SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 54

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POLO ELECTRIC CORP.,

Plaintiff,

INDEX NO.: 652421/10
DECISION, ORDER & JUDGMENT

-against-

NEW YORK LAW SCHOOL, PAVARINI McGOVERN, LLC and "JOHN DOE #1 THROUGH JOHN DOE # 25,"

Defendants.

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SHIRLEY WERNER KORNREICH, *J.*:

This is an action seeking payment for work done on a construction project. Defendants New York Law School (NYLS) and Pavarini McGovern, LLC (PMG) move: (1) to dismiss the first, third and fourth causes of action as asserted against them in the amended complaint, pursuant to CPLR 3211[1]; (2) to dismiss the amended complaint in its entirety as asserted against PMG; and (3) pursuant to CPLR 3002, to declare that any remaining claims plaintiff may have seeking damages for additional work, delay or acceleration are precluded by the written contract between the parties. The amended complaint asserts five cause of action: (1) wrongful termination; (2) breach of contract; (3) additional costs; (4) quantum meruit; and (5) lien foreclosure. Motion, Ex. A.

Background

NYLS is the owner of a facility that was constructed at 185 West Broadway, New York,

[1]Although defendants do not indicate which subsection(s) of CPLR 3211 are applicable, their arguments indicate that they are basing this motion on CPLR 3211 (a) (1) and (7).

New York. PMG was the construction manager for the project. On March 14, 2007, plaintiff entered into a Trade Contract with PMG to perform electrical work at the project. Motion, Ex. C. Pursuant to this agreement, all work was to be completed on or before August 15, 2008, and plaintiff was to obtain temporary certificates of occupancy (TCO) for all cellar and sub floors by July 15, 2008, and a TCO for the above ground five floors by August 15, 2008. *Id.*

In the amended complaint (Motion, Ex. A), plaintiff admits that PMG was the disclosed agent of NYLS, whose actions were and are totally attributable to NYLS. Amended Complaint, ¶ 8. However, the amended complaint also alleges that PMG acted independent of its agency with NYLS in both the administration of the contract entered into between the parties and in PMG's promises of payment to plaintiff. *Id.*, ¶ 9.

Plaintiff asserts, in the amended complaint, that the reason that it was not able to complete its work within the mandated time-frame were "delays ... caused by NYLS and [PMG]." *Id.*, ¶ 18. In addition, plaintiff states that "these delays caused [it] to suffer, inter alia, increased labor and material costs," in addition to other costs for which it now seeks damages. *Id.*, ¶ 20. Further, the complaint alleges that, "[i]n an attempt to make up for its own delays ... [PMG] directed [plaintiff] and other trade contractors to work simultaneously on all floors." *Id.*, ¶ 21.

The amended complaint maintains that defendants failed or refused to issue approved change orders for the additional work that plaintiff incurred because of the construction delays (*id.*, ¶ 26). It also contends that when plaintiff demanded payment for this work, defendants issued a notice of default, said notice being issued in bad faith so that defendants would not have to reimburse plaintiff for the additional costs plaintiff incurred. *Id.*, ¶ 34.

Basically, it is plaintiff's contention that it was delayed by defendants and others within the control of NYLS and PMG in completing its work when defendants changed the project schedules during construction and directed plaintiff to perform additional and overtime work. Plaintiff maintains that defendants failed to complete the superstructure in accordance with the work schedule, which denied plaintiff access to the work areas. Moreover, plaintiff claims that defendants later denied it access to the site and prohibited it from completing the work for which it was contracted.

Defendants argue that, pursuant to the terms of the contract between the parties, there is a "No Damage for Delay" provision which expressly bars plaintiff's claims for damages for its first, second, third and fourth causes of action. Article 2.10 of the contract states:

> Trade Contractor expressly agrees not to make, and hereby waives, any claim for delay costs, loss of productivity or efficiency, lost profits or extended home office overhead, on account of delay, obstruction or hindrance for any cause whatsoever, whether or not foreseeable, whether or not anticipated and whether or not caused by the Trade Contractor.

Motion, Ex. C.

According to defendants, the terms of the above-quoted contractual provision bar plaintiff's claims for wage escalations and lost profits, which are the damages that plaintiff is seeking in its first cause of action. Similarly, defendants argue that plaintiff seeks damages for "additional work" in its third cause of action, and quantum meruit in its fourth cause of action, all of which it waived by entering into the agreement with the "No Damage for Delay" provision.

Moreover, defendants maintain that plaintiff waived any delay claims in agreeing to the timing provisions of the contract, which state, in relevant part:

[* 4]

6.1 TIME IS OF THE ESSENCE IN THE PERFORMANCE OF THIS TRADE CONTRACT. The Construction Manager and/or Owner may sustain financial loss if the whole Project or any part thereof is delayed because the Trade Contractor fails to perform any part of the Work in accordance with the Contract Documents, including, without limitation, a failure to comply with the without limitation, a failure to comply with the Construction Manager's directions of the Project Schedule and any Substantial Completion, Final Completion or Milestone dates contained herein. The Trade Contractor shall begin the Work at the time directed by the Construction Manager and shall perform its obligations under this Trade Contract with diligence and with sufficient manpower to maintain the progress of the Work as scheduled, without delaying other trades or areas of work. At the request of the Construction Manager, the Trade Contractor shall perform certain parts of the Work before other parts, add extra manpower, or order overtime or premium time labor in order to comply with the Project Schedule, all without any increase in the Trade Contract Price (unless otherwise specifically provided in the General Conditions). The Trade Contractor shall be liable for all direct and consequential damages arising out of the Trade Contractor's breach of this Trade Contract including any defects in the Trade Contractor's Work.

6.2 Trade Contractor expressly agrees not to make, and hereby waives, any claim for delay costs, loss of productivity or efficiency, lost profits or extended home office overhead, on account of delay, obstruction or hindrance for any cause whatsoever, whether or not foreseeable, and whether or not anticipated. Trade Contractor shall promptly advise Construction Manager in writing within twenty-four (24) hours of Trade Contractor's discovery or knowledge of any delay (or the reasonable likelihood of a delay) and shall suggest strategies to Construction Manager to mitigate the effect of any delay including overtime, re-sequencing and other remedial methods, failing which, Trade Contractor shall be deemed to have waived any entitlement to an extension of time.

6.3 Trade Contractor acknowledges and accepts that the construction of the Project is complex and subject to delays. Accordingly, and notwithstanding any other provisions of this Trade Contract, Trade Contractor agrees to make no claim for additional costs on account of, and contractually

> assumes the risk of, any and all loss and expense for delay in the performance of the Work, including any delay occasioned by or resulting from any act or omission of Construction Manager, Owner, Architect or their consultants or other Trade Contractors employed at the Project site.

Id.

Defendants assert that all of the damages specified in the amended complaint are related to changes in the project's schedule caused by delays and, consequently, are barred by the above-quoted contractual provisions. In addition, defendants claim that such changes in the work schedule were contemplated by Article 4 of the Trade Contract, which states, in pertinent part:

> Without limitation of the provisions of the General Conditions, the Trade Contractor shall complete the Work in accordance with the Project Schedule, including any revisions thereto provided by the Construction Manager. The Construction Manager exclusively shall control scheduling, including the periodic updating thereof, if any, and the Trade Contractor shall comply therewith. The Construction Manager shall have the right to schedule other work at the same time and in the same areas as the Trade Contractors' Work.
>
> Trade Contractor also agrees to be bound by such modifications to the Project Schedule as are discussed at the weekly job progress meetings and are contained in the minutes of those meetings unless written objection is delivered in writing by Trade Contractor within forty-eight (48) hours of the receipt of such minutes.

Id.

Defendants also argue that, in accordance with the terms of Article 16 of the Trade Contract, plaintiff agreed that a time extension would be its sole right and remedy for any delays that occurred in the work. Specifically, plaintiff agreed that:

> [s]hould the Trade Contractor be obstructed or delayed in the commencement, prosecution or completion of the Work, without fault on his part, by the act, failure to act, direction,

> order, neglect, delay or default of the Owner, the Architect, the Construction Manager or any other Trade Contractor employed upon the work or by changes in the Work, or by changes made to the Construction Project Schedule pursuant to Article 4 of the Trade Contract, ..., then he shall be entitled to an extension of time for a period equivalent to the time lost by reason of any or all of the causes aforesaid but no claim for extension of time on account of such delay shall be allowable unless a claim in writing is presented to the Construction Manager with reasonable diligence but in any event not later than within five (5) days after the commencement of such delay. The Trade Contractor expressly agrees not to make, and hereby waives, any claim for damages, including those resulting from increased supervision, labor or material costs, on account of any delay, obstruction or hindrance for any cause whatsoever, not limited to the aforesaid causes, and agrees that the sole right and remedy therefore shall be an extension of time.

Id.

Defendants say that plaintiff fails even to allege that it requested an extension of time, much less that it gave any written notice of any condition justifying an extension of time.

In addition, the amended complaint alleges that certain delays were caused by obtaining multiple temporary certificates of occupancy (CO), which delays, defendants assert, are delays anticipated by the Trade Contract, in which plaintiff agreed to assist in obtaining the TCOs. Moreover, it is defendants' position that the amended complaint fails to allege, in the second, third and fourth causes of action, any claim that is not barred by the "No Damage for Delay" clause in the Trade Contract.

With respect to the first cause of action for wrongful termination, defendants argue that this cause of action should be dismissed because plaintiff has never been terminated. Defendants say that the basis for plaintiff's claim for wrongful termination is a letter sent to it from PMG on May 8, 2009, which outlines various problems that PMG says that it is having with plaintiff's

work, and acts as a deduct change order, stating, in relevant part:

> Accordingly and without prejudice to any further remedies or rights [PMG] and the Owner have, we are hereby issuing in accordance with the terms of your contract a deduct change order removing from your contract all the remaining incomplete and deficient work. This shall take effect immediately.

Motion, Ex. B.

In addition, this letter says:

> Nothing herein is intended to constitute a termination of [plaintiff]'s contract, which remains in full force and effect. However, nothing contained herein is intended to waive any breach on [plaintiff]'s part, and [PMG] and the Owner reserve the right to terminate your contract at any time in the future based upon such breach.
> ... [PMG] and the Owner reserve all rights to alter the scope of the deduct change order so as to reinstate to your contract any or all of the work covered by this deduct change order.

Id.

Defendants claim that the Trade Contract gave them the right to have plaintiff's work completed by other contractors if PMG determined that plaintiff committed any act of default (Motion, Ex. C, Articles 5, 11 and 16), and, hence, the deduct change order was not a termination of the Trade Contract.

Defendants also aver that plaintiff's first through fourth causes of action allege delays based on acceleration of plaintiff's contract work. However, even assuming that they are based on additional work, according to the Trade Contract, if plaintiff required any changes, it needed to submit change orders to be approved in writing by PMG, after PMG received approval from NYLS for such changes. Defendants point out that the amended complaint does not allege that any of the claimed change orders for which it is seeking damages were ever approved by PMG or

NYLS. According to the amended complaint, all of the changes alleged to have been approved by PMG were based on oral requests by plaintiff, which, defendants maintain, are unenforceable by the terms of the Trade Contract. Further, since plaintiff is arguing the breach of a written contract, defendants assert that plaintiff may not maintain a cause of action for quantum meruit.

Lastly, PMG argues that the complaint must be dismissed in its entirety as asserted against it because it was always acting as the agent for NYLS as the disclosed principal. PMG says that the amended complaint fails to allege any evidence that PMG took any clear and explicit action to "superadd" its own liability to that of NYLS.

In opposition to the instant motion to dismiss, plaintiff states that when delays occurred in the completion of the superstructure, delays caused by defendants and others in defendants' control, it was orally agreed that the initial dates appearing in the Trade Contract were not achievable and that plaintiff's time to complete the work was extended to December of 2008. Additionally, plaintiff states that the work areas in which it was to perform electrical work were not made available to it until July or August of 2008 and that defendants consistently failed to issue comprehensive work schedules or updates. When the building was finally available to plaintiff, plaintiff asserts that defendants created a haphazard environment that necessitated plaintiff hiring additional labor, in effect creating a project that was starkly different from the one on which plaintiff had bid.

Plaintiff contends that defendants accelerated the time for plaintiff's performance, in contravention of the Trade Contract. Specifically, plaintiff says that at a meeting on January 6, 2009, at which time the accelerated dates were given, plaintiff immediately informed PMG that this accelerated schedule would cause plaintiff to incur significant additional costs, and plaintiff

avers that PMG's principal personally assured plaintiff that defendants would reimburse plaintiff for these extra expenditures.

Plaintiff has submitted the minutes of the January 6, 2009 meeting, prepared by PMG, which states, among other things:

> PMcG confirmed that overtime directed to a trade to improve their contract schedule would be reimbursed, but that work to meet their purchased contract schedule would be the particular trade's responsibility.
>
> . . .
>
> [Plaintiff] to complete wiring of mockup desk for the resolution of the desk wiring, immediately following meeting.
>
> The above represents the best understanding of the writer. Should any party have a differing recollection please contact C. Worrell in writing as soon as possible.

Opp., Ex. 1.

Plaintiff also states that, pursuant to Article 16 of Exhibit H to the Trade Contract, defendants specifically agreed to reimburse plaintiff for overtime and change order/additional work directed by defendants. It is noted that the court has reviewed what is marked as Exhibit H of the Trade Contract and finds no such provision. Article 16 of the main body of the Trade Contract merely says "[a]dditional terms and conditions of, and Schedules to, this Trade Contract, if any, are provided for on the 'List of Exhibits' attached hereto and made a part hereof."

Plaintiff asserts that defendants authorized it, among other things, to: (1) perform additional work; (2) provide additional (union) labor and supervision at "premium time" to accelerate the work; (3) maintain and provide additional temporary lighting, power, equipment and/or materials; and (4) perform its work out of sequence. Plaintiff maintains that principals of

PMG told it that they would submit all extra costs associated with this allegedly additional work to NYLS for approval. Plaintiff says that it submitted additional work authorizations, T&M tickets, lump sum change orders, proposed change orders, general correspondence and/or invoices, all of which document the additional work that it performed (Opp., Ex. 2), some of which resulted in formal written change orders (Opp., Ex. 3) and some of which were approved by e-mail or orally.

It is plaintiff's position that, by PMG failing to submit its requests for change orders to NYLS, PMG breached its contract with plaintiff, since the Trade Contract states that PMG would "pursue all legitimate change orders/additional costs on behalf of [plaintiff]." Motion, Ex. C. Plaintiff states that this breach was conceded at the January 6, 2009 meeting, but the minutes provided by plaintiff do not substantiate this allegation.

Plaintiff says that, on March 25, 2009, he was again orally promised by PMG's principal that defendants would pay all of plaintiff's change orders on or before March 27, 2009, as a result of which plaintiff says that it agreed to further accelerate the work.[2] Plaintiff further states that, by e-mail dated March 28, 2009, PMG directed plaintiff to use its full labor force over the weekend without any manpower reduction (Opp., Ex. 6); however, that e-mail indicates that there was a dispute as to how many men constituted plaintiff's full labor force as agreed to in the Trade Contract.

Finally, plaintiff argues that PMG sent the default notice in retaliation for plaintiff's demand for the arrears that it claims it is owed because of the additional work that it performed.

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[2]Plaintiff says that this assertion was memorialized in a proposed stipulation of settlement (Opp., Ex. 5), but the court does not give cognizance to unexecuted stipulations of settlement.

In reply, defendants, in sum and substance, reiterate their position that plaintiff's claims are delay costs, which are barred by the terms of the Trade Contract, and that the amended complaint fails to assert any cause of action as against PMG.

Discussion

CPLR 3211 (a), governing motions to dismiss a cause of action, states that

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> (1) a defense is founded upon documentary evidence; or
> * * *
> (7) the pleading fails to state a cause of action ... ."

On a motion to dismiss, pursuant to CPLR 3211, the pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and all inferences should be drawn in the plaintiff's favor (*Leon v Martinez*, 84 NY2d 83 [1994]); however, the court must determine whether the alleged facts "fit within any cognizable legal theory." *Id.* at 87-88. Further, "[a]llegations consisting of bare legal conclusions ... are not presumed to be true [or] accorded every favorable inference [internal quotation marks and citation omitted]." *Biondi v Beekman Hill House Apartment Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *affd* 94 NY2d 659 (2000).

Defendants' motion is granted to the extent of dismissing the first, third and fourth causes of action appearing in the amended complaint.

Plaintiff's first cause of action alleges unlawful termination on the part of defendants, based on the above-referenced letter of May 8, 2009. Plaintiff claims that its contract was terminated by defendants in retaliation for its demand for payment for what it alleges was additional work performed, and that defendants unlawfully denied it access to the job site to

continue its work.

However, not only does the letter relied upon by plaintiff to support this cause of action specifically state that it is not terminating the contract, but the Trade Contract itself, in Article 5, ¶¶ 5, 11 and 16, as noted above, grants defendants the right to issue a deduct change order to reduce plaintiff's contractual work. Moreover, the letter indicates eight areas in which PMG asserts that plaintiff has failed to meet its contractual obligations as the basis for the deduct change order. The court notes that plaintiff never specifically disputes the allegations of its non-performance or malfeasance appearing in the deduct change order letter. Therefore, the allegations appearing in the complaint regarding wrongful termination are contradicted by the terms of the Trade Contract and, hence, the first cause of action is dismissed.

The third cause of action for additional costs is barred by the Trade Contract's No Damages for Delay clause.

> A clause which exculpates a contractee from liability to a contractor for damages resulting from delays in the performance of the latter's work is valid and enforceable and is not contrary to public policy if the clause and the contract of which it is a part satisfy the requirements for the validity of contracts generally. The rule is not without exceptions, however, and even exculpatory language which purports to preclude damages for *all* delays resulting from *any* cause whatsoever are not read literally [emphasis in the original; internal citations omitted].

Corinno Civetta Construction Corp. v City of New York, 67 NY2d 297, 309 (1986).

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

> of a fundamental obligation of the contract.' However, the clause exonerates the defendant for delays caused by inept administration or poor planning, a 'failure of performance' by the defendant 'in ordinary garden variety ways,' or a failure of performance resulting from ordinary negligence, as distinguished from gross negligence [internal citations omitted].

Plato General Construction Corp./EMCO Tech Construction Corp., JV, LLC v Dormitory Authority of State of New York, 89 AD3d 819, 823 (2d Dept 2011).

"Plaintiffs seeking to invoke one of the exceptions to the enforceability of a 'no damages for delay' clause face a 'heavy burden.' Possible causes for delay specifically mentioned in the contract are, by definition, 'contemplated' [internal citation omitted]." *LoDuca Associates, Inc. v PMS Construction Management Corp.*, 91 AD3d 485, 485 (1st Dept 2012).

In the case at bar, plaintiff asserts that its extra work and additional costs were occasioned by delays caused by defendants' inept administration and improper scheduling of the work of different trades. Extra work caused by delays resulting from inept administration fall within the category of damages for delay. *Blue Water Environmental, Inc. v Incorporated Village of Bayville, New York*, 44 AD3d 807 (2d Dept 2007).

Moreover, plaintiff has failed to allege any facts from which it could be argued that the delays cited are exempt from the No Damages For Delay clause in the contract.

> It was reasonably foreseeable that there would be changes to the work .... The prime contract made clear that the owner retained the right to make changes or modifications, and included a procedure to deal with delays. Furthermore, the delay alleged was not long enough to qualify as abandonment of the contract ....

Commercial Electrical Contractors, Inc. v Pavarini Construction Co., Inc., 50 AD3d 316, 318 (1st Dept 2008); *see also T.J.D. Construction Co., Inc. v City of New York*, 295 AD2d 180 (1st

Dept 2002).

Plaintiff has not alleged any willful or gross negligence on the part of defendants that caused delays in the progress of the construction project. Thus,

> [plaintiff] may not recover additional compensation resulting from costs incurred by delay, including the [plaintiff] to accelerate the work in an attempt to achieve timely completion. It is undisputed that [plaintiff] did not give written notice to [defendants], as required by the terms of the ... agreement ... that it would be seeking an extension of time ... by reason of unavoidable delay."

Spectrum Painting Contractors, Inc. v Kreisler Borg Florman General Construction Co., Inc., 64 AD3d 565, 574-575 (2d Dept 2009). The court finds unpersuasive plaintiff's argument that defendants waived the contractual requirement that all authorizations for additional work compensation be in writing, approved by both defendants. The amended complaint does not allege such a waiver.

Plaintiff has failed to articulate, in the amended complaint, a course of conduct that would eliminate the Trade Contract provision requiring change order work to be in writing. *Universal/MMEC, Ltd. v Dormitory Authority of State of New York*, 50 AD3d 352 (1st Dept 2008). Plaintiff states that some work orders received formal written approval, that some were approved in informal writing by e-mail, and that some were orally approved. To substantiate the oral approvals, plaintiff cites to the minutes of the January 6, 2009 meeting, which stated, in pertinent part:

> PMcG confirmed that overtime directed to a trade to improve their contract schedule would be reimbursed, but that work to meet their purchased contract schedule would be the particular trade's responsibility.

The minutes only state that overtime directed to "improve" work would be reimbursed,

not work for which a contractor was already contractually bound to perform. Plaintiff has failed to allege any conduct that indicates that defendants were willing to depart from the requirements of the Trade Contract with respect to authorizing additional work, such as the conduct appearing in the cases cited by plaintiff in support of its position on this issue: *CNP Mechanical, Inc. v Allied Builders, Inc.*, 84 AD3d 1748 (4th Dept 2011)(additional work initiated by owners, indicating owners' relinquishment of written approval); *Tucker v AM Sutton Associates*, 16 AD3d 670 (2d Dept 2005)(modifications of contract specifically authorized by owners); *Mel-Stu Construction Corp. v Melwood Construction Corp.*, 131 AD2d 823 (2d Dept 1987)(oral authorization admitted by defendant).

> Nothing in the [amended complaint] can be viewed as unequivocally referable to an intent to modify the provisions in question. In any event, any reliance on the purported waiver and/or modification on the part of plaintiff, a sophisticated contractor, which would result in [several] million [dollars] in extra work and delay damages [is] unreasonable.

F. Garofalo Electric Co., Inc. v New York University, 270 AD2d 76, 81 (1st Dept 2000).

Based on the foregoing, plaintiff's cause of action for additional work is dismissed. Similarly, plaintiff's fourth cause of action for quantum meruit is dismissed. The existence of a valid contract bars a cause of action in quantum meruit. *Universal/MMEC, Ltd. v Dormitory Authority of State of New York*, 50 AD3d 352, *supra; The Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320 (1st Dept 2004); *see also Sheiffer v Shenkman Capital Mgt.*, 291 AD2d 295 (1st Dept 2002). Moreover, since plaintiff is arguing breach of a valid contract as the basis for its alleged injuries, a claim for unjust enrichment cannot be maintained for the same alleged wrongs.

Also, based on the foregoing, that portion of defendants' motion seeking a declaration that any claims asserted by plaintiff for damages for additional work, delay or acceleration are precluded by the written contract between the parties, is granted.

Even if the first, third and fourth causes of action were found to have merit, they would still have to be dismissed, along with the second cause of action for breach of contract, as asserted against PMG. "[A]n agent for a disclosed principal 'will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal' [internal citation omitted]." *Savoy Record Company, Inc. v Cardinal Export Corp.*, 15 NY2d 1, 4 (1964). In the instant amended complaint, plaintiff has failed to provide any allegation that would meet the standard of clear and explicit evidence of such an intention on the part of PMG. *Weinreb v Stinchfield*, 19 AD3d 482 (2d Dept 2005). All of the allegations regarding PMG's conduct are actions that are incorporated into the Trade Contract as actual authority granted to PMG by NYLS.

Furthermore, the court finds unpersuasive the allegation that PMG breached the contract by failing to submit work orders to NYLS. The terms of the contract, as quoted above, only require PMG to submit "legitimate" change orders for NYLS approval, and the complaint does not allege that plaintiff submitted the written change orders mandated by the agreement. Accordingly, it is

ORDERED that defendants' motion is granted and the first, third and fourth causes of action in the amended complaint are dismissed; and it is further

ADJUDGED and DECLARED that any cause of action asserted by plaintiff for damages resulting from additional work, delay or acceleration are precluded by the written contract

between the parties; and it is further

ORDERED that the amended complaint is dismissed in its entirety as against Pavarini McGovern, LLC; and it is further

ORDERED that the action is severed and continued as against the remaining defendants; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 1580, who are directed to enter judgment dismissing the action asserted as against Pavarini McGovern, LLC; and it is further

ORDERED that the remaining defendants are directed to serve an answer to the complaint within 20 days after this decision is efiled; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 228, 60 Centre Street, on October 11, 2012, at 9:30 a.m.

Dated: September 11, 2012

ENTER:

J.S.C.

CLERK