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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

GREG OPINSKI CONSTRUCTION, INC. et al., Cross-complainants, Cross-defendants and Appellants, v. CITY OF OAKDALE, Cross-defendant, Cross-complainant and Respondent.	Consolidated Case Nos. F060219 & F060727 (Super. Ct. No. 381788) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. William A. Mayhew, Judge.

Cassinat Law Corporation, John E. Cassinat, for Cross-complainants, Cross-defendants, and Appellants.

Costanzo & Associates, Neal E. Costanzo, for Cross-defendant, Cross-complainant, and Respondent.

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*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I.B, I.C, II, III, and V of the Discussion.

After a bench trial in this dispute between the City of Oakdale (city) and its general contractor on a building project, Greg Opinski Construction, Inc. (Opinski), the trial court awarded the city $54,000 in liquidated damages for late completion, $3,266 for repair of construction defects, prejudgment interest, and $97,775 in attorneys' fees. The claims in a cross-complaint by Opinski and its performance bond surety, Fidelity and Deposit Company of Maryland, were rejected.

In its statement of decision, the trial court stated that it would not consider whether the late completion was caused by actions of the city. This was because the contract required any extension of time to be obtained through certain procedures, procedures Opinski did not use, so the question of fault for the delays did not arise. Opinski argues that, in so ruling, the trial court contravened the rule laid down by our Supreme Court in *Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist.* (1963) 59 Cal.2d 241 (*Peter Kiewit*). There the court held that an owner is not entitled to damages for late completion if the lateness was caused by the owner's conduct, even if the contract barred extensions of time unless requested under specified procedures and the contractor admittedly did not make a request.

In the published part of our opinion, we hold that this aspect of *Peter Kiewit* was superseded by a 1965 amendment to Civil Code section 1511, which allows parties to specify in a contract that a party intending to avoid the effect of its failure to perform by asserting that the other party's act caused the failure must give written notice of this intention within a reasonable time. In this case, the contractual provisions requiring certain procedures to be followed by a party requesting an extension of time amounted to the type of specification contemplated by the amendment to Civil Code section 1511. Since Opinski did not follow those procedures to claim an extension of time, it cannot rely on *Peter Kiewit*, and the trial court was correct to enforce the procedural requirements of the contract.

We also hold in the published part of our opinion that the court erred when it awarded prejudgment interest to the city. The city was holding retention funds in an escrow account created pursuant to Public Contract Code section 22300, in an amount that exceeded the damages upon which interest was awarded. The city was entitled to access the funds when it determined that Opinski had breached the contract. It had dominion and control of the funds from that point and therefore was not entitled to prejudgment interest.

The trial court ordered the retention funds in the escrow account to be used as a setoff against the judgment. With the interest included, the award consumed the entire escrow balance. The reversal of the interest award will mean that the escrow funds exceed the total amount awarded to the city. We remand so the trial court can modify the judgment to require the city to pay the residue to Opinski.

In the unpublished part of the opinion, we reject the remainder of Opinski's and the surety's arguments in these two appeals (Case Nos. F060219 & F060727).

FACTUAL AND PROCEDURAL HISTORIES

On May 3, 2004, Opinski entered into a contract with the city as the general contractor for the project. The city issued a "Notice to Proceed" effective the same day. The contract required the work to be completed within 300 calendar days and provided for liquidated damages of $250 for each day of delay. The 300th day was February 26, 2005, but, according to the architect's certification of substantial completion, the project was not substantially complete until September 30, 2005, more than seven months late.

The litigation began when a subcontractor sued Opinski for withholding payment. The subcontractor's claim was dismissed before trial and is not now at issue. Opinski cross-complained against the city for breach of contract. The city answered and cross-complained against Opinski and the surety, also for breach of contract.

Opinski's claim against the city was that the city wrongfully refused to pay a balance of $164,839 of the contract price plus $24,436 in excess of the contract price for

proposed change orders the city had refused to approve, along with interest and contractual penalties. The $164,839 balance represented an unpaid portion of the "retention" funds. In a construction contract, a retention is a portion of the contract price that is withheld by the owner as a form of security in case of a dispute. "Authorities have noted that a retention occurs when the owner retains a percentage from each progress payment as a form of security against potential mechanics' liens and as security that the contractor will complete the work properly and repair defects." (*Yassin v. Solis* (2010) 184 Cal.App.4th 524, 534.) The contract in this case provided for a retention of 10 percent of the contract price. As the progress payments came due, the retention funds were deposited in an escrow account the parties established for that purpose.

The city's claim against Opinski was that Opinski owed $54,000 in liquidated damages for lateness, $10,000 for defective conditions, and interest. The city also claimed that it was withholding the balance of the contract price in escrow because it had received stop notices from three subcontractors. Stop notices are notices from subcontractors stating that the city should not pay the general contractor an amount the general contractor had failed to pay the subcontractor.

The city did not, however, argue that the stop notices ultimately meant the amount to be paid to Opinski should be reduced. In its post-trial brief, the city suggested that the court should award the city judgment against Opinski for the damages for lateness and defects, but should also direct the city to authorize the release of the funds in escrow to Opinski. Then, according to the city, Opinski should be ordered to pay the amounts at issue in the stop notices to the subcontractors.

The key provisions of the contract for purposes of these appeals concerned the means by which the contract price and the contract time (i.e., the time by which the project was to be completed) could be changed. The parties could only be bound by changes in the completion time or the price that were made in writing through specified procedures. These procedures were included in a lengthy set of provisions called the

"General Conditions of the Contract." Paragraphs 11.2 and 12.1 of the General Conditions provided that the completion time and the contract price can be changed only by means of a change order. A change order is defined as a document signed by the contractor and the city that authorizes a change in the price, time, or other provision of the contract.

Paragraph 11.2 provided that "[n]o claim for an adjustment in the Contract Price will be valid if not submitted in accordance with this paragraph 11.2." Paragraph 12.1 included a similar provision about claims for adjustment to the contract time.

A change order altering the time or price could be executed by either of two routes. First, under paragraph 10.4.2, the parties could execute the order by mutual agreement. Second, under paragraph 10.4.3, an order could be issued to "embody the substance of any written decision rendered by Engineer pursuant to paragraph 9.11 …." The engineer was defined as "[t]he person, firm or corporation which prepared the Plans and Contract Documents." The engineer for this project was the firm RRM Design Group.[1] Paragraph 10.4 provided that "Owner and Contractor shall execute appropriate Change Orders" covering changes to the time or price arrived at in one of these ways.

Paragraph 9.11 provided a process by which the engineer could be asked to rule on claims by the parties for changes in the time or price. "[C]laims under Articles 11 and 12 in respect [to] changes in the Contract Price or Contract Time" were to be "referred initially to Engineer in writing with a request for a formal decision …." The party making the claim was required to give written notice of the claim to the engineer and to the other party "promptly (but in no event later than thirty days) after the occurrence of the event giving rise thereto …." Data supporting the claim were required to be submitted "within sixty days after such occurrence" unless the engineer allowed

[1]RRM Design Group provided architectural and engineering services. One of its principals, Kirk Van Cleave, signed the certificate of substantial completion as architect.

additional time. After this, the engineer was to render a decision in writing within a reasonable time.

Paragraph 12.2 specified that an extension of time based on circumstances beyond the control of the contractor were to be granted after submission of a claim:

> "The Contract Time will be extended in an amount equal to time lost due to delays beyond the control of the Contractor if a claim is made [therefor] as provided in paragraph 12.1. Such delays shall include, but not be limited to, acts of neglect by Owner or others performing additional work as contemplated by Article 7, or to fires, floods, labor disputes, epidemics, abnormal weather conditions or acts of God."

The court issued a written ruling after a bench trial. It awarded the city $54,000 plus interest for lateness and $3,266 for repair of construction defects. It found that the city rightly withheld $43,546 for two stop notices, and that Opinski "failed to meet its burden of proof that it bonded around the two … stop notices …." It further found that the city's decision to withhold over $164,000 of the contract price was "not unreasonable" because, under Public Contract Code section 7107, subdivision (c),[2] the city was entitled to withhold up to 150 percent of the amount in dispute. The amount in dispute was $54,000, plus $43,546, plus a then-unknown amount for defects. The ruling rejected Opinski's claims for unpaid change orders, stating that Opinski failed to submit them within 30 days as required by the contract. Finally, the ruling directed the city to prepare a proposed statement of decision and judgment.

The ruling did not state that either Opinski or the city was required to pay any of the withheld money to subcontractors and did not state that the contract price was reduced by the amount of the notices or any other amount. It did not include any statement about the disposal of the money in the escrow account.

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[2]The subdivision provides: "In the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount."

These omissions led to a dispute over the contents of the proposed statement of decision and judgment. Opinski submitted a request for a statement of decision asking for, among other things, rulings on whether the city was required to release the funds in escrow and whether Opinski was entitled to a judgment in the amount of the difference between the escrow balance and the judgment in favor of the city.

The city prepared, and the court signed and filed, a statement of decision that included a set of responses to the issues raised in Opinski's request. The responses included a determination that there was no need to answer Opinski's requests for findings about the causes of the delay in completion. It was "not necessary to separately respond to each of these requests" because, under the circumstances, the terms of the contract made the answers irrelevant. To alter the contract time—regardless of the reason—the contract required the party seeking the alteration to obtain a change order either by mutual agreement or by submitting a claim to the engineer with a request for a formal decision in writing. Neither procedure was used, the court reasoned, so the time was not extended, regardless of which party was to blame for the late completion.

The responses to Opinski's requests also included the following three reasons why Opinski was not entitled to a judgment for the difference between the escrow balance and the judgment for the city and why no order for the disposition of the escrow funds was called for:

> "First, these requests assume that the City is unilaterally withholding and can unilaterally release $164,839 in retention funds. In fact, the money representing the retention funds is deposited and held pursuant to an escrow agreement …. The money held in escrow can only be released with the consent of both parties. It cannot be … unilaterally released, or accessed, by either party. The court's finding is that since the City could 'retrieve up to 150% per PCC §7107,' … the 'retention is not unreasonable.' That the principal sum of the judgment to be entered is less than the amount now held in the escrow account provides no legal or factual basis for an entry of judgment in favor of [Opinski or the surety]. Any issues that remain between the parties following entry of judgment in this action, which is premised solely upon alleged breaches of the construction agreement, are

not within the subject matter of the issues framed by the pleadings in this case.

"Second, a judgment in favor of Opinski or its surety would necessarily need to be premised upon a breach of the construction contract by the City. Here, the court has found no such breach by the City but has determined that there is a breach of the contract by Opinski.… Thus, there is no legal or factual basis that could support the entry of any judgment in favor of either Opinski or its surety.

"Finally, and as noted, the City is entitled to effectively stop payment of 150% of the amount in dispute under PCC §7107. The presumptive reason for the legislative right to maintain a retention in that amount in the event of a dispute necessarily contemplates, as [do] the terms of the construction agreement, that the City will recover costs and attorneys fees in connection with any dispute arising out of the construction agreement. Accordingly, the court concludes that the City of Oakdale is not required to release for payment to Opinski [the amount of the difference between the escrow balance and the amount of the judgment for the city]; that Opinski is not entitled to a judgment on its cross-complaint in that amount or in any amount; and is not entitled to a net judgment in that amount, or any amount."

The court entered judgment for the city and against Opinski and the surety on February 3, 2010, stating that attorneys' fees would be determined later by motion. A motion for a new trial and a number of other motions were denied. In its order denying the new trial motion, the court stated that it was "retaining jurisdiction over the issue of the amount of retention funds that are being retained and to which Opinski is entitled to until that amount is finally determined." Opinski and the surety filed a notice of appeal, initiating the first of the two appeals (No. F060219) now before us.

The city filed its motion for attorneys' fees. Relying on article XIII of the parties' contract, the city requested $104,478.67 in attorneys' fees. On June 28, 2010, the court awarded $97,775 in fees against Opinski and ruled that no fees could be awarded against the surety. The combined amount of the damages judgment, interest, and fees now exceeded the amount of the funds retained in the escrow account. The court ruled that all

the money in the escrow account would be used to satisfy a portion of the judgment. The order awarding fees stated:

> "During the hearing, [Opinski] asked the Court about the status of the retention monies that are still held in escrow for this Project. After hearing from both counsel on the subject matter of the retention monies, the Court directed [city's counsel] to write to the bank holding the monies and request the release of the retention monies to the [city]. Any such monies paid to the [city] from the retention account shall, to that extent, satisfy the judgment of the [city] against [Opinski] in this action."

Opinski and the surety filed the second appeal, No. F060727.

DISCUSSION

I. Liquidated damages for late completion

A. Court's reliance on contractual requirements for extension

Opinski argues that it was error to award liquidated damages for lateness on the ground that if no extension was requested or granted through the required procedures, then it did not matter which party, if either, was to blame for the delays, since the contract barred extensions of time for any reason except pursuant to those procedures. Relying on *Peter Kiewit, supra*, 59 Cal.2d 241 and on Civil Code section 1511, Opinski contends that liquidated damages could not be awarded for any portion of the delay that was caused by the city, even if Opinski failed to use the contract's procedures for obtaining an extension. Opinski says its timely performance was impossible because of the city-caused delays.

In *Peter Kiewit*, the California Supreme Court rejected an analysis like the one the trial court employed here. The contract at issue had similar provisions. The court stated:

> "The principal question presented concerns the effect, if any, to be given to a provision of the contract that, if the work was not completed within the time specified (300 days after notice to start work), the sum of $25 was to be deducted from the final payment as liquidated damages for each day's delay after the expiration of that period until final acceptance by defendant [junior college district]. The agreement also provided that, if plaintiff [contractor] considered itself entitled to an extension of time for any cause, it must submit in writing to the architect and defendant an application for such extension. Extensions were to be granted only for delays resulting

> from causes beyond plaintiff's control, including, among other things, strikes, alterations of the work delaying completion, and 'any act of neglect, duty, or default' of defendant." (*Peter Kiewit, supra*, 59 Cal.2d at p. 243.)

The work was not completed on time, but the trial court found that the lateness was caused by matters beyond the contractor's control. The government agency conceded that its own conduct caused the delays. The contractor did not request extensions of time in connection with those delays in accordance with the required procedures. (*Peter Kiewit, supra*, 59 Cal.2d at p. 243.)

The Supreme Court rejected the government agency's contention that the trial court should have enforced the contract's requirements for extending time and should have awarded the agency liquidated damages even though the agency caused the delays itself. It held, "Noncompliance with a provision requiring an application for an extension of time is not a proper basis for holding a contractor liable in liquidated damages for late completion caused by the owner's conduct." (*Peter Kiewit, supra*, 59 Cal.2d at p. 245.) The court relied on Civil Code section 1511, which provided in part:

> "The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:
>
> "1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse …." (Civ. Code, § 1511; see also Review of Selected 1965 Code Legislation (Cont.Ed.Bar 1965) p. 55.)

Chief Justice Gibson's opinion explained:

> "Section 1511 of the Civil Code provides in subdivision 1 that any delay in the performance of an obligation 'is excused' when performance is delayed by 'the act of the creditor … *even though there may have been a stipulation that this shall not be an excuse*.' (Italics added.) An owner who is a party to a construction contract is a creditor within the meaning of section 1511 [citation], and, as the italicized portion of the section makes clear, a provision in an agreement that the contractor is not to be excused for late completion caused by the owner is rendered inoperative by the

> statute. A provision in a contract which would require the contractor to make an application for an extension of time before he may be excused for a delay caused by the owner's conduct would obviously constitute a substantial limitation on the policy declared by section 1511." (*Peter Kiewit, supra*, 59 Cal.2d at pp. 243-244.)

The *Peter Kiewit* decision was criticized as an unwarranted interference in the power of contracting parties to shift the risk of delays caused by one party onto the other party by forcing the second party to give the first notice of any intention to claim an extension of time based on delays caused by the first. A Boalt Hall professor thundered:

> "Almost universally, building contracts contain a provision that conditions the contractor's right to claim an extension of time for delays beyond his control upon giving written notice of his intention to make such a claim. Despite contrary precedents, a unanimous California Supreme Court gutted this sensible provision in [*Peter Kiewit*]. A questionable application of an obscure provision of California Civil Code Section 1511 was employed to justify the court's refusal to give effect to this express condition. This decision will undoubtedly hamper fair and effective administration of California construction contracts and should not pass unnoticed by the Bar." (Sweet, *Extensions of Time and Conditions of Notice: California's Needless Restriction of Contractual Freedom* (1963) 51 Cal. L.Rev. 720, 720, fns. omitted.)

In 1965, the Legislature amended section 1511, subdivision 1, to add the following clause after "shall not be an excuse": "however, the parties may expressly require in a contract that the party relying on the provisions of this paragraph give written notice to the other party or parties, within a reasonable time after the occurrence of the event excusing performance, of an intention to claim an extension of time or of an intention to bring suit or of any other similar or related intent, provided the requirement of such notice is reasonable and just …." (Civ. Code, § 1511; see also Stats. 1965, ch. 1730, § 1, pp. 3887-3888; *General Insurance Co. v. Commerce Hyatt House* (1970) 5 Cal.App.3d 460, 470-471.)

The amendment was a legislative reaction against the *Peter Kiewit* decision. A Continuing Education of the Bar publication issued at the time explained:

> "Formerly, § 1511(1) prevented a contract obligor from contracting to assume to risk of delays or barriers to performance caused by the obligee. Obstructive conduct by the obligee was always an excuse for nonperformance, even if the obligor had accepted a stipulation that this conduct would not be an excuse.
>
> "Many contracts include a provision whereby the obligor is required to give notice of his intention to claim that failure of performance has been excused by the obligee's conduct. Failure to give timely notice is made a waiver of the excuse. [Citations.] However, these notice requirements have been held contrary to the policy of § 1511(1) and hence void. [*Peter Kiewit, supra*], followed in *Aetna Cas. & Sur. Co. v. Board of Trustees* (1963) 223 CA2d 337, 35 CR 765; see 1 Witkin, Summary, 1963 Supp, Contracts § 252.
>
> "Amended § 1511(1) overcomes the court holding and restores the power of contracting parties to include in their contract a provision requiring the obligor to give notice if he intends to rely on obligee's conduct as an excuse for delay or nonperformance, or as a basis for damages or other affirmative relief." (Review of Selected 1965 Code Legislation, *supra,* at pp. 55-56.)

The contract in this case contained provisions of the type contemplated by the 1965 amendment. If the contractor wished to claim it needed an extension of time because of delays caused by the city, the contractor was required to obtain a written change order by mutual consent or submit a claim in writing requesting a formal decision by the engineer. It did neither. The court was correct to rely on its failure and enforce the terms of the contract. It makes no difference whether Opinski's timely performance was possible or impossible under these circumstances. The purpose of contract provisions of the type authorized by the 1965 amendment to Civil Code section 1511, subdivision 1, is to allocate to the contractor the risk of delay costs—even for delays beyond the contractor's control—unless the contractor follows the required procedures for notifying the owner of its intent to claim a right to an extension. There was no error.

Besides *Peter Kiewit*, Opinski also cites *Aetna Casualty & Surety Co. v. Board of Trustees, supra*, 223 Cal.App.2d 337 and *General Insurance Co. v. Commerce Hyatt*

House, supra, 5 Cal.App.3d 460, but both of those cases apply the law as it was before the 1965 amendment. *General Ins. Co. of America* was decided after the amendment, but the court explained that the preamendment law applied because the contract was made before 1965. (*General Insurance Co., supra,* at p. 471.)

B. Contract intepretation issues

Opinski argues that the court's conclusions were based on a misinterpretation of the contract. He says the provisions in paragraphs 11.2 and 12.1 requiring submission of claims to the engineer were not applicable "[i]n the absence of a rejection" of Opinski's request for an extension of time.

Opinski is mistaken. The contract allows an extension of time only via a change order executed by the mutual consent of the parties or pursuant to a decision of the engineer upon a claim submitted in accordance with paragraph 12.1. Nothing in the contract supports the notion that the contractor can obtain an extension of time merely by asking for one, so long as the city never expressly rejects the request.

Opinski relies on paragraph 4.2.6 and paragraph 10.2, but these provisions do not support Opinski's position. Paragraph 4.2.6 is part of article 4, which is titled "Availability of Lands; Physical Conditions; Reference Points." Paragraph 4.2.6 provides that the contract price can be increased and the contract time extended if these changes are made necessary by an inaccuracy in the description of the physical conditions at the building site included in the contract documents and the engineering reports used to prepare the contract documents. The paragraph states that, "[i]f Owner and Contractor are unable to agree as to the amount or length [of the change in price or time], a claim may be made [therefor] as provided in Articles 11 and 12." Opinski claims this sentence means "the claims provisions in Article 12 do not apply" unless there has first been a "rejection" of a request. The language of the paragraph, however, does not imply that there must be a rejection. It merely says a claim may be made if the parties are unable to agree. Parties can fail to agree where one party simply does not respond to the other

party's proposal. The evidence in this case supports the conclusion that this is just what happened here. In any event, the facts in this case have nothing to do with inaccuracies in the documents describing the physical conditions at the site, so paragraph 4.2.6 is irrelevant.

Paragraph 10.2 provides that if the parties "are unable to agree" on a change in the time or price arising from a "Work Directive Change," then a claim for a change may be made under article 11 or article 12. Again, an inability to agree is not the same as an express rejection. The contract did not require an express rejection by one party of another party's proposed change order as a precondition to the applicability of the procedure for requesting a decision by the engineer. Further, a "Work Directive Change" was defined by the contract as a written order by the city directing a change in the work to be done. No work directive change is at issue in this case, so paragraph 10.2 is irrelevant.

C. Sufficient evidence

Opinski also argues that the liquidated damages award was not supported by sufficient evidence. "When an appellant asserts there is insufficient evidence to support the judgment, our review is circumscribed. [Citation.] We review the whole record most favorably to the judgment to determine whether there is substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof." (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.)

The court's finding that the project's completion date was September 30, 2005, is supported by the city's exhibit No. 307, titled "Certificate of Substantial Completion," and admitted into evidence by stipulation. The certificate states that it was issued on September 30, 2005. It is signed by representatives of Opinski, the city, and the project architect. It includes the following text:

> "The Work performed under this Contract has been reviewed and found, to the Architect's best knowledge, information and belief, to be substantially complete. Substantial Completion is the stage in the progress of the Work

> when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use. The date of Substantial Completion of the Project or portion thereof designated above is hereby established as which is also the date of commencement of applicable warranties required by the Contract Documents, except as stated below …."

The blank line between "established as" and "which is also" was not filled in, but there is no dispute that the certificate purports to establish September 30, 2005, as the date of substantial completion. There also is no dispute about the authenticity of the document.

The certificate represents the project architect's determination that the project reached substantial completion on September 30, 2005. The parties' signatures are evidence that they concurred, or at least acquiesced, in this determination. This was substantial evidence upon which the trial court could rely. Since it was undisputed that the contract required completion by February 26, 2005, and provided for liquidated damages for lateness of $250 per day, the court's award of $54,000 for these damages was supported by substantial evidence.[3]

Opinski relies on evidence that it "demobilized" from the building site in the summer of 2005, apparently meaning its equipment and personnel mostly left the site. The trial court rejected this evidence, asserting in the statement of decision that "Opinski did not demobilize from the project between June 30, 2005, and September 30, 2005 …." Opinski argues that "[t]his finding lacks substantial evidence" because "every document shows and every material witness in the case admitted that Opinski demobilized and the building just sat" while an adjacent plaza was being finished. For instance, David Steinbeck, the city's construction manager for the project, said "[y]es" when asked by Opinski's counsel whether "[t]he reality of the situation was that Opinski's work was

[3]February 26, 2005 to September 30, 2005, is 216 days. Two hundred and sixteen times $250 equals $54,000.

pretty much done in the early summer, and for most of the summer, the building just sat there waiting for the plaza work to catch up."

The essence of Opinski's argument is that the evidence the project was complete earlier than September 30, 2005, is weightier than the evidence to the contrary. This is not a winning appellate argument. In a sufficient-evidence appeal, the question is only whether the record contains substantial evidence in support of the judgment, not whether it also contains evidence that would have been sufficient to support a different judgment. We do not reweigh the evidence. In any event, the court was not required to find that the evidence that Opinski had mostly left the site or that the building was "pretty much done" earlier than September 30, 2005, meant the building was substantially complete before then. "Substantial completion" was a defined term in the parties' contract,[4] and the court was entitled to regard the architect's certificate of substantial completion as a more reliable indicator of when the project was substantially complete than testimony about when the work was "pretty much done" or when Opinski "demobilized."

Opinski also contends that liquidated damages should not have been awarded because there was evidence that it asked for and received an extension. Opinski's project superintendent sent a letter to the city requesting a four-week extension. He never received an answer. Greg Opinski then sent another letter to the city asking for a 30-day extension. He testified that John Word, the city's Director of Public Works, orally agreed

[4] "***Substantial Completion***—The Work or a portion thereof, constituting a separately functioning process or facility, has progressed to the point where it is sufficiently complete, in accordance with the Contract Documents, so that it can be utilized for the purposes for which it is intended; or if there be no such certificate issued, when final payment is due in accordance with paragraph 14.13. The terms 'substantially complete' and 'substantially completed' as applied to any Work refer to Substantial Completion thereof."

that Opinski should have the extension. Word testified that he did not remember doing so.[5]

The trial court could reasonably find that this evidence did not establish any agreement to extend the contract's time provision. It expressly rejected Greg Opinski's testimony that he had an oral agreement with John Word to extend the time. The court was not required to credit that testimony.

Opinski uses the evidence about this alleged oral agreement as the basis of another argument. It contends that, even assuming a change order was necessary to extend the contract time and the city never executed one, the deadline cannot be enforced against Opinski. This is because the city had an *obligation* to execute a change order based on John Word's oral agreement and the city's failure to reject Opinski's request expressly. Opinski relies on paragraph 10.4, which states that the parties "shall execute appropriate Change Orders" under certain conditions, including change orders for alterations in the contract price or time "which are agreed to by the parties." As we have said, however, the trial court could reasonably find that there was no oral agreement. Even if there had been an oral agreement, we doubt it would have been enforceable. The provision stating that changes in the time or price can only be made by written change orders would be pointless if the parties could enforce oral agreements to make change orders.

Finally, in the statement of facts in its opening brief, Opinski argues that it effectively submitted its request for an extension of time to the engineer as well as to the city. It says that when it sent a request for an extension of time to the city, it also sent a

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[5]In its reply brief in case No. F060219, Opinski disavows any reliance on an alleged oral agreement between Greg Opinski and John Word to extend the time, saying it never challenged the trial court's finding that no such agreement existed. This disavowal strengthens the city's case, for it means Opinski is saying it is excused from following the required procedures for changing the contract time by the city's mere failure to answer its request for an extension, an argument which, as we have said, finds no support in the contract.

copy to someone named Dave Steinbeck. According to Opinski, the city had told Opinski to use Steinbeck as a conduit when communicating with the engineer, RRM Design Group. Opinski says this means there is no substantial evidence to support the trial court's finding that Opinski did not make a claim to the engineer for an extension of time in accordance with paragraphs 9.11 and 12.1. Opinski does not, however, claim the copy it sent to Steinbeck included a request for a formal decision by the engineer on a claim, as required by paragraph 9.11. In fact, the letter, which is included in the appellate record, does not request a formal decision by the engineer. Consequently, it did not satisfy the contract's claims requirements, even assuming sending it to Steinbeck was equivalent to sending it to the engineer. The court's finding was, therefore, supported by substantial evidence.

II. The city did not breach by not paying for late-submitted proposed change orders for increases in the contract price

Opinski claimed in the trial court that the city breached the contract by refusing to pay for additional work described in proposed change orders submitted by Opinski. Since paying for additional work would have meant an increase in the contract price, it was necessary for a change order to be executed, either by mutual consent of the parties or pursuant to a formal decision of the engineer after submission of a written request for a decision. The trial court ruled that the city had no obligation to pay because the proposed change orders "were not submitted within the thirty (30) days required by the contract …." This ruling was based on the requirements in paragraphs 9.11 and 11.2 of the General Conditions of the contract. Both paragraphs require any claim for an increase in the contract price that is submitted to the engineer for a decision to be so submitted within 30 days "after the occurrence of the event giving rise" to the claim.

Opinski claims the ruling reflects a misinterpretation of the contract. In a variation on one of the arguments it made about the time extension, Opinski says it was never required to submit a claim to the engineer because there was never an express

disagreement between the parties about whether the price should be increased. "According to the contract," Opinski argues, "a [proposed change order] ripens into a 'claim' only if the parties *are unable to agree* on the price." The city did not reject the proposed change orders, so they did not ripen, and the 30-day period never began to run.

The contract does not support Opinski's interpretation. The contract contains nothing suggesting that a claim comes into being when a proposed change order "ripens" because the parties failed to agree. The contract simply provides two ways to create a change order altering the price: by mutual agreement and by the engineer's decision resolving a claim. The provisions establishing the 30-day deadline for submission of a claim are unqualified; they do not say the 30 days begin to run only after the parties have tried and failed to execute a change order by mutual agreement. To the contrary, those provisions state simply that the 30 days begin to run upon the "occurrence of the event giving rise" to the claim. The plain meaning of "the event giving rise to the claim" is the event that would justify an increase in price or an extension of time, such as a demand by the owner for extra work or an unforeseen occurrence that creates a necessity to do extra work. Opinski asserts that paragraph 10.2 "defines" the event giving rise to a claim as the inability of the owner and contractor to agree, but this is not correct. Paragraph 10.2 merely states that if the owner and contractor are unable to agree on a change in the time or price, then a claim may be made. This cannot reasonably be read as modifying the 30-day deadline set forth elsewhere or as establishing an express rejection of a proposed change as a condition precedent for the submission of a claim. Further, as we have said, paragraph 10.2 pertains only to changes made via work directive change. No work directive change is at issue in this case.

In sum: The 30-day claim period begins to run when something happens that might justify a change in the time or price. During that period, the parties can execute a change order by mutual agreement; if they do not, the party seeking the change must submit a claim to the engineer. If that party fails to submit a claim within that time and

no change order is executed by agreement, the unaltered contract time and price remain in effect. No change order was executed by agreement, and Opinski did not submit any claim to the engineer within 30 days of the event giving rise to the claim. Opinski does not even assert that it submitted any claim for a price increase to the engineer within 30 days of such an event. Instead, it only makes the erroneous argument that the 30 days never began to run because the city did not issue rejections of the proposed change orders. The contract price therefore did not change and the court was correct to reject Opinski's claim that the city breached the contract by refusing to pay for the work described in the proposed change orders.

Opinski also argues that the 30-day time limit for claims somehow was waived because the parties orally agreed that proposed change orders could be submitted after the work described in them was already done. Opinski cites sections of the Civil Code authorizing oral modifications of written contracts. The city responds by arguing that Government Code section 40602 provides that a general-law city can be held liable only on a written contract. In its reply brief, Opinski disavows any reliance on oral agreements, abruptly denying that authorities on the enforceability of oral agreements have "any relevance to the issues in this case." Consequently, we need not discuss this contention further. In any event, it is not clear how an agreement that Opinski could submit proposed change orders after the fact would mean either that the city was obligated to accept them or that the procedure for submission of claims to the engineer did not apply.

III. Escrow funds

One of the claims in Opinski's complaint was that the city wrongly refused to release from escrow an amount exceeding $164,000, which represented a portion of the contract price. The court ruled that the withholding of up to 150 percent of the amount in dispute was authorized by Public Contract Code section 7107, subdivision (c), and that the sum the city withheld was reasonable. It retained jurisdiction over the issue of the

escrow funds after it entered judgment for the city on February 1, 2010. In the end, the court implicitly ruled that Opinski was entitled to any difference between the balance retained in escrow and the amount awarded to the city, for when it awarded attorneys' fees on June 28, 2010, it ordered that the escrow funds be used as a setoff against the total amount awarded to the city. The escrow funds could not have been used to satisfy the judgment against Opinski unless the court concluded that the funds belonged to Opinski.

The net result of the court's decisions was that Opinski received nothing and still owed the city a portion of the judgment, since the escrow funds were less that the total amount of the judgment, including the attorneys' fees. Opinski now argues that the court should have ordered a setoff in the February 1, 2010, judgment instead of waiting until after it decided the fee motion. If it had done so, the net judgment would have been in favor of Opinski, since the $164,000 in escrow was more than the amount awarded to the city at that time. Opinski further argues that this net judgment would have meant that it, not the city, was the prevailing party, so the award of attorneys' fees to the city was improper.

A. Timing of setoff decision

Opinski has not established any reason why the court was compelled to order a setoff before deciding the fee motion instead of after. He relies on *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720 (*Fassberg*), but that case does not support his argument.

Fassberg, a general contractor, sued the housing authority, and the housing authority cross-complained. A jury returned a verdict for the housing authority. The court found that the housing authority was the prevailing party and awarded attorneys' fees. The housing authority had retained a portion of the contract price, just as in this case. (*Fassberg*, *supra*, 152 Cal.App.4th at pp. 726, 732.) Fassberg filed a motion requesting that the retained funds be used as an equitable setoff against the judgment. The court ruled that, under Public Contract Code section 7107, subdivision (c), the

housing authority had properly retained the funds during the dispute and that Fassberg had no right to a setoff. (*Fassberg, supra,* at p. 733.) The court stated that Fassberg would have to commence a separate equitable action to recover the retained funds. (*Id.* at p. 763.) The Court of Appeal reversed, stating: "The Housing Authority has no right to continue to withhold any part of the retention proceeds after this action is fully resolved and must return all of the retention proceeds to Fassberg …. Therefore, the denial of a setoff was error. Fassberg is entitled to recover the full amount of the retention proceeds in the judgment to be entered after further proceedings on remand." (*Id.* at p. 764.)

The *Fassberg* opinion says nothing suggesting that if attorneys' fees are to be awarded, the retention funds must be used as a setoff *before* they are awarded. It only held that the retention funds had to be used as a setoff. In the present case, the court did use the retention funds as a setoff. In fact, the *Fassberg* opinion favors the court's action in this case: It said the housing authority had no right to retain the funds after the dispute was *fully* resolved. (*Fassberg, supra,* 152 Cal.App.4th at p. 764.) Fees were part of the contract and the motion was part of the parties' dispute over the contract, so the dispute was not fully resolved until after the fee motion was decided.

Opinski also contends that the terms of Public Contract Code section 7107, subdivision (c), are inconsistent with the court's decision to allow the city to continue retaining the escrow funds after the February 1, 2010, judgment. Opinski says:

> "Section 7107 provides statutory authority for an owner to withhold 150% of a disputed amount 60 days after the Project is initially completed. (PCC §7107(c).) The section does not authorize the City to indefinitely withhold money, nor does it authorize the withholding of money once the dispute is resolved. Herein lies the fallacy in the City's reliance on Section 7107. Once the trial court hears the evidence and makes a finding as to what is actually owed, there is no dispute. When the trial court found that the City withheld … too much from Opinski …, Section 7107 doesn't insulate the City from liability for having to pay this *mathematical difference*."

Opinski is mistaken. The 60-day provision of Public Contract Code section 7107 reads: "Within 60 days after the date of completion of the work of improvement, the

retention withheld by the public entity shall be released. In the event of a dispute between the public entity and the original contractor, the public entity may withhold from the final payment an amount not to exceed 150 percent of the disputed amount." (Pub. Contract Code, § 7107, subd. (c).) Under the most natural interpretation, this means the retention funds must be released within 60 days of completion *absent* a dispute; if there is a dispute, the public entity may continue withholding a portion of the retention funds, not to exceed 150 percent of the amount in dispute. Opinski cites no authority to the contrary, and does not even explicitly claim that the city was required to release all the funds 60 days after the completion date. Opinski may well be correct that the statute does not allow the funds to continue to be withheld after a dispute is resolved and a court has found that the contractor is owed a portion. There is no authority, however, for Opinski's view that the dispute was fully resolved while the fee motion was still pending.

We conclude that the trial court had discretion to wait to order a setoff until after it had decided the fee motion. A setoff is an equitable remedy. (See, e.g., *Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 362.) It is likely that the court anticipated that it would find the city to be the prevailing party and award it attorneys' fees. In light of this, the equities favored leaving the retention funds in escrow until after the fee motion was decided and granting a setoff at that point.

B. Prevailing party

Contrary to Opinski's argument, the city would have been the prevailing party even if the trial court had ordered a setoff in the original judgment of February 1, 2010, and had ordered the city to pay Opinski the post-setoff balance of the funds in the escrow account. The court found that Opinski breached the contract and the city did not breach the contract. Since it was only the city that obtained a favorable verdict on the contract claims, the fact that (before the attorneys' fees award) Opinski was entitled to receive a portion of the escrow funds does not show that the city was not the prevailing party. As

we will explain, the city recovered "greater relief in the action on the contract" within the meaning of Civil Code section 1717 regardless of the disposition of the escrow funds.

The fee clause in the contract provided:

> "If any legal action, including arbitration, is necessary to enforce or interpret the terms of this agreement, the prevailing party shall be entitled to reasonable attorney's fees, which may be set by the Court or the Arbitrator, as the case may be, in the same action, or in a separate action brought for that purpose, in addition to any other relief to which he may be entitled."

The court's order granting the city's fee motion implicitly found the city to be the prevailing party and awarded $97,775 in attorneys' fees, about $7,000 less than the city requested. It denied Opinski's request for findings.

Civil Code section 1717, subdivision (a), authorizes an award of attorneys' fees to "the party prevailing on the contract" in a contract dispute where the contract provides for such an award. Subdivision (b)(1) of the same section provides that "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract."

Opinski's argument that it, not the city, was the prevailing party is premised on the fact that, before the attorneys' fees were awarded to the city, the city owed Opinski more money because of the funds retained in escrow than Opinski owed the city because of the judgment. It contends that this means it obtained (or would have obtained, had the court ordered a setoff before the fee award instead of after) a greater monetary recovery and therefore was the prevailing party.

The party who recovered "a greater relief in the action on the contract" within the meaning of Civil Code section 1717, subdivision (b)(1), however, "does not necessarily mean the party receiving the greater monetary judgment." (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136 (*Sears*); see also 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 194, pp. 745-746.) In *Sears*, Sears was the guarantor of a lease. When the lessee defaulted, Sears paid $112,000 under protest to the lessor's assignee, Baccaglio, and later

sued to recover the money, claiming the guaranty had been revoked before the default. In the meantime, Baccaglio collected from several other sources, recovering a total (including Sears's payment) of about $67,000 more than his damages.

The trial court found Sears liable on the guaranty, but, since Baccaglio had already been paid more than his loss, ordered Baccaglio to return the $67,000 excess to Sears. (*Sears, supra,* 60 Cal.App.4th at pp. 1140-1141.) In spite of this, the trial court found Baccaglio to be the prevailing party because Baccaglio had won on the contract issue. It stated, "'By no stretch of the imagination can Sears claim that he was in fact the prevailing party because, having lost on his principal claim that the contract was ineffective, he recovered more of the $112,000 than Baccaglio.'" (*Id.* at p. 1141.) The Court of Appeal agreed: "A party can fail to recover a net monetary judgment and yet prevail for purposes of collecting fees in an action founded in contract." (*Id.* at p. 1139.) After an exhaustive analysis of the meaning of Civil Code section 1717 and related statutes, the appellate court concluded that the trial court had discretion to find Baccaglio was the prevailing party because he was the victor on the contract issue. Sears's recovery was not based on the verdict on that issue, but simply on the fact that Sears had previously paid money to Baccaglio that turned out to be more than he owed:

> "The complaint and record demonstrate enforcement of the guaranty was the pivotal issue. Sears received money *not* because the court found Baccaglio liable for breach of contract. Instead, the court ordered Baccaglio to return a portion of Sears's payment because of the fortuitous circumstances of Baccaglio's collecting from [another party's] bankruptcy estate in March 1994 and mitigating the damages by re-leasing a portion of the building." (*Sears, supra,* 60 Cal.App.4th at p. 1159.)

The present case is analogous to *Sears*. Before the attorneys' fees award, Opinski was owed a net balance, but not because it prevailed on any contract issue. The city would have been obliged to return some of the money in the escrow account, but not because it breached the contract. To the contrary, it withheld the money reasonably, and would have had to return it simply because the dispute that gave it the right to withhold

had now been resolved, not because it did something unlawful. Under these circumstances, the trial court did not abuse its discretion in finding the city to be the prevailing party. (*Sears, supra,* 60 Cal.App.4th at p. 1158 [prevailing-party determination must not be disturbed absent clear abuse of discretion].)

Code of Civil Procedure section 1032 contains a different definition of "prevailing party" for purposes of awarding *costs*: "'Prevailing party' includes the party with a net monetary recovery …." Courts often employ Code of Civil Procedure section 1032 to award attorneys' fees as a category of costs. (*Sears, supra,* 60 Cal.App.4th at p. 1139.) Opinski cites both Civil Code section 1717 and Code of Civil Procedure section 1032 in its brief. Code of Civil Procedure section 1032 arguably supports Opinski's position better than Civil Code section 1717, since one of its definitions of a prevailing party refers specifically to a net monetary recovery. We agree with the *Sears* court, however, that Civil Code section 1717 should be applied, not Code of Civil Procedure section 1032, if there is a conflict between them, since Civil Code section 1717 "is the statute that expressly deals with attorney's fees under a contract …." (*Sears, supra*, at p. 1157.) We also agree with the *Sears* court that the two statutes point to the same result in circumstances like these. Under both, the court has discretion to use facts other than net monetary recovery to make the prevailing-party determination. (*Id.* at pp. 1155-1157.)

Opinski claims the court did not find that the city never breached the contract by retaining the funds in the escrow account. It argues that the statement of decision is consistent with the view that the city did breach: "The trial court merely found that the City had a good faith basis for withholding the $164,839 at the time the Project was completed <u>in 2006</u>, such that prompt pay penalties could not be imposed on the City under Public Contract Code section 7107."

Opinski is mistaken. In reality, the court's statement of decision simply stated that the city did not act unreasonably when it withheld the money. It said nothing about 2006 or prompt pay penalties:

> "Since the City could retrieve up to one hundred and fifty percent (150%) per PCC §7107, with the liquidated damages amount of Fifty-four Thousand Dollars ($54,000.00) plus Forty-three Thousand Five Hundred Forty-six Dollars ($43,546.00) plus the unknown amount to correct the OPW problem [i.e., the construction defect problem] (see, Opinski's expressed opinions as to the necessary structural fix), the court finds that the retention is not unreasonable."

There is no way to interpret this as a finding that the city breached the contract because it was obligated to release the money at some time after completion of the project and before trial, but failed to do so. The trial court's finding is simply that the city did no wrong by refusing to release the money.

Opinski points out that in *Fassberg*, the court remanded for a new prevailing-party determination after it held that Fassberg was entitled to a setoff for the retained contract funds. (*Fassberg, supra*, 152 Cal.App.4th at p. 764.) The opinion in *Fassberg*, however, says nothing about what the prevailing party determination should be on remand or how the court should make it. In particular, the opinion does not say that Fassberg must become the prevailing party if the retention funds owed to it turn out to be more than the damages owed to the housing authority. The matter was simply left to the trial court to decide on remand. "[A]n opinion is not authority for a proposition not therein considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

Finally, in our view it would make little sense to deem a contractor a prevailing party solely because the contractor obtained an order for release of retention funds. Public Contract Code section 7107, subdivision (c), makes it *lawful* for an owner to retain 150 percent of an amount in dispute. A determination at the end of the lawsuit that the owner must release some of the money does not mean the owner has acted wrongly. A court might find that the only breach of contract was a breach by the contractor. Retention money might still be owing to the contractor, since the damages the contractor caused might be less than 150 percent of the disputed amount. That would not show, however, that the owner had breached the contract or that the contractor had prevailed.

That is the situation in this case. The city prevailed on its claims on the contract; Opinski failed in its claims on the contract; the amount of damages was less than the amount retained; and Opinski would have been owed a portion of the retention funds if not for the attorneys' fees award. The court had discretion to find that the city, not Opinski, was the prevailing party in this state of affairs.

IV. Interest

Opinski argues that the court should not have awarded prejudgment interest to the city because the city was withholding the money the court ultimately awarded to it. Opinski contends that this means the city had the use of that money. Since the purpose of awarding prejudgment interest is to compensate the injured party for the time value of money it recovers, interest should not be awarded where that party was in possession of the money all along, Opinski says.

The city argues that "[i]t is simply not the case that [it] ever had the ability to access" the retention funds in the escrow account. It claims the escrow agreement did not allow one party to withdraw the funds without the consent of the other party.

The rule is that if, during any prejudgment period, a party has dominion and control over money that is awarded to it as damages, it is not entitled to prejudgment interest for that period. In *Buckman v. Tucker* (1937) 9 Cal.2d 403, Thompson sued Buckman for $439.72 upon a contract and prevailed at trial. Buckman appealed but did not file a stay bond. Thompson secured a writ of execution and collected on February 18, 1935. The appeal led to a new trial, the result of which was a determination that, under the parties' agreement, the suit had been brought prematurely because the debt had not yet matured. (*Id.* at p. 404.)

After the maturation date, Buckman sued and prevailed again. The trial court awarded prejudgment interest from July 16, 1934 to October 29, 1935. (*Buckman v. Tucker, supra,* 9 Cal.2d at p. 405.) The Supreme Court held that the interest award was erroneous because Buckman had obtained the money on February 18, 1935: "Defendant

Thompson had execution issued on February 18, 1935. It is obvious from the date that the defendant thus came into possession of the money that he had dominion and control thereof, and interest should have terminated on that date." (*Id.* at p. 409; see also *Insurance Co. of North America v. Bechtel* (1973) 36 Cal.App.3d 310, 319 [prejudgment interest on judgment against insurer should have terminated on date when insurer deposited funds with court and parties stipulated that funds would be released to insured without prejudice].) The question, therefore, is whether the city had dominion and control over the money in the escrow account. This, in turn, depends on the terms of the parties' escrow agreement.

The parties' escrow agreement conforms to the model agreement in Public Contract Code section 22300, subdivision (f). The purpose of an escrow agreement under Public Contract Code section 22300 is to allow the contractor to receive in cash the money that would otherwise be held by the owner as retention, while providing the owner with securities as collateral: "At the request and expense of the contractor, securities equivalent to the amount withheld [as retention] shall be deposited with the public agency, or with a state or federally chartered bank in this state as the escrow agent, who shall then pay those moneys to the contractor. Upon satisfactory completion of the contract, the securities shall be returned to the contractor." (Pub. Contract Code, § 22300, subd. (a).) In effect, the agreement allows the contractor to borrow against the securities. As an alternative, the contractor can request that the owner pay the retentions in cash to the escrow agent. In that case, the contractor "may direct the investment of the payments into securities," and interest earned on the investments belongs to the contractor. (Pub. Contract Code, § 22300, subd. (b).)

Like the model agreement in the statute, the parties' escrow agreement provides in paragraph seven that the owner is entitled to convert the securities to cash and withdraw the cash "in the event of default by the Contractor." (Pub. Contract Code, § 22300, subd. (f)(7).) Neither the model agreement nor the parties' agreement explains what

happens if the contractor defaults and the escrow account already contains only cash, as appears to have happened in this case.

Opinski argues that paragraph seven implies that, in case of breach by the contractor, the owner is entitled to withdraw the principal in the escrow account regardless of its form. The city argues that two other provisions, paragraphs three and six, imply that, once funds are placed in the escrow account, they cannot be withdrawn without the consent of both parties. Paragraph three provides that when the owner makes cash retention payments into the escrow account, "the Escrow Agent shall hold them for the benefit of the Contractor until the time that the escrow created under this contract is terminated." Paragraph six states that "Contractor shall have the right to withdraw all or any part of the principal in the Escrow Account only by written notice to Escrow Agent accompanied by written authorization from the Owner to the Escrow Agent that Owner consents to the withdrawal of the amount sought to be withdrawn by Contractor."

We agree with Opinski. The purpose of the practice of withholding retention payments is to give the owner security in case of breach by the contractor. Nothing in Public Contract Code section 22300 evinces a legislative intent to limit an owner's recourse. Although paragraph seven of the model escrow agreement (and the parties' actual escrow agreement) does not expressly state that an owner can withdraw cash if the contractor defaults and the account never contained securities, the inclusion of that paragraph presupposes that the owner has a right to possession of the retention when the owner deems the contractor to be in breach. The purpose of withholding retention would be undermined if this were not the case, and there is no reason why the form of the retention—securities or cash—would make a difference in this regard. For these reasons, we conclude that the city had the power to withdraw the money from the escrow account when it determined that Opinski had breached the contract. Therefore, it had dominion and control over the money from the time of the breach and was not entitled to prejudgment interest.

The court's order in its ruling on the attorneys' fees motion is consistent with this view.[6] It directed the city to "write to the bank holding the monies and request the release of the retention monies to" the city. The court did not direct Opinski to give consent. The record does not show, and the city does not claim, that it turned out to be impossible to release the money to the city on the city's sole authorization.

The city's reliance on paragraphs three and six of the escrow agreement is misplaced. Paragraph three states that the escrow agent "shall hold" retention payments "for the benefit of the Contractor" until the escrow is terminated, but this cannot mean the owner lacks power to direct the escrow agent to return the principal if the contractor breaches, since paragraph three would in that case conflict with paragraph seven. Paragraph three would also conflict with the basic purpose of retention under that interpretation, for it would deprive the owner of security against the contractor's breach. Paragraph six says only that the contractor cannot withdraw funds without the consent of the owner. The omission of the converse provision—that the owner cannot withdraw funds without the consent of the contractor—shows that the converse provision is not intended. Further, once again, the purpose of retention—to provide security to the owner—would be defeated if the placement of retention in escrow meant the money is inaccessible to the owner absent the consent of the contractor.

We conclude the award of prejudgment interest to the city was error and reverse the award. The effect of the reversal is that the escrow balance will exceed the total award to the city. The escrow balance is sometimes stated in the record as $164,839 and sometimes as $164,781. Without prejudgment interest, the total award to the city is $54,000 for late completion, $3,266 for repair of construction defects, and $97,775 for attorneys' fees, a total of $155,041.

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[6]Its statement of decision in support of the February 1, 2010 judgment, however, was not consistent with this view. The court opined that the city could not have accessed the money without Opinski's consent. We reject this position, as we have said.

The difference between the escrow balance (whichever it is) and the city's recovery must be awarded to Opinski on remand. We agree with the *Fassberg* court that, where there is no remaining dispute to justify continued withholding of retention, the owner must release any retention funds that exceed the court's award to the owner, and the court should order the owner to do so. (*Fassberg, supra*, 152 Cal.App.4th at p. 764.) The trial court's assertion in the statement of decision that the question of a release of retention funds to Opinski was not within the issues framed by the pleadings is inconsistent with the holding in *Fassberg* that no special procedures are needed to "invoke the equitable power of the court to effect a setoff, when appropriate." (*Id.* at p. 763.)

V. Surety's claims

The surety argues that its bond should have been extinguished in the judgment of February 1, 2010. It contends that there was enough money to cover the judgment in the escrow account, and, as the court determined later, it was not liable for attorneys' fees, so funds sufficient to satisfy the bonded liability were in the city's hands when judgment was rendered on February 1, 2010, and its obligations as surety should have ended then.

As we have said, the dispute between the parties was not fully resolved before the attorneys' fees motion was decided, and the court could reasonably anticipate that attorneys' fees would be awarded to the city. Opinski cites no authority stating that the escrow funds had to be applied to the damages first. There was no way of knowing before the attorneys' fees motion was decided whether there would be enough money in the account to cover both the attorneys' fees and the damages, so there was no way of knowing whether the surety would still have an obligation when all was said and done. The court was right, therefore, not to enter judgment in favor of the surety on February 1, 2010.

The surety also argues that, after the attorneys' fees motion was decided, judgment against the surety should have been reduced by the amount the city received from the

escrow account. It contends that the court's failure to reduce the judgment against it contravened the principle that a surety's obligation cannot exceed that of the principal. (Civ. Code, § 2809.[7])

This argument supplies its own rebuttal. If a surety's obligation cannot exceed that of the principal, then the court's decision not to adjust the amount of the judgment against the surety after a portion of the principal's liability was satisfied made no difference. The partial satisfaction of the principal's liability reduced the surety's obligation by operation of law. An order by us to reduce the amount of the judgment against the surety would, therefore, also make no difference. The surety cites no authority for the view that any change in the judgment was necessary to give effect to the principle that the surety's obligation is reduced when that of the principal is reduced. We perceive no error.

DISPOSITION

The award of prejudgment interest in No. F060219 is reversed. No. F060727 is remanded to the trial court with directions to determine the amount by which the total award in both matters is exceeded by the amount that was retained in escrow and to order the city to pay Opinski the difference. The judgments are affirmed in all other respects. The parties shall bear their own costs on appeal.

_____
Wiseman, Acting P.J.

WE CONCUR:

_____
Levy, J.

_____
Kane, J.

[7] "The obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation."