the one that the contract and original plans described. The plans of architect Antonio Leo were not approved by the Plandome Manor Planning Board until September 2003, though created and apparently followed long before that date.

The plaintiff argues that the contract (Exhibit 2) should be controlling, though not signed by defendant (no signed copy produced) (not including the 300 day completion clause). Yet, the change orders upon which a large part of the claim is based were not submitted to defendant until December 2004, two months before plaintiff left or was terminated from the job. These Change Orders/Construction Change Directives do not comply with the requirements of the AIA contract (Exhibit 2), but the AIA contract was not signed by the defendant. Defendant, on the other hand, apparently argues that the Leo plans (Exhibit 35) which were not completed or approved until after April 3, 2003 (approval date, September 2003) should be controlling on

plaintiff without additional cost to defendant.

HISTORY OF CONSTRUCTION

The defendant purchased the 7.8 acres of land on which the house was built for cash - \$700,000 in September 2002. It was purchased in the name of Stonetown Development, LLC. The defendant was his own general contractor. In 2000 he hired an architect, Anthony Barbieri, to draw plans (Exhibit 34) for his home of approximately 5,500 square feet which was two years before he owned the land. The plans called for a traditional brick veneer for a colonial style home. Where the land was surveyed and staked out it was according to the Barbieri plans. He also hired the original excavator, Mega Structures, to excavate the foundation. Dr. Pilavas contacted the plaintiff, who was a patient of his ophthalmology practice, and provided him with various sets of drawings in early 2003. His discussion about cost included saving money by eliminating middlemen and buying materials directly from manufacturers.

It appears that the plaintiff bid on the set of drawings known as Exhibit B (dated December 28, 2001). Exhibit 34 resembles B, but has a four car, rather than a three car garage. The homes described in Exhibits 36 and 38 are larger. Plaintiff used Exhibit B to create a "take off" list (part of Exhibit J) (a document he denies giving to defendant, but which defendant took from his office). He then invoiced for a larger home - one that is larger than the plans in Exhibit 34, but not Exhibit 36 or Exhibit 38. The contract provided expanded footings, extra concrete so that the foundation would support a bigger house including a tile roof instead of shingles, and extra steel for a stronger foundation. This also allowed for, but allegedly did not include, substitution of a concrete masonry block (CMU) instead of wood framing, and stucco instead of a brick veneer. These three contingencies were apparently subject to Pilavas making a decision on changes and Plandome Manor's Board of Planning and Review approving the changes.

The original contract (Am. Inst. of Architects (AIA) form contract) is dated March 31, 2003 (Exhibit 2) (colonial style), the Rider (Exhibit 3) is dated April 4, 2003. There is an intervening document, Exhibit J, prepared partially by plaintiff, but mostly by the defendant, which defendant argues is what was supposed to be built for the price in the contract, which he never signed. None of plaintiff's documents, the contract (Exhibit 2) or the Rider (Exhibit 3), were signed by defendant and no document was presented to the court containing both their

signatures. Plaintiff argues there was a signed agreement which defendant took from plaintiff's office. The contract called for a down payment of \$177,000. It was never paid. Plaintiff testified he trusted defendant to pay when defendant sold his existing house, the one he was living in when the construction started.

Despite the fact that plaintiff did not have a signed contract nor did he have a down payment, he started work on May 3, 2003. Pilavas made payments, usually in \$50,000 sums, from various sources (corporate entities, his medical practice) and cash, a methodology which immediately made funding the project difficult (Exhibit 54). Work was allegedly stopped in September 2003 by the local building inspector, apparently because the construction did not fit the approved plans. However there was no "stop work" order. The evidence produced at trial reflected an ongoing problem with the Village of Plandome Manor's Design and Review Board, the local building inspector and the plans presented by the defendant to the board. There were multiple hearings even into 2007 on various issues. The work restarted sometime later.

No architect or engineer supervised the construction on behalf of defendant as one would have expected under an AIA contract, but the defendant, Dr. Pilavas, visited the site at least three times a week. Plaintiff had a supervisor on site.

Besides contending that the work which was done was not done competently, defendant argued at trial about the poor quality of the windows, which were ordered from Greece where the plaintiff and defendant met to look at and buy the windows, and the fact that they came without a "thermal break."

In November 2004 Pilavas and Michelakis met and "discussed" the progress to date. Shortly thereafter, plaintiff presented defendant with nine Change Orders covering work done, or allegedly done, in some cases over a year and a half earlier. Payments that had been made had been applied, so argues defendant, to work that had never been done. For example, a spreadsheet reflecting the work to be done and percent completed of each area indicated 80% of the plumbing was completed and paid for, but defendant argued only 20% was completed. In February 2005 there was an exchange of letters resulting in defendant terminating plaintiff as of February 23, 2005 (Exhibit 4, 5 and 7). EMCO terminated their relationship with defendant as of March 1, 2005 via a letter of February 28, 2005 (Exhibit 8).

Dr. Pilavas has argued that it is costing and will cost him 1.378 million dollars to finish the job, but that will not bring it up to "par." That will be 2.265 million dollars. He points out that he needs to renew his permit to finish the job and the contract (which he did not sign) called for the job to be completed in three hundred days. He also argues that he still lives in a home (in the school district where he wants his children to attend) and is paying real estate taxes on the home he still cannot live in.

Plaintiff believes he was terminated because defendant realized he was not going to get a Certificate of Occupancy from the Village so why bother to pay him to continue to work on the project. As noted previously, plaintiff argues there was a signed contract which defendant took from plaintiff's office along with plaintiff's "take off" sheets (pricing sheets). They were produced at the examination before trial by defendant (Exhibit 19), but were not produced as part of a document demand.

Mr. Michelakis, along with Dr. Pilavas, made a presentation to the Plandome Board of Review (May 15, 2003, Exhibit 22). He gave the Board drawings for two buildings - Exhibit 36, Mediterranean style with brick veneer and Exhibit 38, Mediterranean style with stucco. He referred to the Greek Revival design of Barbieri, as a "square thing." He purposefully poured a foundation to accommodate a wood frame, brick veneer or cinder block home. He recommended Antonio Leo to defendant to redesign the house prior to the contract date of March 31, 2003. Exhibit J, the "take off" could be used for a wood frame or masonry house. As previously noted, plaintiff completed the left side of the page; defendant, Pilavas, filled out the numbers on the right side on his own. Dr. Pilavas testified that the Board wanted plans for these designs. He argued they had the plans from February 27, 2003. The plans representing the stucco house as depicted in Exhibits 38 and 39 were not approved until September 15, 2003 as per Exhibit 35 a/k/a the Leo plans. The plans which the Building Inspector, Anthony Padula, approved on February 27, 2003, were not plans for the structure Michelakis and Pilavas presented to the Plandome Board of Review on May 15, 2003. Not having plans that matched the house that was being built as of May 2003 caused continuous consternation to our builder and Dr. Pilavas.

When plaintiff initially created the contract on the house, he provided an Option A in a letter (Exhibit 1) dated February 24, 2003 to Pilavas. This option was presented before the

drawings of Antonio Leo were created and shortly before Plandome approved the plans (Exhibit M, February 27, 2003). Elements of Option A were discussed with Pilavas.

Pilavas argues that the AIA contract (Exhibit 2 and Exhibit P) contained a clause (2.3) that construction was to be completed three hundred days from commencement. That would occur at the end of February 2004, not counting work stoppages due to Plandome's directions or requests. In a letter from the Village, Exhibit UU, they deny issuing a stop work order. However, the Board Minutes of May 15, 2003 reflect work was stopped until issue was clarified (see Transcript, Exhibit 22, p. 19). Dr. Pilavas has claimed Exhibit Q/Exhibit 19 was part of his agreement/contract with plaintiff, a handwritten document which bears the same date as the Rider (Exhibit 3). Michelakis denies ever seeing this list created by Dr. Pilavas before the litigation began. Plaintiff denies that the enlarged footings were part of the 1.18 million dollar contract, while defendant contends it was.

Plaintiff argues you could not build the concrete masonry unit (CMU) house for 1.18 million dollars. It needed the enlarged footing, which plaintiff did build, but he contends were not part of the 1.18 million dollar price. He put them in a Change Order in December 2004, eighteen months after it was completed.

Rider A (Exhibit 3) contained allowances and exclusions as well as scope of work. Michelakis stated he had allowed \$49,000 for windows, but it is not in Rider A. It is listed in the cost breakdown as part of the contract (Exhibit 2).

Dr. Pilavas met with Antonio Leo in late March 2003. Leo faxed a proposal to Pilavas dated March 25, 2003. Pilavas paid him \$10,000 on April 27, 2003 to prepare a modified design for his home. Pilavas actually signed an agreement dated April 12, 2003. Leo agreed to redesign the exterior and interior layouts (see Exhibit O).

Pilavas again met with Michelakis while, allegedly, physically holding Exhibit J (take off sheet). He then prepared Exhibit K. Michelakis told him for \$1,260,000 he would build either the brick or CMU house. Michelakis sent him the option letter (Exhibit 1). Option A included a tile roof with CMU. This was really reflective of the Mediterranean style house for which Antonio Leo eventually prepared plans and designs at a later date.

Pilavas agreed he was familiar with the AIA contract, but he says he never signed it, nor

did plaintiff. Plaintiff's initials appear on all pages of the contract and it is signed by him. Pilavas did not like the idea of work starting after he gave a deposit (apparently he expected work to start without a deposit and then he would make payments). The issue of a "pre-work" deposit did not concern him when dealing with Antonio Leo in April 2003.

The defendant identified Exhibit Q as the list he created of things he **believed** had been left out of the contract and Rider, but which he also contended was part of the "contract.". The plaintiff referred to it as defendant's "wish list." It is handwritten. It bears the date of April 4, 2003, but Michelakis denies having seen it until this litigation. Rider A (Exhibit R and Exhibit 3) was prepared to reflect allowances and exclusions on the project not otherwise shown in Exhibit 2.

The Change Orders, or at least most of them, reflect work that had to be done pursuant to the Leo design changes, not merely changes to the Barbieri drawings for external changes, i.e. frame to brick or frame to stucco.

Angelo Francis Corva testified for the defense. He was hired by Dr. Pilavas in November 2005. Mr. Corva is a licensed architect who has designed custom homes, theatres, hospitals and other major buildings. He has chaired the Town of Hempstead Landmark Preservation Committee. He is a former member of the Board of Appeals of Plandome Manor. In fact, Dr. Pilavas appeared before him on an appeal relating to this house prior to his being retained by Pilavas. The court will refer to his testimony and conclusions in the balance of the decision.

He was retained to work out the building permit problem and analyze conditions on the site, to determine what was incorrectly done and, then, assist the new contractor in working on the premises.

Thomas Ciancarelli was EMCO's Project Manager. He is no longer employed by EMCO.

Al Gelsomino, is or was, a Vice-President of EMCO. Both these men testified on behalf of EMCO along with Michelakis, President of EMCO.

COMMENTARY ON PLANS

Exhibit M, dated September 15, 2000, revised and dated February 27, 2003, contains nine

drawings. "M" is stamped approved by Plandome Manor Building Department, February 27, 2003, "A. Padula."

Exhibit 34 is fourteen drawings with the original date September 15, 2000, revised date September 11, 2001 (see Board of Review Minutes, May 15, 2003), showing a four-car garage (Exhibit 34) (and a tennis court). These were the "bid" set.

Rider A was based on the Barbieri plans with a four-car garage. Apparently the plans with a four-car garage were not those originally approved by the Village. See Exhibit 22, Board of Review Minutes, p. 9. The application for the Building Permit (dated December 28, 2001, Exhibit C) reflects a wood frame house and a masonry veneer (based on Exhibit B). Exhibits 36 and 38 are drawings of what the Leo house would look like. Exhibit 35 is the set of plans by Antonio Leo approved by Plandome in September 2003. More specifically, it contains the Barbieri plans dated August 1, 2001 with revisions of June 6, 2003, July 30, 2003, September 19, 2003, October 27, 2003 and May 6, 2004 (these date modifications are reflected on the face of the plans). It also contains Antonio Leo's drawings of May 31, 2003, A-1 to A-8, additional Leo drawings A-7, 7.1 and 7.2 dated May 6, 2004. Pilavas contends that the plans from September 2003 were to be covered by the contract price of April 2003. Frequently during trial witnesses would leaf through various sets of plans trying to locate the one they believed referred to their specific testimony. The testimony referencing the plans reflected confusion of the witnesses and was, at times, confusing to the attorneys, the litigants and the court.

Exhibit M is a set of working drawings (site plans with views of the house "elevation"). These were approved by Plandome Manor; by Anthony Padula, the Building Inspector, dated February 27, 2003. Exhibit A-27 another set of plans also known as the "stick" plans, were used on the construction site. They also bear the stamp of approval by Padula from February 27, 2003.

REVIEW OF CHANGE ORDERS

All Change Orders are dated December 14, 2004. They are called "additional cost proposals" by plaintiff and are also referred to as Construction Change Directives. The Change Orders, the formal documents, were created when EMCO believed they were going to be thrown off the job (formally occurred in late February 2005). Testimony was received as to the efficacy

of the Change Orders from Tom Ciancarelli, EMCO's project manager on this job from start to finish. Michelakis also was examined as to the Change Orders as were the defendant, Pilavas, and Angelo Corva (defendant's new architect). The AIA contract (Exhibit 2) provided a format for the submission of Change Orders. It was not followed. The plaintiff argues that all changes were made and work was done at the direction of or approval by the defendant. Pilavas has argued that if the contract is found to be in effect, despite his not having signed it, then all Change Orders are invalid. He argues that even if the Change Orders are found to be viable claims, the amounts claimed are, at a minimum, incorrect and the work done (if it was done) should have either been subsumed in the AIA contract price or covered by exclusions. Mr. Corva said that adding "overhead and profit" to a Change Order was not part of the AIA contract. However, overhead and profit may be added to Construction Change Directives (Exhibit 2, para. 12.2) The Change Orders/Construction Change Directives are found in defendant's Exhibit W as well as in plaintiff's numbered exhibits.

Change Order #1

This claim refers to the construction of a room below the garage. It is seen in Exhibit 34 and Exhibit 35. The work was done during the summer of 2003. The original plans did not show this area under the garage. The claim is for \$54,836. The room was created at the request of Dr. Pilavas who wanted a "safe room" in case of home invasion. It required additional excavation, as well as steel support. There was a problem that the dry wall construction was becoming damp. They determined a hole in the concrete slab was causing the dampness and it was plugged.

Pilavas does not deny requesting the construction of the safe room (he called it a storage room) under the garage. However, he was told it would cost him "next to nothing" to complete it since some of the work was already done.

Dr. Pilavas argues there was supposed to be waterproofing accomplished by installing "ridged" boards at foundation level and channeling water away from the house. Gravel was to be filled in against the ridged boards, but he says it was never done. No witness testified to confirming this one way or another.

Dr. Pilavas believed that \$11,000 of this Change Order should be allowed (this offer was

only made at time of trial). More specifically, he argued that the \$8,500 for excavation found in Exhibit 2 should have covered the room (under the garage). He believed the cubic yard price of \$400 per cubic yard was too high, but it did include rebar. He says his calculations would indicate a \$175 cubic yard price. He also pointed out that he never got a ceiling or a new entrance door for this area. As to this area and all other Change Orders, to add O&P (Overhead and Profit) was absurd.

Change Order #2

Additional work due to redesign of house. This work was allegedly caused by the redesign of the house as were Change Orders #3, #4, #5 and #7, or more specifically, the amended contract drawings of Antonio Leo. Number 2 refers to the patio area by the Gazebo (N.W. corner of site). It is seen in Exhibit 34, drawing 6 of 14. Right side elevation facing south. See also drawing in Exhibit 34A, 2 of 14. The drawing reflects the original plan, then how it was changed. The amount claimed is \$58,489 consisting of additional excavation, reinforced concrete, structural steel, new exterior stairs and additional tile and stone work. Mr. Angelo Corva (defendant's expert witness architect who also worked for defendant) testified that he could not evaluate this work based on what he saw, nor did he know what the "patio" area was supposed to be. Pilavas did not accompany him on his walk through of the site.

Dr. Pilavas does not really argue that this work was related to a change of design of the house (see items #1 and #2 in Change Order #2). What he objected to was the price. Once again he points to the concrete at \$400 a cubic yard, which he says should be \$175 a cubic yard. In total, he would be willing to allow \$8,000 for the work done on the Change Order. This offer was not made until the trial.

Change Order #3

This Change Order refers to the need for additional concrete and rebar because larger footings were needed to support heavier walls. It is reflected in Exhibit 35, the "as built" set of drawings - 60-40 split on labor and materials. The amount of the claim is \$32,947.50. Mr. Corva could not give an opinion as to this Change Order because it was not sufficiently explanatory for him.

Dr. Pilavas agreed the footing would have to be bigger for the design with the tile roof

house. But, he argues, enlarged footings were covered in the original contract price. The footings were to be made bigger to cover the possible need for stronger support. He does not recall agreeing to pay for extra foundation work. He points to Exhibit 1 - Option A in the letter, that called for the bigger footings. He argues that the \$95,000 listed in the cost breakdown covers the \$32,947 in Change Order #3. He will pay nothing on Change Order #3. Once again, however, it must be pointed out that Option A is not the contract. Michelakis argued that the \$95,000 did not cover the enlarged footings, but Pilavas had agreed to it as an extra. Considering that footings and foundations are the first part of the construction, it is hard to believe it was not part of the original contract. Change Order #3 is rejected by the court.

Change Order #4

Modification of entrance due to redesign of facade. The portico was extended in the Antonio Leo redesign requiring, in turn, additional support not anticipated in bid set. It required steel tubes and additional framing plywood. There is a major style change seen when comparing Exhibit 35 (unnumbered pages) with Exhibit 34 (bid set) on pages 2 of 14 and 3 of 14. The total claim is \$32,930.25. Again, Mr. Corva could not opine about the reasonableness of the price for the work done because he had insufficient knowledge of the work.

Dr. Pilavas refuses to pay anything on this Change Order. He argues that he was not given credit for the original facade. Any work that did not have to be done on the first design that was part of the contract should be a credit against what the new facade ended up costing. He also argues that the structural steel tubing was equal to the columns for which he had contracted.

More specifically, he argues over the cost of the decorative lintels (line 4 of Change Order #4) and the roofing tiles (line 6 of Change Order #4). He says that the roofing tiles were only supposed to be \$4.50 a square foot, not \$18 a square foot. Whether this is an appropriate price or not cannot be determined from other testimony, but it is clear that the \$4.50 a square foot price did not include labor while the higher price does.

Change Order #5

Extended garage area. This Change Order referred to extending the garage to include a doorway and a pedestrian entrance to the immediate right of the garage door closest to the main house. Since the physical space above the garage was to be livable space, this garage extension

required additional plumbing, tile work, an exterior door and frame and related materials.

Exhibit 34, pages 6 of 14, 7 of 14 and 8 of 14 reflect such changes. Flooring and related material including gutters and copper fascia installed below the roofing were required. Dr. Pilavas spoke to plaintiff about adding additional rooms. He was provided with floor plans as needed. The gutters were never installed. They would have been attached to the copper fascia which had been installed. Total claim is \$24,253.50. Mr. Corva had insufficient information to opine on the reasonableness of the price, nor on whether it was done because it could not be seen.

Dr. Pilavas has argued that extending the garage pre-dated the contract, thus, cannot be a Change Order. Originally, the garage was to be 40 feet in length by 21 feet. It was enlarged to 44.5 feet in length. It was built at 45 feet by 19 feet. He does not deny it was lengthened, it was done at his request. However, since it is not as wide and has reduced floor space, he should be given credit.

Plaintiff argued that the "man door" in between the garage door closest to the house and adding a stairway to the maid's quarters were also covered by this change.

Change Order #6

Damp proofing versus waterproofing. The original plans required damp proofing of the walls. Dr. Pilavas decided this was insufficient and they switched to waterproofing (Gelsomino). The original material was to be troweled onto the walls. What was actually done was 2 inch rigid styroform insulation and membrane was adhered to foundation walls. This resembles what Pilavas claims was not done around the garage. Total claim \$17,796.25. Once again, Mr. Corva had insufficient information to opine on the reasonableness of the price.

Dr. Pilavas testified that prior to April 3, 2003, he had discussed waterproofing with Michelakis and that this was to be done. As to the prices in Change Order #6, these were never discussed with him. In that there was to be waterproofing in the original contract, he says, then, this should not be a Change Order.

Change Order #7

Enlargement/redesign of patio. When the design of the Gazebo area with a trellis was changed, the patio was also extended. This area was not completed. The claim for this Change

Order is disallowed. Mr. Corva stated he could not see the rosewood joists or much of anything in the Gazebo construction. Dr. Pilavas stated this was not done. Photos Exhibit 18A Bates 000062 and 000063 reflect partial completion.

Change Order #8

Windows. According to the original plans (if that terminology may ever be used with safety in this case), the windows were of a specific design using Jeld Weld or Pella windows. These were very expensive. The contract called for Andersen windows and gave an allowance of \$49,000. Pilavas and Michelakis decided that money could be saved by ordering windows from Greece; (European windows) who actually made the decision or who convinced whom is not clear. Dr. Pilavas stated he had priced the windows between \$60,000 to \$95,000. Where these numbers came from was not revealed from Pilavas' testimony, as was much of his testimony as to cost of items of construction.

The parties met in Greece in the summer of 2004 and windows were ordered. They arrived in the fall of 2004. The windows were insulated, made of aluminum with a wood grain finish. There was supposed to be a rounded top added to the rectangular windows. The rounded tops did not arrive with the rest of the windows in the fall. Nor was there a "thermal break" in the delivered windows. Roofing and stucco work had been done while waiting arrival of the windows. It would have been preferable to have the windows installed before the stucco work was done, but that was not possible, so the stucco work was completed while awaiting the window delivery.

Ciancarelli testified that he informed Michelakis about the lack of a "thermal break" in the windows and was told they had been approved and that he should install them (fall of 2004). The change in windows added \$13,800 to the cost. Mr. Corva had insufficient information to opine on the reasonableness of the price. He had never examined the windows by catalogue or checked out the specs. He only saw the windows after their installation and after they were vandalized.

Dr. Pilavas stated he never requested a change in the windows. He does not deny meeting Michelakis in Greece and going to the showroom. He selected the appearance and color of the windows. He states he was told the windows would have some kind of special coating and were

to be elliptical and in one section.

Exhibit 34, page 2 of 14, describes the windows. It reflects two sections, the lower being a rectangle, the separate top part being a semi-circle or arch. Nothing in any drawing depicts a single, elliptical window. EMCO did build the rectangle and the arch opening, but that was not the window that was delivered. Eventually a rectangle and a smaller rectangle space cut above it for a smaller rectangular window/transom were constructed and the windows were installed. By the year 2006 the windows had all been broken due to vandalism.

In July 2004, Pilavas paid EMCO \$140,000. He believed this was to pay for the windows, to order flooring materials, and hook up the services (water, gas, electric) from the street to the house. The plaintiff argues this was just to catch up on what he was already owed by that time.

There is a charge of \$12,000 in Change Order #8 which really reflects the cost of flying in the windows (actually cost \$12,438.88), and there is an allowance of \$49,000 given for the windows from the original contract. Dr. Pilavas argues he never agreed to this and, thus, it was not a change.

Mr. Michelakis testified that he paid Palkan (the Greek manufacturer) \$10,000 to order the Windows. He then paid them with another check to get the windows shipped to the United States in total the charges for the windows including shipping, ordering, and transportation for him to go to Greece totaled \$84,065.52

Change Order #9

Additional excavation. This work was actually done at the very beginning of the project. It was determined after the re-staking was completed that a section of the property had not been excavated sufficiently. Total cost \$6,550.

Dr. Pilavas testified that he and Michelakis had agreed to the enlarged foundation prior to the contract being signed (the one he never signed) and, therefore, it should not be an extra or Change Order. He, more specifically, objected to the charge in line 6 of Change Order #9 for carting away five truckloads of dirt at \$600 each. He cannot understand why you would cart away the dirt (there was ample acreage to spread the dirt on his property).

On page 6 of 14 of Exhibit 34, there is a reference to a room under the garage. It reflects

a 4.5 foot extension handwritten reference to Change Order #1. It also reflects a 26 foot basement extension under the garage.

Gelsomino discussed these Change Orders with Pilavas. Pilavas believed these Change Orders were within the scope of work of original contract (the one Pilavas denied signing).

Gelsomino also testified that he had built the foundation to be prepared for a brick front. He even had "metal ties" installed that would be used to attach the brick. As to the percentage of work completed, he disagrees with Barbieri's opinion in Exhibit NN (compare with Exhibit 17). Once again, Mr. Corva state he had insufficient information to opine on the reasonableness of the price.

Ronald Dean was the Building Inspector for Plandome Manor from April 2005 to April 2007. There was one inspector in the Village who did both code enforcement and inspected buildings and it was Dean. After he was hired, he reviewed open permit files including the Pilavas file. He was aware that the permit had expired and had not been renewed. He drove past the property and met Winnacott, the second contractor, who was working at the site. He did a walk through of the property and around the perimeter. He informed Winnacott that he could not continue to work without a permit, though this did not occur until after he had visited the site on more than one occasion. He requested an engineer's report as to the "seat cuts" and the weight of the clay tile roof on the frame and cement block structure. He noted what he called inaccurate metric cuts; lack of jack rafters between 18 inch micro lams (it is unclear whether these were installed by Emco or whether these were installed by Winnacott). Dr. Pilavas was informed of his findings at a Village Board Meeting.

Thomas D. Reilly, a Professional Engineer, inspected and analyzed the structural framing at the premises at the request of Dr. Pilavas after Ron Dean had expressed his concern about structural defects. He wrote the following letter to Dr. Pilavas dated June 24, 2005 (Exhibit 25):

We have determined that the building, as constructed, is structurally sound except for a few minor details and is capable of supporting all anticipated dead and environmental loads in accordance with the requirements of the N.Y.S. Fire Prevention & Building Code. The roofing has been designed for clay tile weight of 14 psf.

It is my opinion that the construction on the house can proceed forward while these minor remedial items are corrected.

Then in December 2005 (December 19, 2005, Exhibit 29) Mr. Reilly wrote to the Building Department:

We have examined and evaluated the roof tiles which have been installed on the roof at the above-named location, and have determined that their weight, as installed, equals 10 psf of roof surface.

This letter will serve to certify that the roof framing as shown on the previously submitted drawings is adequate to support this load without overstress in accordance with the requirements of Fire Prevention & Building Codes of New York State.

The Reilly inspections occurred before the additional perimeter walls were installed, but apparently after Mr. Winnacott had done remedial work to reduce sagging in the garage roof that he had identified and sagging in the main roof of the house.

John Barbieri, the architect who created the original building plans, was called as a witness. He never provided or was paid to provide on-site supervision as required in the AIA contract, paragraph 9.1, nor did he play a role in approving payments made to plaintiff by defendant. He did do several field inspections prior to March 31, 2003 (plaintiff started in May 2003). He never made any design changes, but was shown designs by another architect (Antonio Leo).

Exhibit M are plans that he drew and submitted to the Village (September 15, 2000) (amended September 11, 2001). These are, to his knowledge, what Plandome issued the permit for and what were approved on February 27, 2003 (shows four-car garage and attic over garage).

Exhibit B is another set of plans which also reflect underground electrical service. They were approved December 28, 2001, and, according to Michelakis, were the bid set. In April of 2005 Dr. Pilavas asked him to do an inspection relating to payments he was making to contractors. The letter he wrote, relaying the results of that inspection, is Exhibit NN. He never made an estimate as to the percentage of work that had been completed or by whom.

He inspected the house and on July 8, 2005 he wrote a letter to Mr. Ronald Dean, the Plandome Building Inspector:

Dear Mr. Dean:

In accordance with your letter of May 26 to my client, Dr. Pilavas, a qualified

licensed professional engineer has certified that the present construction is structurally sound and that work on the project can proceed forward.

I have reviewed the revised as-built plans and concur with his findings. Apparently your observations of structural defects were unfounded and the revoking of the building permit was uncalled for.

Therefore, I am advising Dr. Pilavas to request reinstatement of his permit and to resume work on the project without any further delay.

Further delay or letter writing will not be in anyones interest and will only result in financial hardship for Dr. Pilavas, Thomas Rilley, P.E. & John Barbriere, Architect.

This letter was sent to Dean by Dr. Pilavas on July 12, 2005 with a package of materials, including copies of "as is drawings", including the letter from Reilly dated June 24, 2005. Dr. Pilavas wrote:

Dear Mr. Dean,

Included with this cover letter please find copies of revised "as is drawings" for the above project that you have requested. Also included are letter consulting engineer Thomas D. Reilly, P.E. certifying the safety of [REDACTED] are along with a letter from architect John Barbriere attesting to the same [REDACTED]

For the record, please note that this unwarranted delay has cost this property holder more than \$10,000.00 per month. Please also note that under no circumstances should it be assumed that this project was ever abandoned by the property owner. What the facts point to is that an unscrupulous builder was allowed by the building department to work without renewal of permit for more than a year. This oversight is now costing this property holder an additional \$8,200.00.

I am including my check for renewal of the permit, and trust that this will be forthcoming ASAP since we have complied with your every demand.

As previously discussed, please submit any future correspondence in writing.

It is clear to the court that the biggest problem faced by Dr. Pilavas after EMCO was removed from the job was Ron Dean. Mr. Dean did not like the house and apparently did not like the "players." The testimony from all the witnesses, whether called by plaintiff or defendant,

reflects this. No matter what was done by the defendant, Mr. Dean was not satisfied and it eventually cost Dr. Pilavas even more money.

In the minutes of the Design Review Board meeting of September 18, 2003 (Exhibit 45), Antonio Leo presented "elevation" drawings reflecting the new Mediterranean look. The stucco version of the house was approved at this meeting.

Keith Winnacott was called by the defendant. He stated he operates a construction company which builds homes similar to that of Dr. Pilavas. Dr. Pilavas asked him to finish his house in February 2005. He provided Dr. Pilavas with an estimate of percentage of completion. He never saw the contract or plaintiff's submission nor did he look at the plans "too much." He, not surprisingly, had no contract with Dr. Pilavas. He would make a proposal for work on a particular area of the house. The defendant would agree or disagree. He worked on the house and made various changes or modifications and completions: bridging under the floor (squeaking); header at top of stairs (sagging); sagging of the garage roof; completed the spiral staircase; other stairs into basement; enclosed closet in basement; nailed off rafters to the ridge; nailed rafters to ceiling beams and other miscellaneous nailings; finished downstairs kitchen walls.

Winnacott did remediation work. He also did a plumbing inspection. He noted that there was a lack of bushings where the romex cable passed through studs. This he stated was a code violation.

The issue of whether the plaintiff had completed any or all of what was called "finish carpentry" was a major discussion at trial. Winnacott defined "finish carpentry" as what comes after "rough framing", more specifically it would include insulation, followed by sheetrock, then "trim", tile work and floors. Normally "finish carpentry" would not be started until the house had passed a rough framing inspection. He stated he did \$140,000 of Finish carpentry. He testified he was originally hired to prepare the house for a rough framing inspection or at least he thought he was. Winnacott stated he was paid \$35,000 to complete the rough framing.

Mr. Dean viewed the plans (Exhibit 34, page 6 of 14). He also took photos which showed living space above the garage. The second floor plans showed a large closet (page 8 of 14).

The Village did not issue a “stop work” order at this time because there was no longer a permit in effect, having lapsed in January 2004. In order to give, or reinstate the Building Permit, in a letter he wrote to Pilavas, May 26, 2005, Dean required an engineer’s letter. As previously notes, this was received from Mr. Reilly, via Dr. Pilavas, (Exhibit 25) on the structural integrity of the building. He also received a letter from Barbieri, dated July 8, 2005, reflecting that the work on the project was structurally sound and could continue. These did not satisfy Dean.

In a letter Dean wrote to Pilavas in July, 2005 (Ex. 56), he requested an accurate set of drawings for the house that had been built (rather than for the one that had been approved by Plandome Manor).

Mr. Dean also wrote to Dr. Pilavas on January 10, 2006, denying his request to renew the permit (Exhibit TT) and stating that he needed plans to fit the design that was, and had been, built. Mr. Dean stated that Exhibit 35 contained details he had not seen, and Exhibit 34 did not reflect a concrete slab, but that he had plans in the office (whatever that meant). It is interesting to note that Mr. Dean expressed surprise that the Design Review Board had accepted the clay tile roof (September 15, 2003). Apparently his role as Code and Building Inspector had expanded to the artistic venue.

Dr. Pilavas stated plaintiff gave him the “take off” sheet (Exhibit J) which was only completed on the left side. This is denied by plaintiff. He filled out the right side including cubic yards and labor price. Dr. Pilavas argues that Exhibit J is what the house should have cost, or at least specific parts thereof. When compared to Exhibit 2's cost breakdown prepared by plaintiff, Exhibit J is less. The reasons are substantial.

Dr. Pilavas testified about the slowness of the work. He noted that the cinder block walls were not started until September 2003. Cinder blocks were brought in, one by one, and then hoisted to the second floor. He noted there was no supervision on the job. He complained to Michelakis. He was given a chart that reflected “work progress” that was prepared by EMCO (Exhibit U). As of July 2004, when he went to Greece, there was still no electrical hookup on the site and the roofing tiles had yet to be delivered. Pilavas testified Plaintiff had asked for \$150,000 for suppliers so that they would deliver materials to the site (Exhibit 54 reflects

payments he made in July).

Pilavas testified to returning to New York at the end of August 2004 from Greece to find the electric, water and gas had not yet been hooked up from the street. He met with Michelakis and complained how all the things he says he was promised had not been done. Michelakis told him that the marble had come in and been cut, but was in the warehouse waiting to be cured. The windows had arrived in November 2004 and were installed. There were no "half rounds" or "transoms" though there should have been eighteen of these. He was told there was an error in the shipment and it would be corrected.

Another error was the sliding door shown in Exhibit XX (Q12) (photos). The door was supposed to be six feet eight inches high and six feet wide. It came in six feet high and six feet eight inches wide. Pilavas is six feet tall, thus, there was a problem. Another window-related problem was that the designs called for eight feet high windows - six foot windows with two foot transoms. They were converted to a six foot window combining a four foot window with a two foot transom. Whether this manufacturing error was in any way caused by plaintiff or by the Greek manufacturer was never explored. Winnacott testified that when he went on the job one of the things he had to correct was the space on the tops and sides of windows that had been installed. This was probably due to the fact that openings for the windows were made with one design in mind while the windows that were delivered were of a different size.

In early December 2004, Pilavas states Michelakis asked him for a loan to meet payroll which he refused. Michelakis denied this. Pilavas owed him money. He did not want a loan. He wanted to be paid. The window installation continued. Pilavas was mailed the aforementioned Change Orders dated December 14, 2004. He then went on vacation. Upon his return from vacation he spoke with Michelaskis about the Change Orders. He was told Tom Gelsomino had prepared the Change Orders. Tom told him he was told to prepare the Change Orders for everything they did on the job that was not part of the March-April 2003 contract and Rider and the approved plans of 2003 and create charges for the work. Reference was made to what was called a "stick-set of plans" (A-27), similar to Exhibit M. A stick-set refers to plans that are used on a job site attached to a stick.

Pilavas arranged a meeting with Gelsomino, Ciancarelli and Michelakis to go over the

Change Orders. He told them he would not pay \$217,000 of the nine Change Orders which claimed \$227,080 of completed work. He insisted then, as he insisted at trial, that they all (exclusive of #1) should have been covered by the contract (the contract he refused to sign). He also argues that the submission of the Change Orders did not comply with the requirements of the contract and in some cases came sixteen months after the work was done. He rejects as “sheer nonsense” the idea that the failure of Dr. Pilavas to sign the contract excused the plaintiff from submitting Change Orders proposing the work to be done.

Pilavas testified that Michelakis said “I’m building you a frame house and all these Change Orders are extras.” He said that if he did not pay he would not winterize the house. Pilavas terminated plaintiff in a letter dated February 23, 2005 (Exhibit CC). They came and removed their equipment from the site and sent him a letter (Exhibit DD) stating that they, the plaintiff, were terminating the contract due to his failure to pay.

The defense called **John Gayson**, a master plumber, to testify as to the condition of the house. He had met Pilavas through Mr. Winnacott of Fredrick Construction. He prepared a report marked Exhibit A-12. The report included the repair of the house caused by vandalism after plaintiff left the job. He also completed the installation of radiant heating on the second floor (not part of original plan). Plaintiff had done the preliminary work for radiant heating on the first floor, but had not finished the installation. Apparently EMCO was responsible for preparation of the radiant heating installation but not for the installation itself. He testified that not all the “rough in” piping had been completed in all areas (laundry room and powder room). Furthermore, he had to remove and rebuild the master bath because a beam had been damaged, though there is no indication when or how this happened. He did not look at the house until late winter, 2005 or early spring of 2006, over a year since plaintiff left the job. He provided an estimate of \$108,000. The plans he was given by Dr. Pilavas did not include the radiant heating. He priced it from “specs” in a computer program and what he believed was to be done in each bathroom.

Exhibit A-12 includes work that was not part of the contract. It included a charge of \$15,800 to run a two hundred foot water line to the house (October 13, 2006). Not surprisingly, Dr. Pilavas did not sign and authorize the work for Mr. Gayson, though it was apparently

completed. He did not even sign the capital improvement form. To date defendant had paid him \$88,000 - of this amount approximately \$28,000 was for extras beyond the contract. Exhibit 17 reflects a claim that 70% of the plumbing, or \$40,600, had been completed by EMCO.

Mr. Gayson testified to what he considered incomplete plumbing work. He testified that 60% of the rough plumbing had been done. However, he had to replace about 1/3 of that (mostly in the master bath). It is unclear how much of this work is "rough plumbing." An example of the problem in this case is that Gayson testified that a bathroom across from the library was framed out, but had no plumbing. Exhibit 34, page 8 of 14, would seem to indicate a walk-in closet in this spot. This confusion may have been due to Gayson placing the library on the wrong floor, or, perhaps, the fact that Winnacott testified to completing another closet into a bathroom. He also stated that the plans called for the installation of underground water and gas. He states he has finished 65% to 70% of the work for which he contracted. Defendant requests a credit of \$34,800 and argued only 10% of plumbing was done. Defendant's demand is inconsistent with his own evidence. However, a credit of \$2,000 will be given to defendant.

Winnacott was shown Exhibit 35. It included drawings of the architect Antonio Leo. He was asked to look at specific drawings and compare them to what he actually did for the defendant. He generally testified that he did not do the work/designs as reflected in A-1, A-3, A-4 or A-7. There were different tile designs. Exhibit 21 (page 6) is a drawing of the foyer. It is not what he had done. What he did, and is doing, is a toned down design as directed by Dr. Pilavas. Page 8 of Exhibit 21 is the upstairs bathroom which he did not recognize.

When questioned about the issue of changing the metal studs, he testified that this only came up after the visit from Mr. Dean. Mr. Dean visited the site while he was doing the first stage of his work in May of 2005. He continued to work until told to stop due to seat cut issues and claims of lack of structural support. Dean was a frequent visitor, at least weekly, and three to four times during the first work period of May to July 2005. In a letter from Dean dated May 26, 2005, he requested a walk-through of the house with an engineer and also requested amended drawings and plumbing permits. Exhibit 25 is the letter from Reilly, the Professional Engineer, declaring the house capable of supporting the roof (as previously recited in detail). Winnacott had worked on the premises in April and May.

As late as August 2006, the metal studs (furring strips) had not yet been removed from the garage walls. The Reilly letter (June 2005) (Exhibit 25) indicated there was no problem with the structural integrity of the home. However, at the direction of Corva (architect) and Ron Dean (Building Inspector) he replaced the metal studs with 2 x 4s attached to bottom and top plates NOT to the wall. There is some confusion whether the wooden studs were placed throughout the house or only to support the roof in the room above the garage as stated in Exhibit 55. It is clear to the court that work of EMCO as indicated by Reilly's letter did not result in a structurally unsafe house, nor did it provide a basis for the refusal by Plandome Manor to renew the permit.

Winnacott installed 2 by 6's that lowered the ceiling so much that it blocked the top of windows in the upstairs part of the garage. Much remedial work was connected to correcting Winnacott's own work. The work in the garage was apparently induced by pressure from Dean to make sure this area was not living space. Winnacott accomplished this by installing the aforementioned 2 by 6's and creating a space for small people only in the area above the garage. None of this was related to the quality of EMCO's work.

In July 2005, after the aforementioned Pilavas submission, they received a letter from Ron Dean that the Village's files did not have approved drawings (at least not approved drawings for what was built).

Mr. Corva reviewed the EMCO proposal of February 2003 (Exhibit 1)(options), the AIA Agreement with a schedule of costs (Exhibit 2), the Rider (Exhibit 3) with schedule of allowances, and the plans (Exhibit 34). He stated the electrical work shown on page 10 of 14 of Exhibit 34 had not yet been done. Mr. Corva also examined the plans labeled Exhibit 35. Exhibit 35 is apparently "as built" plans. Some pages reflect Change Orders by the number. Other pages are unnumbered and some page are labeled "finish" plans.

In the AIA contract, Exhibit 2, page 5, there is a reference to plans, but without referencing a specific date. The plans in Exhibit 34, the plans which the plaintiff said he originally followed or were the "bid set", show what is described as a Greek Revival design with a brick front. The cost of constructing a brick house is approximately \$25 to \$30 a square foot of brick (labor and materials). An EFIS construction costs \$6 to \$9 a square foot. It is argued by defendant that what was done was EFIS construction (exterior), but that the contract was priced

with a brick facing.

Mr. Corva was asked to examine Exhibit 17. This document, entitled "Contractor Application for Payment Form," is a lengthy detailed list of the type of work to be done and what percentage has been completed, the amount charged, and the amount paid. On page 2 of Exhibit 17 is a line (#12) for "finish carpentry", \$102,750. In Corva's opinion, none of this was done. The problem here becomes what does "finish carpentry" mean? It was apparent it did not mean the same thing to the individual witnesses. Exhibit 17, #15 windows, \$44,100; Corva did not believe this was done at all. Exhibit 17, #31 electrical, \$19,200. He said there was electrical wiring completed, but not to an amount of \$19,200. On what he based this conclusion is not clear.

When asked to describe the house today, Mr. Corva called it an "Ersatz" design and incomplete. Mr. Corva and Mr. Dean really did not like Dr. Pilavas' house, and it is reflected in their trial testimony. The conclusion that was reached of "inadequacy of framing" was based upon the improper cutting of the seat cuts. This did not mean it could not support the roof. Corva testified that in his opinion about 40% of the "cost breakdown" as seen on the last page of Exhibit 2 had been completed.

Dr. Pilavas testified that Michelakis had asked for a \$150,000 "loan" in the fall of 2003 or into 2004, but he refused. He paid him the \$140,000 in July 2004 because he said he did not have materials with which to work. Michelakis said it was money he was owed. The reasons given by Pilavas for the payment varied.

Exhibits 12 to 17 are called "Contractor's Application for Payment." Parts of these exhibits were previously referred to by the court. Dr. Pilavas testified he first received these in February 2005 after he had terminated the plaintiff (though he believed there was a mutual termination). He stated that the plaintiff had made no demand for payment between the summer and December 2004.

Dr. Pilavas gave his opinion of the construction's quality. He obviously thought little of it, calling it shoddy. The roof, he stated, is incomplete, there is water in the basement, the stucco walls are peeling and spongy in spots. Some plumbing had to be replaced and he contends the wiring is incomplete. He also complained that the rooms are smaller than planned because the

walls were made thicker. He stated he had tried to meet with them, meaning Gelsomino, Ciancarelli and Michelakis, but they could not find the time to meet with him together in one place.

He testified the house has now cost him 2.4 million dollars, which includes \$754,500 paid to EMCO, \$718,000 to suppliers and contractors, \$688,200 to contractors to complete the house, and \$151,000 to obtain the permits and reinstate the permits.

Dr. Pilavas agrees he gave his permission to construct the house, he just would not sign the contract. He states he selected "Option A", a house with masonry construction. Option A is not part of the AIA contract. He contends he was told that Option A would cost him \$100,000 more than the AIA contract. He contends there were no changes to the entranceway after April 3, 2003, despite the visual differences in drawings. Also, that the Leo drawing was not completed until a later date. He agreed that he made changes after April 2003: electrical changes - change of fixtures for \$15,000; an increase to two boilers. Despite the problem the Village had with the room over the garage, he believes they had approved it before they started. He may have been correct. Apparently the Village elders were not happy that Mr. Padula had approved the drawings on February 27, 2003.

Defendant believes he is owed a credit of \$100,000 because instead of 11,341 square feet of brick, he got 11,341 square feet of stucco. There is an approximate difference of \$10.00 per square feet. Michelakis had testified that the contract price included any of the different wall constructions or changes in the roof.

The plaintiff inquired of Dr. Pilavas on cross about his first contractor, Mega. Exhibit 58 was the Mega contract, which also was unsigned. Dr. Pilavas was unsure of the details. He paid them \$12,000. When asked if he ever had a written agreement that stated the full contract amount, he did not give a response. Though the court always instructs a jury that they are to disregard an unanswered question, this is an especially telling situation. He did not sign the Mega contract, he just does not trust contractors so he does not sign contracts. He just likes to enforce them as needed.

The plaintiff explored the work Mr. Barbieri had done for Dr. Pilavas. He was originally retained on July 7, 2000, (Exhibit A), but he did no work after that until March 24, 2006. See

invoice for \$5,750. This is inaccurate as evidenced by the Barbieri letter of July 8, 2005. Barbieri prepared drawings of the house "as built" for use by the Building Inspector. Plaintiff questioned Dr. Pilavas on the concrete issue about which the defendant was very loquacious during the trial. Normally this is not an area of importance - what a defendant homeowner believes about the cost of construction. However, when such a lay person presents himself to the court as an expert, the court will allow an examination of his credentials and how he reached his conclusions.

Dr. Pilavas determined the amount of concrete that was used to construct his house. He says Exhibit J reflects a larger amount of concrete than he says was used on the house. In reaching his results he did not use any of the plans (that have been referred to), but rather measured the house himself. He criticizes the plaintiff for including cement used in the retaining walls in his totals for the house. He then did his own calculations for the amount of cement used in the footings and foundation and left out the concrete in the slabs. It was difficult to understand how he reached much of his result or how he initially determined a price of \$175 per cubic yard, then \$224 per cubic yard price. Defendant testified as to the notes he says he made at the time the contract would have been signed, April 3, 2003 (Exhibit Q, dated April 4, 2003). Michelakis also did his calculations and came up with a more logical and mathematically sound number of \$275 per cubic yard, which this is closer to the amount requested in the Change Order.

When a party refuses to sign a contract and then presents testimony of what "he" says was to be included in the contract based on notes apparently made after the would-be contract date, the court begins to doubt the reliability of this type of testimony. Was this list to be included in the contract? Was it a "wish list" of what Pilavas wanted to be done, but had not been included in the proposed contract? The defendant testified this list was to be part of the contract work. See Exhibit 34, page 7 of 14 and page 8 of 14.

Exhibit Q has numbered items. Dr. Pilavas was questioned as to each one. Some are self-explanatory, yet on others he does not recall what his notes meant. This is the exhibit which he has argued was part of the contract.

For example, Q2 refers to "leaving space" for a doorway (garage?).

Q3 and Q4 refer to making niches in the walls in living and dining rooms.

Q5 refers to the closet in the master bedroom.

Q6 speaks to leaving space for shelving in front of each car in the garage.

Q7 references the installation of an air purification system in the room under the garage.

It was supposed to be part of the plans in the original contract, he contends.

Q10 refers to moving the windows in the garage from the rear to the right wall. He does not know what this meant.

Q11 and Q12 - he does not know what these items refer to. Possibly a window in the maid's room.

Q13 speaks to an 8 foot doorway for a "cabana" which was to be part of or attached to the cellar entrance.

Q19 references extending garage by 5 feet. This compares to Change Order #5 which extends the main and second floors 4' 6" located to right of the garage door, not the left as reflected in Q19.

Dr. Pilavas argued that the drawings of Exhibit 34 are not the way the house was built nor was to be built. Exhibit 35 are the "as built" plans. This exhibit, previously described, contains a mix of plans with different dates through 2004. The Antonio Leo portion of these plans were not approved by Plandome Manor until September 2003 though they may have been in plaintiff's hands before that.

Q14 refers to "radiant heat in basement slabs." This was done by Gayson. There is no indication this was part of the original contract. The plaintiff did install radiant heating in other parts of the house.

Touching on other "Q" list items, 20 was for a stairway to the space over the garage that was going to be used as a living area and eventually precluded by Plandome Manor.

On page 2 of "Q" the sixth item calls for wiring to go outside of the house for a generator.

"Q" also lists a "Local TV Channel Antenna"; he wanted a separate TV line installed so he could set up an outside antenna.

Item 17 on page 2 of "Q" called for a doorway to be built at the bottom of the steps to the basement from the first floor.

Dr. Pilavas did not price out any of these items. He contended that he did price out the

radiant heating for the first and second floors at \$21,000 (materials only).

Q16 and Q17 - lighting. Dr. Pilavas says this referred to the wiring for lights, not the fixtures themselves. It would cover the "smart wiring" (wiring the thermostats). None of this was to be included in scope of EMCO's work.

The court rejects any claim by the defendant that Exhibit Q was part of any agreement with the plaintiff. The longer Dr. Pilavas testified in this area the more incredible he became.

Dr. Pilavas testified that Michelakis told him they could save money by buying materials in Europe. The windows were an example of that.

In April of 2004, the plaintiff created a document (Exhibit U) which was a schedule of expected completion dates for specific parts of the project from April 2004 through July 2004. There is a column listing the type of work to be done, another column for information about the first column. Despite his current complaints of the quality of work, he never filed or wrote to plaintiff complaining of any of these issues. This document, interestingly enough, lists the hookups for water, gas and electric.

Defendant's Exhibit V (plaintiff's Exhibit 23) is a construction inspector's report from the Village of Plandome Manor. It reflects inspections of February 17, 2004, April 8, 2004 and May 5, 2004 or August 5, 2004 (difficult to read date). It stated, as best that can be deciphered by the court:

- Excavation & Footings - inspected by A.P./inspected rear...?, passed 2/17/04.
- Foundation - main house - inspected by A.P./rear patio w...?, passed 2/17/04.
- Rough Framing - Inspected by A.P.

At the bottom of the form it reads:

4/8/04

Met on site w/AL & Steve of EMCO-Tech to review required inspections going forward, minor framing issues to remedy - AL to fax progress...? SAL/...?, plan...? [underlying provided by the court]

Date maybe: 5/5/04 or 8/5/04 - On site no work going on. Observed extended rear patio & curved stairs, double stairs & rear patio were not on approved plans.

Dr. Pilavas said he was unaware of this inspection or its findings. Generally, Dr. Pilavas contends that plaintiff did not complete the work according to their own schedule. He denies

being told that the work could not be completed without him choosing tile color, or cabinets, or any of the things listed in Exhibit U.

Exhibit O is the proposal by Antonio Leo. It is dated March 25, 2003, it was sent to Pilavas, and was signed on April 12, 2003. It should be noted that the Leo proposal postdates by eight days the April 4, 2003 Rider (Exhibit 3 and Exhibit R) to the contract which is dated March 31, 2003 (Exhibit 2 and Exhibit P). According to Dr. Pilavas, Leo had not given designs prior to that date, April 12, 2003. On April 27, Dr. Pilavas made a \$10,000 down payment to Mr. Leo. As of that date EMCO had already started working on the job site.

Dr. Pilavas testified that he had discussed the possibility of a Mediterranean style home with Mr. Michelakis prior to April 4, 2003. When he and Mr. Michelakis appear before the Design and Review Board on May 15, 2003, Mr. Michelakis made a presentation that was aimed at getting approval for the Mediterranean style house.

The defendant called **Ronald Lash**, an electrical contractor, who had been asked to take a look at the house and see what needed to be done by the new general contractor Fredrick Construction (Winnacott) as to electrical work. He was provided with plans for the upstairs and downstairs parts of the house. He used these plans to create his estimate. As of the time that he made his estimate, which was approximately April of 2005, he determined that 20% of the work had been done. EMCO claims 60% of the electrical work was completed (Exhibit 17, line 31). He later determined that certain wiring was the wrong amperage, 15 amp versus 20 amp, in the study and in some bathrooms. He charged \$11,000 to remediate the work that had already been done.

He submitted bills for electrical work for \$127,500. The bill consists of: new high hats-\$10,000; remediation-\$11,000; completion of electrical work in the house-\$106,500.

Of this work, the total listed above, approximately 20% remains undone. At the time of his testimony he estimated it would take a month to complete the work. He has been paid \$84,000 to date for all of the electrical work testified to. The plans he used had been created by Antonio Leo. Besides those plans, he also based his work on what Dr. Pilavas wanted him to do. He referenced exhibit A-10, more specifically pages 1 to 3, as work that had been requested by Dr. Pilavas.

He ran an underground line (400 amp) to the house; he considered this a separate part of the work, not part of any original contract. He also ran wire for the installation of a Jacuzzi in the master bath, and a hot tub in the basement of the house. Neither of these last two items were included in the original EMCO contract. In total he installed 300 high hats in the entire house (not part of EMCO contract). He upgraded certain circuits due to the amount of fixtures and receptacles that were placed on those circuits.

Dr. Pilavas, during his testimony, referred to the pages of a spiral notebook which have been marked as exhibit A-25. He contends that these are the records of Stoneytown Development. The court notes that these "records" are not in any date order nor are they even within a subject matter order. Dr. Pilavas testified that between the date of the contract dated March 31, 2003 and the date of the rider to the contract dated April 4, 2003, he spoke to Mr. Michelakis two to three times. It is during this period of time that he stated that he created the aforementioned exhibit Q. He testified that he understood that if an item was not listed as an exclusion than it was included in the contract, for example roofing tiles.

In explaining why he did not want to pay a down payment, Dr. Pilavas testified that if the contractor was a reputable contractor, he should not need a down payment. It is clear that Mr. Michelakis agreed to go ahead on the construction without a down payment. Mr. Michelakis believed that when Mr. Pilavas sold the home that he was currently living in he would be paid the down payment from the profits of the sale of that house.

To date, Dr. Pilavas has paid \$754,000 to EMCO. This represents 63.8% of 1.18 million dollars. He contends that EMCO did not complete anything close to 63.8% of the job.

Mr. Michelakis testified, as part of his rebuttal, that Dr. Pilavas "knows every dollar spent on the project." Further, that he never borrowed anything from Pilavas, and, as previously argued, Pilavas owes him money (see Exhibit 11, p. 32, transaction detail by account).

Once again, the battle of the concrete continued. Michelakis did his math on footings and foundations coming up with 258.8 cubic yard. In the cost breakdown of Exhibit 2, \$95,000 is allotted for foundations and footings (resulting in \$367.07 per cubic yard). Adding 119 cubic yards for the slabs, we get approximately 380 cubic yards. In Exhibit J, the Pilavas document, line 1 represents the 380 cubic yards plus 5% for waste. Dr. Pilavas had provided the court with

his own personal concrete evaluation using Exhibit J and adding an additional 121 cubic yards from lines 2 through 9 of Exhibit J. Michelakis pointed out that concrete slabs are cheaper than footings and foundations (more labor). Michelakis pointed out that he did not bill for certain bathroom fixtures (Exhibit 17, Req. #6, 1.30).

He rebutted part of Corva's testimony. He argued that the small photo used by Corva to support his argument on the supporting beam is insufficient. Further, that Corva's estimate on the percentage of work completed is not valid, failing to consider all issues (not clear what that meant). Corva failed to consider the drainage problem behind the exterior wall, the method of construction, and the parex system which was more expensive, but had a higher R value.

Winnacott had testified to building an additional perimeter wall to add to its weight bearing ability. Michelakis, referring to Exhibit 18-a (#009)(photo) and Exhibit 20 (I-beams into CMU), argued that no additional wall support was needed or constructed in the main house.

Photos not previously produced, Exhibit 59 a-g, were stored in EMCO's computer by the former project manager. They reflected the patio work at the rear of the house and how it progressed over a period of time. Dr. Pilavas has argued that all concrete work was done at the same time, obviously an impossibility, and, therefore, there should have been no Change Orders on concrete work. Dr. Pilavas' "professional" opinion must be rejected by the court.

In Exhibit 2, the cost breakdown, the EFIS system was included. It included Concrete Masonry Unit (CMU) construction. Thus, whether they built a wood frame with brick or a CMU home with stucco, the price remained the same.

Michelakis estimated the windows would cost about \$82,000, referring to Exhibit 11, page 16, and the listed items for which he had paid. Exhibit 11 is "Transaction Detail by Account", January 2003 to January 2005. If you subtract the \$49,000 allowance that would leave \$33,000. In the Change Order reflecting the window installation, the plaintiff claims he is owed \$12,000. To say that the actual cost of the windows was a moving target would be a kindly assessment.

Izadore Pac, a carpenter, did the "framing" for EMCO on the Pilavas home. He was responsible for framing the roof, meaning he did the rafters, sheeting soffits and fascia. Referring to Exhibit A-37, he pointed to the "valley" of the roof. He had to make the afore described cuts

in the micro lams, which rest on 2 by 4s. Exhibit A-39 also shows a cut micro lam. Mr. Pac testified this does not effect the structural strength of the building. He did what he did based upon the building design. If the exterior walls were lower, the rafter cut would have been less extreme. He used metal studs to allow for a larger room. The use of wood results in a loss of 1 or 2 inches on either side of a room. This is exactly what happened in the alleged “remediation” by Winnacott and Fredrick Construction.

In referring to Exhibit A-37, he used 5 to 6 nails to nail these sections together. He was responsible for framing the window area, but could not complete it because of the change/exchange of the windows. Based upon the request of Dr. Pilavas, he moved walls on the second floor. He agreed that 100% of the rough carpentry had not been completed. The first floor stairs to basement, had not been framed by the fall of 2004. Closets on the first floor were complete. He did not do any “finishing” carpentry. He did not know whether the project could pass a “rough framing” inspection.

Why has the court spent nearly 30 pages reviewing the testimony in this case? To show the inconsistencies between each party’s claims and the evidence as well as the internal inconsistencies within each party’s own evidence/witness. Where does this now leave us?

We have in the defendant, Dr. Pilavas, a man who 2 years before he has land on which to build his home, has contracted an architect to design his home and has plans for the construction. He is a wise enough businessman to purchase the land for his dream house in the name of an LLC. Yet, this canny businessman refuses to sign contracts. Why? If he is dealing with an honest contractor, he does not need a contract so says he. When the contract, a million dollar plus contract, that he will not sign, calls for a \$177,000 down payment he refuses to pay it. Why should an honest contractor need a down payment so he argues? He will pay as the work proceeds. This is the same man who wants the court to hold the plaintiff to the clauses of the contract that suit him, like the 300 day completion clause and the provision for form and timing of Change Orders, and that they be signed by the builder, owner and architect. He chose not to have an architect supervise construction, yet he now pays a new one to critique the contractor, and pays the original architect to opine on the work that was or was not completed.

For the plaintiff to be successful in a breach of contract claim, it must prove that there

was an agreement, that one party performed all or part of that agreement, and that the other party breached the agreement and incurred damages due to the breach. Cleveland Wrecking v. Hercules Construction, 23 F.Supp. 287 (E.D.N.Y. 1998).

It is clear that we have a written contract and Rider to that contract. It is also apparent that no copy of that agreement, signed by both parties, has been produced. It is quite obvious that objective evidence has been produced that the plaintiff proceeded as though Exhibit 2 (AIA contract with cost breakdown) and Exhibit 3 (Rider) were the documents under which the parties operated for nearly two years, with some notable exceptions, and that defendant ignored the down payment portion of the agreement, paying what he wanted when he wanted, while plaintiff failed to follow the strict rules of Change Orders or Construction Change Directives.

Even though a party against whom a contract is sought to be enforced has not signed it, if there is evidence that the parties intended to be bound by the agreement, Flores v. Lower East Side Service Center, Inc., 4 N.Y.3d 363 (2005); Geha v. 55 Orchard Street, LLC, 29 A.D.3d 735 (2d Dept. 2000), then it may be enforced if the Statute of Frauds is not implicated. It is also generally accepted that an oral acceptance of a written offer forms a binding contract between the parties. Tyman v. Linoki, 16 N.Y.2d 293 (1965). It is clear that the parties had a sufficient meeting of the minds so that the plaintiff partially erected a 1.5 million dollar home on the defendant's property and the defendant paid him over \$750,000. Defendant is credited with an assent under the doctrine of partial performance. Messner Vetere Berger McNamee Schmeiterer Euro RSCG Inc. v. Aegis Group PLC, 93 N.Y.2d 229 (1999). But what of the various terms of the contract? Are all the terms of the unsigned contract binding by partial performance by both sides? How do we determine what parts of the written contract are binding on each party and what terms are not?

The court finds that Dr. Pilavas, by his actions, orally accepted the agreement set forth in Exhibits 2 and 3 (AIA contract and Rider) including the plans in Exhibit 34. That said agreement was amended or modified by Exhibit 35, the Antonio Leo modifications to Exhibit 34. That, if nothing else, the cost breakdown (part of Exhibit 2) and Rider A (Exhibit 3) are controlling on the parties.

Furthermore, the documents labeled Change Orders are written descriptions of what the

plaintiff claims it did as per the oral request of Dr. Pilavas and/or that which was required by the modification of the original plans given to Mr. Michelakis, also called the "bid set." They are, in a worst case scenario, oral modifications of the agreement. Generally, a contractor is entitled to compensation for extra work performed outside the contract at the defendant's request. Hi-Amp Electrical Contr. Corp. v. Maximum Mechanical Corp., 37 A.D.3d 541 (2d Dept. 2007). Oral changes or modifications are enforceable, even when the contract has a clause precluding oral modifications. Tridee Associates, Inc. v. New York City School Construction Authority, 292 A.D.2d 444 (2d Dept. 2002).

Thus, the denominated Change Orders will be examined for their correctness to determine whether the work was completed and whether they were requested by the defendant, either directly or indirectly through a modification of the contract by the Leo plans. Overhead and profit will be allowed (Exhibit 2, paragraph 12.2 allows it).

The plaintiff will be allowed to recover lost profit on the incomplete part of the project at the rate of 7%.

The defendant, as the party the court finds to have breached the contract by his wrongful termination of EMCO, is not entitled to recover expenses he incurred to complete the project. Nor shall the cost of items which were not within the scope of the contract and were added on by defendant after EMCO was off the job, be included as damages. However, Pilavas is entitled to a credit for those items the court finds the plaintiff had not completed despite having claimed otherwise. The defendant is also entitled to the cost to remediate any defective workmanship of plaintiff.

The court rejects any defense the defendant has raised as to the 300 day completion clause as a basis for terminating the contract. The court rejects any defense that the Change Orders must be rejected because they did not comply with the AIA contract. The defendant deliberately, purposefully and intentionally, refused to sign the AIA contract and cannot now claim the "protection" it provides to an owner who has signed one. There is no evidence, nor even a claim, of a "material breach" such as would justify termination for cause, nor does the court find that the evidence supports a material breach. This does not mean the court must accept the plaintiff's position in whole or even in part on what he is owed, or the enforceability of the Change Orders,

or the claimed percentage of work completed. The court finds the defendant breached the agreement between he and EMCO by terminating it without sufficient cause.

PERCENTAGE OF WORK COMPLETED

The question thus is what work did EMCO satisfactorily perform and what, if any, Change Orders are valid? Further, how should plaintiff be paid for the work reflected in the requests for Change Orders/Construction Change Directives.

It is clear to the court, and not surprising, that the plaintiff exaggerated the work he had completed. The plaintiff's witnesses have described the work they completed as being between 65% to 75% of the job: Michelakis - 75%; Gelsomino - up to 70%; Ciancarelli - up to 65%; Exhibit 17 - 62% of the work not counting Change Orders; final requisition number 6 - 64% complete as of February 28, 2005 (including Change Orders as computed by EMCO); final invoice dated July 14, 2004 as found in Exhibit 30, Invoice #, Requisition #9 - July 14, 2004, shows a 69.60% completion of what is called "General Building Renovations." (64% of \$1,180,000 would be \$755,200). Defendant argues that plaintiff completed less than 40% (as per Corva) of the job and, thus, should only have been paid \$472,000. Thus, defendant argues, the plaintiff was overpaid \$273,000 and owes that to defendant.

While the defendant points out that the plaintiff came up with 3 different percentages, he finds it difficult to support his own conclusion of 40%.

The defendant's witnesses provide a variety of conclusions on what percentage of work was completed on different areas of construction, i.e. rough framing, rough plumbing, electrical work and heating, which defendant argued was no more than 40%.

Specifically, defendant has argued that he paid \$94,000 for 100% of "rough framing" which was not completed. Further, that the work that was done was incomplete and improperly done. He points to the testimony of Isadore Pac, plaintiff's foreman, who did not know if the project would pass a "rough framing" inspection. Thus, defendant wants a credit for rough framing. To use Pac's statement as the foundation of incomplete work, which defendant attempts to do, does not support the argument for any particular dollar amount or percentage. The court will allow a \$500 credit for incomplete "rough framing."

Defendant contends the project did not pass a "rough framing" inspection as proof it was

not done. The only evidence related thereto is the aforementioned Exhibit V (plaintiff's Exhibit 23) which reflected what might be a "rough framing" inspection from April 8, 2004 by Mr. Padula which stated "minor framing issues to remedy." At this time EMCO was actively on the job site. The hypercritical reports of Ron Dean, who started working for Plandome Manor in 2005, came when Winnacott was continuing construction and doing remediation.

Another area that took up much time and bickering at trial is the area of "finish carpentry." In Exhibit 17, page 2, item 12, plaintiff claims 75% completion for "finish" carpentry for which he billed and was paid \$102,500. Although defendant agrees this does not include moldings, domes and other separately itemized work, see Exhibit 17 (lines 13 and 14), his witness pointed to such items, called them "finish" carpentry, and argued these items were not done, and, "finish" carpentry was, therefore, incomplete.

The defendant argues, however, that the witnesses, Corva, Barbieri and Winnacott, testified that there was absolutely no "finish" carpentry at the project. Rough framing inspection would have to be completed before finish carpentry could be done. Defendant, Stonetown, thus claims a credit for \$102,500.

Neither side ordered the minutes and defendant's counsel does not tell us what any of these particular witnesses said. The court's notes do not reflect such testimony, nor do the court's notes reflect plaintiff's witnesses' testimony which would explain where \$102,000 of "finish" carpentry existed within the project.

Plaintiff has claimed \$15,400 for interior door and hardware (70% completion). Defendant counters that these same witnesses, including himself, testified that there were no doors or interior hardware. Thus, defendant challenges the alleged percentage completed and requests credit for the \$15,400. It should be noted that for these items, interior doors, there was an allowance of \$375 per door.

Defendant contends there was no insulation in the entire house and relies again on the testimony of Corva, Barbieri and Winnacott. Plaintiff claimed \$4,400 of insulation equal to 40% of the insulation for the project. Mr. Winnacott testified the only insulation was in the basement area under the garage which had become "moldy." A request for credit of \$4,400 is denied. However, a partial credit will be allowed. There is no testimony that the insulation in the 4-car

garage was not equal to 40% of the project, nor was there testimony what percentage it was equal.

Defendant claims a reduction in percentage of completion in that leaders and gutters were not installed although plaintiff claimed \$18,900 or 90% for sheet metal work. A witness, Ciancarelli, testified that sheet metal work could include leaders and gutters. There is testimony that the metal fascia work, which would precede leader and gutter installation, was installed.

Defendant also claims that his witnesses testified that there were no interior doors installed. One would not expect interior doors to have been installed while the internal construction of the house was continuing. However, the plaintiff claims \$15,400 for having completed this work equal to 70% of the project. In that the doors were not installed and the court has no record of testimony that the doors were delivered to the site and then placed in storage (a not uncommon development on a construction site), an appropriate credit will be given to the defendant.

Plaintiff contends he was improperly terminated, in violation of the AIA contract requirements (and in bad faith), and that it is, therefore, entitled to payment of the balance of the work he would have completed on the 1.18 million dollars. Plaintiff is entitled to a 7% profit on the balance of the work he would have completed on the 1.18 million dollars.

Plaintiff claims the balance due based on the amount paid would be \$1,180,000. Plaintiff would be willing to accept a 7% profit on this amount. EMCO points out that it has requested 15% for overhead and profit on the Change Orders. It also requests 9% interest on the amount due from the time of termination to the trial.

Plaintiff also requests attorney's fees due to the "numerous and deliberate mischaracterizations of the facts of the case, recanting of days of testimony by Pilavas, total disregard of the Rules of the Commercial Division, and overall attempts to bamboozle the court." More specifically, plaintiff's counsel refers to:

A. One and one-half days of Pilavas' testimony on Exhibit Q, alleged to be a written memorialization of part of an oral agreement, which arguable turns out to be defendant's "wish list" of construction items.

B. Deliberate miscalculations by Pilavas on the contract price of concrete that Pilavas testified to for many hours. (That was the area where Pilavas failed to look at the next line of the

cost breakdown for “concrete slabs” when calculating total concrete and cost.)

C. The misuse of Exhibit 17 (Requisition of Payment based on percentage of work completed).

This area included claims by Pilavas that “finish carpentry” had not been completed. He and other defense witnesses testified that moldings, domes and kitchen cabinets had not been done. This was, of course, meaningless testimony because they were listed on other lines of Exhibit 17 and no claim was made for these items by EMCO.

The plaintiff’s request that the court charge a portion of plaintiff’s attorney’s fees to defendant based upon the above is rejected. This court is not going to create a new method of attorney’s fees reimbursement in a contract action based upon the fact that portions of the defense were created out of whole cloth. However, much of what plaintiff raised in A, B and C above goes to the strength or weaknesses of the defendant’s claims and will be considered as such by the court.

Pilavas raised three defenses to the plaintiff’s claims as part of his opening: (1) no contract existed between EMCO and Pilavas; (2) the initial argument was modified during trial, that if there was a contract, it was to be based on the plans approved by Plandome Manor in September 2003 for the price of \$1,180,000 plus or minus a few dollars; (3) that the contract, if there was one, or the agreement was to include the list of items found in Exhibit Q for the price of \$1,180,000 as found in the original agreement.

The court has previously rejected anything based on Exhibit Q. It is clear to the court (and not much is “clear” about these parties’ dealings) that though EMCO anticipated building a house that might contain the kinds of changes which appear in Exhibit 35 when the unsigned agreement was entered into in April 2003, the price of \$1,180,000 did not cover the house represented in Exhibit 35, known as the Leo plans.

JUSTIFICATION FOR TERMINATION

The termination letter from Dr. Pilavas to EMCO (Exhibits 7 and CC) states that, “based upon your persistent failure and neglect to carry out the work, I have no alternative but to terminate our agreement and carry out the work myself.”

The letter continues, highlighting the “300 day” completion clause of the agreement; the

service upon him on December 19, 2004 of “additional cost proposals” for work that was covered by the “original proposal”; that the claims are untimely and “recently manufactured to justify and camouflage the substantial overpayment to [him]”; that he, Michelakis, had assessed the “value of the work performed at \$660,000”; that he had “been paid well in excess of that amount” and some items that Michelakis claimed were 100% complete had not been completed, including but not limited to, basement slab, leaders and gutters, and windows and interior doors).

In his post-trial submission, the defendant has taken great liberty in expanding upon his termination letter. Anything in the post-trial submission as to reasons for termination that were not also in the termination letter is ignored by the court and is not considered as grounds for termination.

Dr. Pilavas has argued he was entitled to terminate EMCO’s contract due to the fact that the plaintiff failed to run lines or pipes from the street to connect electrical water, and gas services as of December 14, 2004. None of the written documents, not the contract, Exhibit 2, the Rider, nor Exhibit 3, list such hookups, nor do the expanded universe of documents Exhibits J, Q or Exhibit 1. However the drawings which are considered part of the agreement according to the plaintiff show the lines (Exhibit 34). Also, Exhibit U which is a chart prepared by EMCO reflecting when different parts of the project would be completed reflect the 3 hookups on lines 20, 21 and 23 of the exhibit. Therefore, defendant argues it was a breach of the agreement for which he could terminate EMCO. The defendant’s electrician, Mr. Lash, and his plumber, Gayson, consider the hookups as additions to contract work.

The application to accept the failure to do the hookups as a reason for termination is denied, along with numerous other stated reasons, the hookups were afterthoughts defendant has used to justify the termination, not a basis for the termination. More importantly, since plaintiff was terminated and the project was obviously not complete, work could still and would naturally have been completed, whether that work would have included the hookups as part of the contract price or whether as additional charges, it is not a termination issue.

An additional ground for termination is that “rough framing” and “electrical work” did not satisfy New York State Building Code Rules and Regulations and required substantial remediation raised during trial. These grounds are rejected as well. Again, whether the claim as

to violations of code is correct or not, it was not a ground for termination. In any event the inspectors report indicated only minor rough framing issues and there was insufficient evidence of code violations involving the electrical work that would support termination. These were minor violations, easily remedied.

Defendant also argues that plaintiff provided unsuitable and defective windows which did not meet New York codes. The codes to which defendant refers did not exist when these windows were either ordered or produced. There is no proof that the delivered windows, with whatever faults they had, were due to the negligence or incompetence of plaintiff. Defendant also requests a credit for the windows in that he paid \$98,000 to have them removed and replaced. The request for a credit on the windows is denied.

Defendant further argues that plumbing materials were also “unsuitable and defective” and did not satisfy various New York State Building Codes. Thus, these required substantial remediation. Mr. Gayson’s testimony does not rise to that level to support a breach by plaintiff, but does support a claim for remediation reimbursement/credit.

Defendant blames EMCO for allowing the permit issued by the Village of Plandome Manor to lapse in early 2004. It is argued it took 6 months until defendant could get it re-issued (Exhibit B, page 19) and the Village would not allow work on the site during the second half of 2005. There is no explanation how work proceeded with a lapsed permit beyond the benign neglect of the Village, nor is it clear how EMCO “allowed” the permit to lapse. What is clear is that the defendant received notification of the permit’s lapse in January 2004. There is nothing to indicate that plaintiff had or was given this notice by the Village or by the defendant, or that defendant made any effort to renew, or that the burden rested on plaintiff to renew rather than on defendant. The court rejects this as a ground for termination. Once again, it is an afterthought by defendant.

That leaves for consideration a written construction contract unsigned by the homeowner. Pilavas wishes to pick and choose which sections he wants enforced. The court will not allow that and has already rejected his claim that the plaintiff breached by failing to complete the house in 300 days. EMCO wants to enforce the contract, but exclude the 300 day clause and ignore how Change Orders are to be processed pursuant to the AIA contract. However, it was clearly

not Mr. Michelakis who refused to sign the contract, but rather Dr. Pilavas.

It is said that those who live by the sword die by the sword. It is also said that the pen is mightier than the sword. Dr. Pilavas chose to fight his battles with a sword rather than a pen. His history as reflected at trial is not to sign contracts, and then enforce them as he sees fit. He should have chosen a pen.

The court finds a valid agreement existed between EMCO and the defendant, Dr. Pilavas. It was supported by AIA contract (Exhibit 2), the Rider (Exhibit 3), and based upon the plans of Mr. Barbieri (Exhibit 34). The court finds that the contract was orally amended at various times at the owner's request to suit his own needs during his numerous visits to the construction site. The court finds that the house design and the contract was modified by the plans of Antonio Leo, which were eventually approved by Plandome in September 2003, but that the plans and drawings of Leo were being used prior to their approval. The foundation modifications, which were made by the plaintiff at the very beginning of the contract period to accommodate the possibility of the stucco house and tile roof, must be considered as part of the \$1,180,000 original contract price. No additional funds will be allowed for that work as reflected in Change Order #3.

The court finds that 62% of the house was completed by EMCO (not including work in the Change Order). However, that does not mean said 62% was completed in good workmanship, and the court will address that shortly.

The court holds that the contract as comprised of Exhibit 2 and Exhibit 3 (contract & Rider), along with Exhibit 34, is clearly written and parole evidence is not needed to explain any part thereof. Neither the document that preceded it (Option A), nor, perhaps, the one that came thereafter, Exhibit Q, form any part of the contract. The substitutions which were to be at the owner's option, CMU construction, stucco, tile roof, could only take place when and if Plandome approved them, were not part of the original contract, and were not approved until September 2003.

The court further holds that the plaintiff was removed from the job by Pilavas without proof of a material breach of the contract - that Pilavas chose not to sign. Therefore, plaintiff is entitled to lost profits on the balance of the contract. The court accepts the 7% figure chosen by

plaintiff in that it is not contradicted by the evidence and is not unreasonable. The court awards plaintiff 7% on the balance of the contract that was not completed, \$1,180,000 minus \$754,000 equals \$426,000 plus 7% of \$426,000 equals \$29,820.

Plaintiff was paid \$754,000, which was more than the 62% of the contract that the court finds plaintiff completed; 62% of \$1,180,000 equals \$731,600. The defendant shall receive a credit of \$22,400, the difference in these amounts. Any other credits will be handled at the end of the decision. Plaintiff will not be given a 7% profit on the now increased "not completed" work amount.

The court finds the plaintiff did do the majority of the work as reflected in the Change Orders. Though not compliant with the AIA contract, these changes were directed by the owner and/or his new architect Leo due to design changes. It would be unfair, unjust and inequitable to disallow these Change Orders outright when the defendant does not believe in signing documents in order to shield himself from liability, the same documents that were meant to protect the owner.

Plaintiff now calls the Change Orders "construction change directives" made by the owner or his architect. The testimony that supports the addition of a percentage for "profit and overhead" to each Change Order comes from Mr. Gelsomino who testified that the 15% is appropriate, required and reasonable pursuant to Exhibit 2, paragraph 12.2. The defendant's "Reply to Plaintiff's Findings and Conclusions", paragraph 32, states, "There is no provision for overhead and profit in any of the documents." He failed to read paragraph 12.2 of Exhibit 2, but, then why should he, since his client intentionally did not sign the contract. He goes on to say any modifications to the contract must be in writing (paragraph 6.1 of Exhibit 2) and that overhead and profit only appear in the "Change Orders", which were not submitted within a reasonable time of the work being done. Once again, defendant cherry picks the paragraphs of the contract and pretends the other paragraphs do not exist.

Interestingly enough, the nine documents that request payment for extra work beyond the contract are labeled "Change Orders" by the plaintiff at the very bottom of each page, and they have been called that by the lawyers and the court. In the plaintiff's final post-trial submission, he refers to the 9 documents as Construction Change Directives. The difference is somewhat

significant. Construction Change Directives need only be signed by owner and architect, while Change Orders are to be signed by the contractor, owner and architect. Of course, in our case there was no architect on the job.

When Gelsomino testified, he concluded that the price charged for the work was reasonable as was the percentage added for overhead and profit as per Exhibit 2, paragraph 12.2. Article 12, paragraph 12.2, reads, "The cost or credit to the Owner from a change in the work shall be determined by mutual agreement of the parties or, in the case of Construction Change Directive, by the contractor's cost of labor, material, equipment, and reasonable overhead and profit."

Thus, the defendant's claim is absolutely wrong that there was no provision for overhead and profit in the documents. Considering Dr. Pilavas' aversion to signing agreements, the court does not find that his failure to consent in writing to the 9 documents, or the fact that the writing was not completed contemporaneously with the work that was done as reflected in the 9 documents, will preclude recovery by the plaintiff.

AMOUNT AWARDED ON CHANGE ORDERS/CONSTRUCTION CHANGE DIRECTIVES

In that the Change Orders/Construction Change Directives were not submitted in a timely fashion, the court could disregard them. However, under the circumstances of this case, the court finds that in specific situations as developed below the plaintiff should be allowed to recover on a quantum meruit basis. Furthermore, it is also appropriate to recover overhead and profit (O&P) in a reasonable amount on the total of labor and materials costs. Whitmyer Bros., Inc. v. State of New York, 47 N.Y.2d 960, 962 (1979). See also D'Angelo v. State of New York, 41 A.D.2d 77, 80 (3d Dept. 1973), after remand for new trial 46 A.D.2d 983 (3d Dept. 1974), affd. 39 N.Y.2d 781 (1976).

Therefore, the court will add O&P in the amount of 7% on the total the court finds for the labor and materials in each Change Order. The court also finds that, unless otherwise noted, there has been insufficient evidence to overcome the proof plaintiff proffers on labor and materials on the diverse Change Orders.

Change Order #1 - the room under the garage.

Requested: \$54,836

The court finds this work was completed at the direction of Dr. Pilavas. However, the court concludes that the charge for concrete is inconsistent with the testimony on the cost of concrete and reduces the cubic yard cost to \$295 per cubic yard. There apparently was also no door installed (\$700) nor a ceiling (\$4,455).

The court thus grants a charge of $\$40,744 + 7\% \text{ O\&P} = \$43,596$

Change Order #2 - extended patio on right side of house.

Requested: \$58,489

The court finds this work was directed by defendant and/or the architect due to the change/modification of the design of the patio. However, again the court reduces the charge per cubic yard of concrete to \$295 per cubic yard.

After modifying the plaintiff's computations, the court reduces the requested amount to \$44,455.

Granted: $\$44,455 + 7\% \text{ O\&P} = \$47,567$

Change Order #3 - the wider footings.

Requested: \$32,947.50

Granted: Denied in its entirety. This modification of the contract cannot be a Construction Change Directive when it was the first thing the builder ever did on the job. It is illogical to consider this a change when it is what plaintiff planned to do to accommodate possible future changes that might be brought about if the Village approved modifications to the house pursuant to the Leo design.

Change Order #4 - additional quantities of material required by the design changes for extended dormer and enclosed portico (redesign of facade).

Requested: \$32,930.25

The court concludes that the design change required this additional work.

Granted: $\$28,635 + 7\% \text{ O\&P} = \$30,639$

Change Order #5 - extension of garage, main floor and second floor by 4 feet 6 inches.

Requested: \$24,253.50

The court finds that the work was done at defendant's request, but rejects the \$400 per cubic yard price for concrete and replaces it with \$295 per cubic yard. No gutters were installed and, therefore, they will be subtracted from the statement.

Granted: \$19,050 + 7% O&P = \$20,384

Change Order #6 - waterproofing system with rigid insulation and rubber membrane.

This work was completed. The only issue is was it part of the contract? The plaintiff says the design called for "damp proofing." The change from "damp proofing" to waterproofing was made at defendant's request due to conditions on the property. However, the contract rider calls for waterproofing. The cost breakdown attached to the AIA contract says "foundation waterproofing" - \$9,500. The words "damp proofing" are never used. However, on the drawings, Exhibit 34, page 5 of 14, it clearly says "Trowel on bit. Damp proofing." Furthermore, on page 11 of 14, "General Notes" "Item 34 - foundation walls to be damp proofed," and on page 9 of 14, it says, "Trowel on Bituminous damp proofing or membrane waterproofing." It is clear that the membrane insulation, with drainage boards and rigid insulation, added significantly to the waterproofing cost and it was requested by defendant.

Requested: \$17,796.28

Granted: \$15,475 + 7% O&P = \$16,558

Change Order #7 - exterior patio work.

Requested: \$92,920

Proven as per EMCO: \$18,923

Upon review by plaintiff, the claimed amount was reduced when they admitted it was only partially completed. They requested payment for 40% of the original price because that is the amount attributed to the materials, while 60% of the originally claimed price would have been labor. The request would be reasonable if the court could be satisfied that the materials were stored away for the defendant's use at a future time; or had been left for him on site protected from the elements. The court is not so satisfied. The requested amount for Change Order #7 is rejected in its entirety.

Change Order #8 - windows.

Requested: \$13,800

This is the area where the testimony became “he said, he said.” It is clear that they both met in Greece to pick out the windows. It is clear that the windows that were delivered were not what was supposed to be delivered. Whether the error was caused by plaintiff or the manufacturer, was not made known to the court. The issue of the windows coming in without a thermal break (which could create fogging) might have been relevant if the windows had not been broken due to vandalism after EMCO was removed from the job in February 2005 until Corva’s inspection in 2006.

The “windows” issue is a prime example of how plaintiff and defendant, in a joint attempt to save money, brought about construction delays and then problems with the quality of the material. The contradictory testimony on the windows precludes this court from awarding plaintiff any additional sums for the windows.

Application under Change Order #8 is denied.

It is interesting to note that the defendant claims the windows were removed and discarded because they did not have a “thermal break.” Perhaps they would have been, but defendant’s other witnesses (defendant and Corva) stated all the windows were broken by vandals by 2006 necessitating removal and replacement. The court finds it disturbing when a defendant’s memo is contradicted by its own witnesses.

Change Order #9 - additional excavation.

Requested: \$6,555

The court is satisfied that further excavation was needed after the property was “re-staked” prior to the beginning of construction. Said work was not part of the contract.

Granted: $\$5,700 + 7\% = \$6,099$ **RECAP OF CONSTRUCTION CHANGE DIRECTIVES AWARDS**

1. \$ 43,596
2. \$ 47,567
3. None
4. \$ 30,639

5.	\$ 20,384
6.	\$ 16,558
7.	None
8.	None
9.	<u>\$ 6,099</u>
TOTAL:	\$164,843

Credit to plaintiff for lost profit on balance of contract: \$29,820

Total credits to plaintiff: \$194,663

The defendant has set forth numerous areas for which he contends he is owed money from EMCO and should be credited against EMCO.

**REMEDATION COSTS PAID BY DEFENDANT
TO CURE CONSTRUCTION DEFECTS**

From the court's review of the testimony of Corva, Winnacott, Lash and Gayson (for the defendant), as well as the EMCO witnesses, the court grants to the defendant the following remediation credits:

Plumbing Remediation	\$ 3,500
Electrical Remediation	\$ 11,000
Rough Carpentry Remediation	<u>\$ 27,000</u>
TOTAL:	\$ 41,500

**CREDIT TO DEFENDANT FOR WORK THE COURT FINDS
WAS NOT DONE, BUT FOR WHICH EMCO CLAIMED IT
HAD COMPLETED**

Interior Doors and Hardware (not installed nor in storage)	\$ 15,400
Installed insulation not equal to claimed 40%	\$ 2,200
Finish Carpentry	\$102,750
Leaders and Gutters	\$ 5,000
Rough Framing	\$ 500

Plumbing not equal to percentage Claimed	\$ <u>2,000</u>
TOTAL	\$127,850

**CREDIT TO DEFENDANT FOR OVERPAYMENT
BASED ON WORK COMPLETED**

Based upon the percentage of the work, the court finds the plaintiff completed 62% as compared to the percentage for which it was paid by defendant. There is a credit to defendant of \$22,400.

Total credits to defendant: \$191,750.

DOWN PAYMENT

The plaintiff requests judgment for the down payment of \$177,000 that was required pursuant to the terms of the contract. The defendant did not sign the contract, or at least no signed contract can be produced. The plaintiff proceeded to work on the project for over a year and a half without the down payment. Plaintiff was obviously willing to proceed without a down payment. The court finds the plaintiff waived the down payment and there is no written agreement to support the payment.

REQUEST FOR ADVERSE INFERENCE

Plaintiff summarizes various issues which he argues would support a missing witness charge if this was a jury trial along with an adverse inference. The fact that Antonio Leo, the architect whose modified plans and drawings were heavily relied upon by defendant, did not testify is somewhat disconcerting. However, plaintiff makes two errors. The first is that you do not need a jury to have a missing witness charge or have the court draw an adverse inference against a party. Secondly, if a party requests such a charge or inference, it must be done before the close of evidence. That allows the other party to explain the failure to call such a witness or, perhaps, to actually call the witness. Plaintiff notes that surveyor, Barrett & Iannucci, was not called to testify. He again says if there had been a jury trial, he would have requested a missing witness charge.

On the issue of the drainage pipe easement, plaintiff contends that there was no testimony on the issue by the County or a knowledgeable source. All of the above inferences against the defendant, which the plaintiff would have requested a jury to draw, are rejected by the court.

CONCLUSION

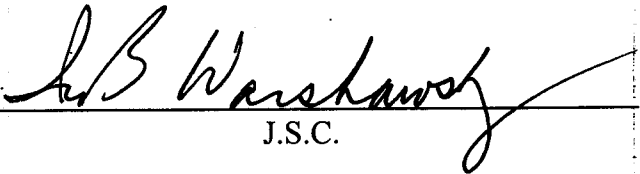
On the basis of the foregoing, the court finds that the total due EMCO is \$194,663, and the credit to Pilavas is \$191,750, with the result that the balance due plaintiff is \$3,413. The court awards plaintiff pre-judgment interest of 9% from February 26, 2005 to date of decision.

Defendant's counterclaim under the Lien Law for attorney's fees on a trust is dismissed. All other counterclaims by defendant brought under the Lien Law are dismissed.

Plaintiff's fourth cause of action for relief under the Lien Law is dismissed.

Settle Judgment on Notice.

Dated: April 1, 2008



J.S.C.