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BERGEN COUNTY CIRCUIT COURT

FERBER CONSTRUCTION COMPANY, Plaintiff, v. THE BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS, Defendant.	Action at Law.

Notice and Grounds of Appeal

(*Filed, June 26, 1916*)

To:

Messrs. Hart & Vanderwart,
Attorneys of the Plaintiff.

Take notice that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The Court refused to direct the jury to find that the defendant was entitled to have its counterclaim for the sum of $885—allowed.

2. The Court, over defendant's objection, directed the jury to find that the plaintiff was entitled to recover the sum of $3591, with interest from November 29, 1915; making the sum of

$3703.51 whereas it should have directed the jury to find that the plaintiff was entitled to recover only the sum of $2706, with interest from November 29, 1915, or the sum of $2790.43.

3. The Court, over defendant's objection, directed the jury to find that the defendant was entitled to recoup nothing upon its counterclaim.

4. The Court refused to direct the jury to find that the defendant was entitled to recoup the sum of $885, or some lesser sum upon its counterclaim.

5. The Court gave judgment for the plaintiff for $3747.69 whereas it should have given judgment for the plaintiff for the sum of $2834.61.

E. J. LUCE & W. A. KIPP,
Attorneys of the Appellant.

(*Endorsed*)

BERGEN COUNTY CIRCUIT COURT

FERBER CONSTRUCTION COMPANY,
Plaintiff,
v.
THE BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS,
Defendant.
} Action at Law.

NOTICE OF APPEAL

E. J. Luce & W. A. Kipp, Attorneys for the Defendant.

Service acknowledged, June 23, 1916.

A. C. Hart & Vanderwart, Attorneys of Plaintiff.

I hereby certify that the foregoing is a true copy of the notice and grounds of appeal filed in my office on June 26, 1916; and that I have annexed hereto a true transcript of everything required by law to be removed; all of which I accordingly transmit to the Court of Errors and Appeals of the State of New Jesey.

GEORGE VAN BUSKIRK,
Clerk.

Summons

(*Filed, January 24, 1916.*)

State of New Jersey.

To The Board of Education of the Borough of Hasbrouck Heights, County of Bergen and State of New Jersey:

You are summoned to answer the annexed complaint of Ferber Construction Company, a corporation of the State of New Jersey, in an action at law in the Bergen County Circuit Court.

And Take Notice, that unless you file your answer to said complaint with the Clerk of the Bergen County Circuit Court at Hackensack, New Jersey, within twenty days after service upon you of this writ and the annexed complaint the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, Luther A. Campbell, Judge of the Bergen County Circuit Court, at Hackensack, this 18th day of January, 1916.

GEORGE VAN BUSKIRK,
Clerk.

A. C. Hart & Vanderwart,
Attorneys.

Complaint

(Filed, January 24, 1916.)

BERGEN COUNTY CIRCUIT COURT

FERBER CONSTRUCTION COMPANY, a Corporation of New Jersey, Plaintiff, vs. THE BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS, County of Bergen, Defendant.	Action at Law.

Plaintiff, a corporation of the State of New Jersey, engaged in the business of constructing buildings and general contracting, having its principal office and place of business at Hackensack, Bergen County, New Jersey, says that:

FIRST COUNT:

1. On or about May 27th, 1915, plaintiff and defendant executed an agreement for the work of masonry, carpentry, plumbing, heating and ventilation, electric work lighting fixtures, concrete footings, fire line valves, hose and hose racks, brick veneer on Dennison block walls, required in the erection of two school buildings in Hasbrouck Heights, Bergen County, New Jersey, plaintiff contracting to perform said work and defendant contracting to pay for said work the sum of $32,653.00 a copy of which said agreement, is attached hereto and made a part hereof.

2. Thereafter, plaintiff entered upon said work under the said agreement, and has since duly completed the same, according to the agreement.

3. Defendant has paid to plaintiff on account of said contract price of $32,653.00 the total sum of $27687.06, and is entitled to a further credit allowance of $60.00 making a total payment to date of the sum of $27747.06, leaving a balance due this plaintiff on the said contract price in the sum of $4905.94, when the said work was completed.

4. According to the terms of the agreement above mentioned, the defendant was entitled to retain a sum equal to 5% of the contract price for the period of one year from the date of the said completion, which said sum of 5% of the contract price, is $1,632.65, but from said amount there is to be deducted a sum equal to 5% upon the amount of $60.00 above mentioned in paragraph three herein, or $3.00 making a total amount to be retained by the said defendant, according to the contract, of $1,629.65 leaving a balance due to plaintiff in the sum of $3276.29.

5. Defendant has not paid the said sum of $3,276.29 nor any part thereof, although demand has been duly made upon it.

Plaintiff has performed all the terms and conditions on its part to be performed, of the said contract.

SECOND COUNT:

1. On or about July 9th, 1915, in accordance with the terms of the contract as described in the

First Count, defendant instructed plaintiff that certain extra work should be performed upon each of the said buildings agreed to be erected as aforesaid, which extra work consisted in furnishing and installing "The Unit System of Heating" of "Peerless Manufacture" including all masonry and carpentry changes in the same and the said work to cost the sum of $2424.00 upon each school, or a total of $4848.00, and on the same date, defendant allowed the plaintiff the sum of $1312.00 upon each school for the heating system originally specified a total of $2624.00 and the sum of $88.00 upon each school for omission of masonry work in connection with the extra heating orders above mentioned, a total of $176.00, making a total credit to the plaintiff of the sum of $2800.00, leaving due the plaintiff on the extra work mentioned the sum of $2048.00.

2. On or about the 19th day of August, 1915, the defendant, according to the terms of the contract, as described in the first count, notified the plaintiff that certain extra work should be performed upon the school buildings agreed to be erected as aforesaid, which extra work consisted in the furnishing and setting of one flag pole for each school and instructed plaintiff to do the said work for the sum of $25 upon each school or a total sum of $50.00.

3. Thereafter, plaintiff, in accordance with instructions of the said defendant, performed the extra work mentioned in paragraphs one and two herein, for which the defendant had agreed to compensate it in the total sum of $2,098.00.

4. Payments have been made on account of said extra work of $2098.00 in the sum of $1783.30, leaving a balance due at the completion of the said extra work in the sum of $314.70.

5. Defendant has not paid the said sum—nor any part thereof, although plaintiff has duly demanded the same.

Plaintiff demands, as damages upon the First Count the sum of $3276.29, together with interest from November 29th, 1915.

Plaintiff demands as damages upon the Second Count the sum of $314.70, together with interest from November 29th, 1915.

Wherefore, plaintiff asks judgment in the sum of $3,590.99, together with interest from November 29, 1915 and costs of suit.

A. C. HART & VANDERWART,
Attorneys of Plaintiff.

Statement

Annexed to Complaint

DEBITS

June 30/15	Amount of contract		$32653.00
July 9/15	Extra on heating		
	Unit system (change in spec)	$4848.	
	Allowance for Am. Htg system originally specified	$2624.00	

		Allowance for omission of masonry work, % of change	176.00		
				2800. 2048.00	
	Sept. 18	Extra for flag poles		50.00	$34751.00

CREDITS

July	12/15	Cash on %	$4411.20	
Aug.	13/15	"	4484.90	
Aug.	21/15	Allowance % of hdw. purchased by Architect for less than amount specified	60.00	
Sept.	14/15	Cash on %	7333.80	
Oct.	13/15	"	9316.01	
Nov.	9/15	"	3924.45	$29530.36
				$5220.64
		Retained for one year from date of completion according to terms of contract		1629.65
				$3590.99

Agreement

Annexed to Complaint

THIS AGREEMENT made the twenty-seventh day of May in the year one thousand nine hundred and fifteen by and between THE FERBER CONSTRUC-

TION COMPANY, Hackensack, N. J. party of the first part (hereinafter designated the Contractor) and THE BOARD OF EDUCATION of the Borough of Hasbrouck Heights, in the County of Bergen, State of New Jersey, party of the second part (hereinafter designated the Owner);

WITNESSETH, that the Contractor, in consideration of the agreements herein made by the Owner, agrees, with the said Owner as follows:

Article 1. The Contractor shall and will provide all the materials and perform all the work for the Masonry, Carpentry, Plumbing, Heating and Ventilation, Electric Work, Lighting Fixtures, Concrete Footings, Fire Line Valves, Hose and Hose Racks, Brick Veneer on Dennison Block Walls, required in the erection of two School Buildings in Hasbrouck Heights Bergen County, New Jersey, as shown on the drawings and described, in the specifications prepared by Henry C. Pelton, Architect, 8 West 38th St., New York City, N. Y. which drawings and specifications are identified by the signatures of the parties hereto and become hereby a part of this Contract.

Article 2: It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawing and explanations as may be necessary to detail and illustrate the work to be done are to be furnished by said Architect and they agree to conform to

and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Article 1. It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architect are and remain his property and that all charges for the use of the same and for the services of said Architect, are to be paid by the said Owner.

Article 3: No alterations shall be made in the work except upon written order of the Architect; the amount to be paid by the Owner or allowed by the Contractor by virtue of such alterations to be stated in said order. Should the Owner and Contractor not agree as to the amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Article 12 of this contract.

Article 4: The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representatives; shall within twenty-four hours after receiving written notice from the Architect to that effect, proceed to remove from the grounds or building all materials condemned by him whether worked or unworked, and to take down all portions of the work which the Architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications and shall make good all work damaged or destroyed thereby.

Article 5: Should the Contractor at any time refuse to or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality or fail in any respect to prosecute the work with promptness and diligence or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at liberty after three days written notice to the Contractor to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing

the work, and any damage incurred through such default, shall be audited and certified by the Architect, whose certificates thereof shall be conclusive upon the parties.

Article 6: The Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, to wit:

This entire contract to be completed on or before the Seventh day of September, 1915, and this Contractor agrees to pay to this Owner and this Owner agrees to accept from this Contractor as liquidated damages Fifteen ($15.00) Dollars per day for each and every day's delay in completing this contract after the First day of October 1915 and this Owner agrees to pay to this Contractor and this Contractor agrees to accept from this Owner as a bonus Fifteen ($15.00) Dollars per day for each and every day saved against the above date of completion to wit: September, 17th, 1915.

Article 7: Should the Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of the Architect, or of any other Contractor employed by the Owner upon the work or by any damage caused by fire or other casualty for which the Contractor is not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all causes aforesaid, which extended period shall be de-

termined and fixed by the Architect; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within forty-eight hours of the occurrence of such delay.

Article 9: It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be Thirty-Two Thousand six hundred and fifty-three ($32,653.00) Dollars subject to additions and deductions as hereinbefore provided and that such sum shall be paid by the Owner to the Contractor in current funds, and only upon certificates of the Architect, as follows; Payments shall be made as of the first of each month in such amounts as in the opinion of the Architect may be deemed warranted by the progress of the work each payment except the final payment is to equal eighty-five per cent (85%) of the value of the labor and materials installed into the building at the time of such payment after approval by the Architect. On completion of the building and its acceptance by the Owner the entire amount of this contract shall be paid to the Contractor by the Owner except five per cent (5%) of this contract which shall be retained by the Owner for one year after completion, same to bear interest at the rate of six (6%) per cent per annum. In consideration of the amount of money to be paid to the Contractor by the Owner, the Contractor hereby agrees to hold the Owner free from any lien in connection with this contract. The final payment shall be made within one year after the completion of the work included in this contract and all payment shall be due when certificates for the same are issued. If at any time there shall

be evidence of any lien or claim for which, if established, the Owner of the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor's default.

Article 10: It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Article 11: The Owner shall during the progress of the work maintain insurance on the same against loss or damage by fire and wind, the policies to cover all work incorporated in the building and all materials for the same in or about the premises and to be made payable to the parties hereto as their interest may appear.

Article 12: In case the Owner and the Contractor fail to agree in relation to matters of payment, allowance or loss referred to in Article 3, of this contract, or should either of them dissent from the decision of the Architect referred to in Article 7 of this contract, which dissent shall have

been filed in writing with the Architect within ten days of the announcement of such decision, then the matter shall be referred to a Board of Arbitration to consist of one person selected by the Owner, and one person selected by the Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one-half of the expense of such reference.

Article 13: The Contractor must furnish all construction having approval and acceptance of the Inspector of Buildings Department of Public Instruction, State of New Jersey, and the approval of the Building Inspector and Health Inspector of the Borough of Hasbrouck Heights, Bergen County, New Jersey.

The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

In Witness Whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

FERBER CONSTRUCTION COMPANY,
By F. V. Ferber, President.

BOARD OF EDUCATION,
Borough of Hasbrouck Heights,
County of Bergen, N. J.
John G. Martin, Clerk.
Geo. D. Hastings, Pres.

(L. S.)
In presence of
H. E. Ferber,
Secretary.

NOTICE TO *with* NAMED DEFENDANT:

In case the within Summons and Complaint are served upon you personally, then TAKE NOTICE that if you intend to make a defense to this action, you must file an Affidavit of Merits within ten days from the date of service hereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing of such affidavit and answer, judgment will be entered against you. Lawful service upon a Corporation is deemed personal service for the purpose of this Notice (P. L. 1912 p. 394 Rule 56).

A. C. HART & VANDERWART,
Attorneys of Plaintiff.

Affidavit of Merits

(*Filed, January 26, 1916*)

BERGEN COUNTY CIRCUIT COURT

FERBER CONSTRUCTION COMPANY, a Corporation of New Jersey, Plaintiff, v. THE BOARD OF EDUCATION of the Borough of Hasbroucks Heights, County of Bergen, New Jersey, Defendant.	Action at law.

State of New Jersey, County of Bergen, } ss:

George D. Hastings, being duly sworn on his oath according to law deposes and says: that he

is the President of the defendant named in the above stated cause and that he is duly authorized as the President of the said defendant to make this affidavit in this cause for the defendant, and that he believes that the said defendant has a just and legal defence to said action on the merits of the case.

Deponent further says that the defendant is a public quasi municipal corporation of this state.

GEORGE D. HASTINGS.

Sworn and subscribed before me this
25th day of January, A. D., 1916.
Maud Edgar,
Notary Public of N. J.

Answer and Counterclaim

(*Filed, February 16, 1916*)

BERGEN COUNTY CIRCUIT COURT

FERBER CONSTRUCTION COMPANY, a corporation of New Jersey, Plaintiff, v. THE BOARD OF EDUCATION of the Borough of Hasbrouck Heights, County of Bergen, New Jersey, Defendant.	Action at Law.

The defendant, The Board of Education of the Borough of Hasbrouck Heights in the County of

Bergen, New Jersey, whose place of business, and only office, is in said Borough of Hasbrouck Heights, says—

First Defense to Counts 1 and 2:

1. By the contract in the complaint referred to, and by copy thereto annexed, in article 9 thereof, it was agreed that the owner, *viz:* this defendant, should be entitled, out of any moneys which otherwise might become due to the contractor, *viz:* the plaintiff, to retain an amount sufficient completely to idemnify the defendant against the lien or claim of any contractor, for which, if established, the defendant might be liable; provided there should be evidence that there are any such liens or claims.

2. There is evidence, and the defendant has had notice, that there are such liens and claims, that is to say, there are numerous creditors of the plaintiff, for labor and materials supplied to it, and actually used in the works for which it claims to recover in this action, who have not been paid and who are entitled to demand of the defendant that they be paid out of whatever is, or hereafter may become, due from the defendant to the plaintiff.

3. The names of said creditors and the amounts claimed by each are as follows, *viz*:

Henry Imken, Plumbing,	$1587.35
M. J. Callahan Co., Heating & Ventilating,	1274.32
P. & F. Corbin Co., Hardware,	290.
N. Mehrhoff Co., Brick,	234.

4. There are other like claimants and claims the names and amounts whereof defendant is, at present, unable to state.

5. By the said contract, in article 6 thereof, the plaintiff was bound to complete, on or before September 7, 1915, all the said works in said contract mentioned, and it thereby agreed to pay the defendant, as liquidated damages, $15—per day for each day after October 1, 1915, that said completion was delayed.

6. Plaintiff did not complete the said works on or before September 1, 1915, but delayed such completion for the space of 59 days after October 1, 1915, *viz:* until November 29, 1915, by reason whereof plaintiff became, on said last mentioned date, entitled to be paid by the plaintiff, for its liquidated damages, $885.

7. The plaintiff has not paid said sum of $885, nor any part thereof, and the defendant hereinafter counter-claims therefor.

8. By the said contract, and by articles 9 and 10 thereof, the defendant is entitled to retain for one year from November 29, 1915, 5 per centum of the contract price, in order to protect itself against any defective work or improper materials that may be discovered during said period. The said 5 per centum is no more than sufficient for such protection.

9. By reason of the premises, the amount, which otherwise might have become due to the plaintiff, is not more than sufficient completely to indemnify the defendant against the liens and claims in paragraphs 2, 3, and 4 above mentioned.

10. By reason of the premises, no money was due to the plaintiff from this defendant at the time this action was begun.

By way of *counterclaim* against the plaintiff, the defendant, whose residence is as aforesaid, says—

1. It repeats the allegations of paragraph 5, as above set forth.

2. It repeats the allegations of paragraph 6, as above set forth.

3. The plaintiff has not paid the said sum of $885, nor any part thereof.

4. The defendant counter-claims the said sum of $885, for its damages as aforesaid, with interest from November 29, 1915.

E. J. LUCE & W. A. KIPP.
Attorneys of the Defendant.

We have agreed that this answer and counterclaim, if filed by February 21, 1916, shall be considered as filed in due time.

HART AND VANDERWART,
Plffs. Attys.

Reply and Answer

(*Filed, March 6, 1916*)

BERGEN COUNTY CIRCUIT COURT

FERBER CONSTRUCTION COMPANY, a corporation of New Jersey, Plaintiff, vs. THE BOARD OF EDUCATION OF the Borough of Hasbrouck Heights, County of Bergen New Jersey, Defendant.	Action at Law.

Plaintiff, by way of reply to Answer of defendant filed herein, says that:

REPLY TO FIRST DEFENSE:

1. It admits the first paragraph.

2. The second paragraph is denied.

3. Plaintiff denies that the sums set forth in paragraph three are due and owing to the claimants mentioned therein from this plaintiff.

4. The fourth paragraph is denied.

5. It admits the fifth paragraph.

6. The sixth paragraph is denied.

7. It admits the seventh and eighth paragraphs.

8. The ninth and tenth paragraphs are denied.

Reply and Answer

ANSWER TO COUNTERCLAIM:

1. The first paragraph is admitted.

2. It denies the second paragraph.

3. Plaintiff denies that any sum of money is due defendant from plaintiff.

FIRST DEFENSE TO COUNTERCLAIM:

1. Plaintiff avers that the counterclaim discloses no cause of action to enforce the claim against the plaintiff because of the provisions of the said contract, and further avers that it contains no prayer for judgment under such claim and the plaintiff hereby raises and reserves an objection to the complaint upon these grounds.

SECOND DEFENSE TO COUNTERCLAIM:

1. Plaintiff avers that while the contract herein bears date the twenty-seventh day of May, 1915, plaintiff could not enter upon the work, because the contract was not formally in the hands of the plaintiff, was not delivered to the plaintiff by the defendant until on or about July 1st, 1915.

2. Plaintiff avers that by reason of said delay in the signing and delivery of the contract by the said defendant Board of Education, it could not enter upon the work until on or about July 1st, 1915, and that by reason of said delay, it was impossible to complete the same according to the date mentioned in the contract hereinbefore mentioned.

THIRD DEFENSE TO COUNTERCLAIM:

1. On or about July 9th, 1915, in accordance with a resolution of the defendant Board of Edu-

cation, certain changes were made in the contract in reference to the heating and ventilating specifications, which said changes materially altered the provisions of the contract hereinbefore described, requiring more time for installation and completion, and that because of said changes and modifications, this plaintiff was unable to complete the contract as modified within the time limited for completion by the terms of the contract originally entered into.

Fourth Defense to Counterclaim:

1. By the contract referred to in the complaint herein, it was agreed in Article 7 thereof, that should the contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the owner, architect or other contractor (which said article is hereby referred to) then the time for the completion of the work, should be extended for a period equivalent to the time lost by reason of the said delay.

2. Plaintiff avers that during the progress and prosecution of the work under the said contract, delays were caused by the acts, neglect and default of the owner, the defendant herein and over which said plaintiff had no control and through no fault of this plaintiff, and for which this plaintiff cannot be held responsible.

3. Plaintiff further avers that in each instance, it complied with the provision of the contract requiring and requesting an extension of time because of the delay.

Fifth Defense to Counterclaim:

1. By the contract referred to in the complaint herein it was agreed in Article 7 thereof, that

should the contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the owner, architect, or other contractor (which said article is hereby referred to) then the time for the completion of the work should be extended for a period equivalent to the time lost by reason of the said delay.

2. Plaintiff avers that during the progress and prosecution of the work under the said contract, delays were caused by the acts, neglect and default of the architect employed by *and* agent of the owner, the defendant herein, and over which said plaintiff had no control and through no fault of this plaintiff, and for which this plaintiff cannot be held responsible.

3. Plaintiff further avers that in each instance, it complied with the provision of the contract requiring and requesting an extension of time because of the delay.

Sixth Defense to Counterclaim:

1. By the contract referred to in the complaint herein, it was agreed in Article 7 thereof, that should the contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the owner, architect or other contractor (which said article is hereby referred to) then the time for the completion of the work should be extended for a period equivalent to the time lost by reason of the said delay.

2. Plaintiff avers that during the progress and prosecution of the work under the said contract, delays were caused by the acts, neglect and default of other contractors employed by plaintiff as contractors, over which plaintiff had no control

and through no fault of this plaintiff, and for which this plaintiff cannot be held responsible.

3. Plaintiff avers that in each instance, it complied with the provision of the contract requiring and requesting an extension of time because of the delay.

SEVENTH DEFENSE TO COUNTERCLAIM:

1. Plaintiff avers that it was unable to complete the said contract within the time limited for the completion thereof, as set forth in the counterclaim herein, because it was unable to make connection with the water main in the street in front of one of the buildings, which is the subject of this contract, for a long period of time, due to the fact that there was no water main in front of the said building.

EIGHTH DEFENSE TO COUNTERCLAIM:

1. Plaintiff avers and says, that as a matter of fact, both schools were completed and ready for use of the defendant, according to the terms of the contract, upon the first day of October, 1915, insofar as this plaintiff could make them, and if they were not ready to be used upon the said date mentioned in the contract, any such delay was due to the acts, neglects and defaults of other persons over which this plaintiff had no control.

Wherefore plaintiff asks that the said counterclaim may be dismissed against it, together with its costs and charges in this behalf by it most wrongfully sustained.

Dated, March 6th 1916.

A. C. HART & VANDERWART,
Attorneys of Plaintiff.

Reply

(Filed, March 16, 1916)

BERGEN COUNTY CIRCUIT COURT

Ferber Construction Company, Plaintiff, v. The Board of Education of the Borough of Hasbrouck Heights, Defendant.	Action at law.

Defendant's Reply to Plaintiff's Answer to Defendant's Counterclaim:

The defendant replying to the plaintiff's answer to defendant's counterclaim says:

First Reply to First Defense:

1. The counterclaim, as above by the defendant pleaded, is sufficient in law.

First Reply to Second Defense:

1. Defendant denies paragraph 1.

2. Defendant denies paragraph 2.

Second Reply to Second Defense:

1. Defendant will object that all the matters and things in paragraphs 1 and 2 of said defense contained disclose no defense to defendant's counterclaim.

Reply

THIRD REPLY TO SECOND DEFENSE:

1. By virtue of the provisions of article VII of the contract, which are hereby referred to and made part of this paragraph, it was provided that the time for completing said contract, as stated in article VII of said contract, should be extended, for any of the causes in said article VII mentioned, only upon the following conditions, *viz:*

(*a*) That a written claim for such extension should be presented by the claimant to the architect within 48 hours after the happening of the cause for which such extension should be claimed:

(*b*) That the period, for which the time for completion, in any such case, should be extended, should be fixed and determined by the architect.

2. The causes, for an extension of time for completion, in the said defense, to which this reply is addressed, alleged, are such causes as are mentioned in said article VII.

3. The plaintiff did not, within 48 hours after the happening of the alleged causes for claiming an extension of time, or of any or either of them, present to the architect a written claim for an extension of time, by reason of the happening of any or either of said causes.

FOURTH REPLY TO SECOND DEFENSE:

1. Paragraph 1 of the above third reply is here repeated.

2. Paragraph 2 of the above third reply is here repeated.

3. The architect has never fixed and determined that the time for completing said contract should, by reason of any or either of the said alleged causes, be in any wise extended.

FIFTH REPLY TO SECOND DEFENSE:

1. Paragraph 1 of the above third reply is here repeated.

2. Paragraph 2 of the above third reply is here repeated.

3. The architect, upon the plaintiff's claim therefor, decided that the time for the completion of said contract should not, by reason of the said alleged causes, or any or either of them, be in any wise extended.

SIXTH REPLY TO SECOND DEFENSE:

1. By virtue of the provisions of article XII of the contract, which are hereby referred to and made part of this paragraph, in case the plaintiff claimed that the time for completion of the contract should be extended for any of the causes mentioned in article VII thereof and dissented from the decision of the architect consequent upon such claim, it was the duty of the plaintiff, within ten days after notice of such decision, to file with the architect a written dissent therefrom; and it was further his duty, in case of duly making such dissent, to submit the matter to the final and binding decision of arbitrators in the manner prescribed by said article XII.

2. The causes for an extension of time for completion, alleged in the said defense to which this reply is made, are such causes as are mentioned in said article VII.

3. The architect, upon the plaintiff's claim for an extension of the time for completion on the occasion of all and each of said causes, decided that the plaintiff was entitled to no extension therefor, of which decision plaintiff had notice.

4. The plaintiff did not, within ten days after notice of said decision, file with the architect any written dissent from such decision.

5. By reason of the premises the plaintiff is now estopped from setting up the defense to which this reply is addressed.

Seventh Reply to Second Defense:

1. Paragraph 1 of the above sixth reply to second defense is here repeated.

2. Paragraph 2 of the above sixth reply to second defense is here repeated.

3. Paragraph 3 of the above sixth reply to second defense is here repeated.

4. The plaintiff, upon dissenting from the said decision of the architect, after notice thereof, refused to submit the matter to the decision of arbitrators in manner and form as it was bound to do, as aforesaid.

5. Paragraph 5 of the above sixth reply to the second defense is here repeated.

First Reply to Third Defense:

1. Defendant denies that because of changes and modifications in this defense mentioned, the plaintiff was unable to complete the contract as modified within the time limited for completion by the terms of the contract originally entered into.

Reply

SECOND REPLY TO SECOND DEFENSE:

1. Defendant will object that all the matters and things in this defense alleged disclosed no defense to the defendant's counterclaim.

THIRD REPLY TO THIRD DEFENSE:

1. Paragraph 1 of the above third reply to the second defense is here repeated.

2. Paragraph 2 of the above third reply to the second defense is here hepeated.

3. Paragraph 3 of the above third reply to the second defense is here repeated.

FOURTH REPLY TO THIRD DEFENSE:

1. Paragraph 1 of the above third reply to the second defense is here repeated.

2. Paragraph 2 of the above third reply to the second defense is here repeated.

3. Paragraph 3 of the above fourth reply to the second defense is here repeated.

FIFTH REPLY TO THIRD DEFENSE:

1. Paragraph 1 of the above third reply to the second defense is here repeated.

2. Paragraph 2 of the above third reply to the second defense is here repeated.

3. Paragraph 3 of the fifth reply to the second defense is here repeated.

SIXTH REPLY TO THIRD DEFENSE:

1. Paragraph 1 of the sixth reply to the second defense is here repeated.

2. Paragraph 2 of the sixth reply to the second defense is here repeated.

3. Paragraph 3 of the sixth reply to the second defense is here repeated.

4. Paragraph 4 of the sixth reply to the second defense is here repeated.

5. Paragraph 5 of the sixth reply to the second defense is here repeated.

SEVENTH REPLY TO THIRD DEFENSE:

1. Paragraph 1 of the sixth reply to the second defense is here repeated.

2. Paragraph 2 of the sixth reply to the second defense is here repeated.

3. Paragraph 3 of the sixth reply to the second defense is here repeated.

4. Paragraph 4 of the seventh reply to the second defense is here repeated.

5. Paragraph 5 of the sixth reply to the second defense is here repeated.

FIRST REPLY TO THE FOURTH DEFENSE:

1. Defendant denies the allegations of paragraph 2 of said defense.

2. Defendant denies the allegations of paragraph 3 of said defense.

SECOND REPLY TO THE FOURTH DEFENSE:

1. Paragraph 1 of the third reply to the second defense is here repeated.

2. Paragraph 2 of the third reply to the second defense is here repeated.

3. Paragraph 3 of the third reply to the second defense is here repeated.

Reply

THIRD REPLY TO THE FOURTH DEFENSE:

1. Paragraph 1 of the third reply to the second defense is here repeated.

2. Paragraph 2 of the third reply to the second defense is here repeated.

3. Paragraph 3 of the fourth reply to the second defense is here repeated.

FOURTH REPLY TO THE FOURTH DEFENSE:

1. Paragraph 1 of the third reply to the second defense is here repeated.

2. Paragraph 2 of the third reply to the second defense is here repeated.

3. Paragraph 3 of the fifth reply to the second defense is here repeated.

FIFTH REPLY TO THE FOURFH DEFENSE:

1. Paragraph 1 of the sixth reply to the second defense is here repeated.

2. Paragraph 2 of the sixth reply to the second defense is here repeated.

3. Paragraph 3 of the sixth reply to the second defense is here repeated.

4. Paragraph 4 of the sixth reply to the second defense is here repeated.

5. Paragraph 5 of the sixth reply to the second defense is here repeated.

SIXTH REPLY TO THE FOURTH DEFENSE:

1. Paragraph 1 of the sixth reply to the second defense is here repeated.

2. Paragraph 2 of the sixth reply to the second defense is here repeated.

3. Paragraph 3 of the sixth reply to the second defense is here repeated.

4. Paragraph 4 of the seventh reply to the second defense is here repeated.

5. Paragraph 5 of the sixth reply to the second defense is here repeated.

First Reply to the Fifth Defense:

1. Defendant denies the allegations of the second paragraph of this defense.

2. Defendant denies the allegations of the third paragraph of this defense.

Second Reply to the Fifth Defense:

1. Paragraph 1 of the third reply to the second defense is here repeated.

2. Paragraph 2 of the third reply to the second defense is here repeated.

3. Paragraph 3 of the third reply to the second defense is here repeated.

Third Reply to the Fifth Defense:

1. Paragraph 1 of the third reply to the second defense is here repeated.

2. Paragraph 2 of the third reply to the second defense is here repeated.

3. Paragraph 3 of the fourth reply to the second defense is here repeated.

Fourth Reply to the Fifth Defense:

1. Paragraph 1 of the third reply to the second defense is here repeated.

2. Paragraph 2 of the third reply to the second defense is here repeated.

3. Paragraph 3 of the fifth reply to the second defense is here repeated.

FIFTH REPLY TO THE FIFTH DEFENSE:

1. Paragraph 1 of the sixth reply to the second defense is here repeated.

2. Paragraph 2 of the sixth reply to the second defense is here repeated.

3. Paragraph 3 of the sixth reply to the second defense is here repeated.

4. Paragraph 4 of the sixth reply to the second defense is here repeated.

5. Paragraph 5 of the sixth reply to the second defense is here repeated.

SIXTH REPLY TO THE FIFTH DEFENSE:

1. Paragraph 1 of the sixth reply to the second defense is here repeated.

2. Paragraph 2 of the sixth reply to the second defense is here repeated.

3. Paragraph 3 of the sixth reply to the second defense is here repeated.

4. Paragraph 4 of the seventh reply to the second defense is here repeated.

5. Paragraph 5 of the sixth reply to the scond defense is here repeated.

FIRST REPLY TO THE SIXTH DEFENSE:

1. The defendant denies the allegations of the second paragraph of this defense.

2. The defendant denies the allegations of the third paragraph of this defense.

SECOND REPLY TO THE SIXTH DEFENSE:

1. Paragraph 1 of the third reply to the second defense is here repeated.
2. Paragraph 2 of the third reply to the second defense is here repeated.
3. Paragraph 3 of the third reply to the second defense is here repeated.

THIRD REPLY TO THE SIXTH DEFENSE:

1. Paragraph 1 of the third reply to the second defense is here repeated.
2. Paragraph 2 of the third reply to the second defense is here repeated.
3. Paragraph 3 of the fourth reply to the second defense is here repeated.

FOURTH REPLY TO THE SIXTH DEFENSE:

1. Paragraph 1 of the third reply to the second defense is here repeated.
2. Paragraph 2 of the third reply to the second defense is here repeated.
3. Paragraph 3 of the fifth reply to the second defense is here repeated.

FIFTH REPLY TO THE SIXTH DEFENSE:

1. Paragraph 1 of the sixth reply to the second defense is here repeated.
2. Paragraph 2 of the sixth reply to the second defense is here repeated.
3. Paragraph 3 of the sixth reply to the second defense is here repeated.
4. Paragraph 4 of the sixth reply to the second defense is here repeated.

5. Paragraph 5 of the sixth reply to the second defense is here repeated.

SIXTH REPLY TO THE SIXTH DEFENSE:

1. Paragraph 1 of the sixth reply to the second defense is here repeated.

2. Paragraph 2 of the sixth reply to the second defense is here repeated.

3. Paragraph 3 of the sixth reply to the second defense is here repeated.

4. Paragraph 4 of the seventh reply to the second defense is here repeated.

5. Paragraph 5 of the sixth reply to the second defense is here repeated.

FIRST REPLY TO THE SEVENTH DEFENSE:

1. The defendant denies the allegations contained in this defense.

SECOND REPLY TO THE SEVENTH DEFENSE:

1. Defendant will object that the matters and things in this defense alleged disclose no defense to defendant's counterclaim.

THIRD REPLY TO THE SEVENTH DEFENSE:

1. Paragraph 1 of the third reply to the second defense is here repeated.

2. Paragraph 2 of the third reply to the second defense is here repeated.

3. Paragraph 3 of the third reply to the second defense is here repeated.

Reply

Fourth Reply to the Seventh Defense:

1. Paragraph 1 of the third reply to the second defense is here repeated.

2. Paragraph 2 of the third reply to the second defense is here repeated.

3. Paragraph 3 of the fourth reply to the secdon defense is here repeated.

Fifth Reply to the Seventh Defense:

1. Paragraph 1 of the third reply to the second defense is here repeated.

2. Paragraph 2 of the third reply to the second defense is here repeated.

3. Paragraph 3 of the fifth reply to the second defense is here repeated.

Sixth Reply to the Seventh Defense:

1. Paragraph 1 of the sixth reply to the second defense is here repeated.

2. Paragraph 2 of the sixth reply to the second defense is here repeated.

3. Paragraph 3 of the sixth reply to the second defense is here repeated.

4. Paragraph 4 of the sixth reply to the second defense is here repeated.

5. Paragraph 5 of the sixth reply to the second defense is here repeated.

Seventh Reply to the Seventh Defense:

1. Paragraph 1 of the sixth reply to the second defense is here repeated.

2. Paragraph 2 of the sixth reply to the second defense is here repeated.

3. Paragraph 3 of the sixth reply to the second defense is here repeated.

Reply

4. Paragraph 4 of the seventh reply to the second defense is here repeated.

5. Paragraph 5 of the sixth reply to the second defense is here repeated.

First Reply to the Eighth Defense:

1. The defendant denies that on October 1, 1915, both schools were completed and ready for the use of the defendant, according to the terms of the contract.

2. It denies that they were on said date so ready in so far as the plaintiff could make them so.

3. It denies that if they were not then so ready the delay was due to the acts, neglects or defaults of other persons over whom the plaintiff had no control.

Second Reply to the Eighth Defense:

1. Defendant will object that the matters in this defense alleged disclose no defense to defendant's counterclaim.

Third Reply to the Eighth Defense:

1. Defendant will object that the matters in this defense alleged, in so far as they are pleaded in denial or traverse of the allegations of defendant's answer by way of counterclaim, are a superfluous repetition of the denials already contained in plaintiff's answer to (defendant's) counterclaim.

Fourth Reply to the Eighth Defense:

1. Defendant will object that the matters in this defense alleged, in so far as they are plead-

ed in avoidance of defendant's counterclaim, are improperly so pleaded, because the said defense does not with sufficient certainty confess the allegations which it purports to avoid.

Fifth Reply to the Eighth Defense:

1. Paragraph 1 of the third reply to the second defense is here repeated.

2. Paragraph 2 of the third reply to the second defense is here repeated.

3. Paragraph 3 of the third reply to the second defense is here repeated.

Sixth Reply to the Eighth Defense:

1. Paragraph 1 of the third reply to the second defense is here repeated.

2. Paragraph 2 of the third reply to the second defense is here repeated.

3. Paragraph 3 of the fourth reply to the second defense is here repeated.

Seventh Reply to the Eighth Defense:

1. Paragraph 1 of the third reply to the second defense is here repeated.

2. Paragraph 2 of the third reply to the second defense is here repeated.

3. Paragraph 3 of the fifth reply to the second defense is here repeated.

Eighth Reply to the Eighth Defense:

1. Paragraph 1 of the sixth reply to the second defense is here repeated.

2. Paragraph 2 of the sixth reply to the second defense is here repeated.

3. Paragraph 3 of the sixth reply to the second defense is here repeated.

4. Paragraph 4 of the sixth reply to the second defense is here repeated.

5. Paragraph 5 of the sixth reply to the second defense is here repeated.

NINTH REPLY TO THE EIGHTH DEFENSE:

1. Paragraph 1 of the sixth reply to the second defense is here repeated.

2. Paragraph 2 of the sixth reply to the second defense is here repeated.

3. Paragraph 3 of the sixth reply to the second defense is here repeated.

4. Paragraph 4 of the seventh reply to the second defense is here repeated.

5. Paragraph 5 of the sixth reply to the second defense is here repeated.

E. J. LUCE & W. A. KIPP,
Attorneys.

Rejoinder

(Filed March 20, 1916.)

BERGEN COUNTY CIRCUIT COURT

FERBER CONSTRUCTION COMPANY, a corporation of New Jersey, Plaintiff, vs. THE BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS, COUNTY OF BERGEN, NEW JERSEY,	Action at law, plaintiff's reply to defendant's reply to plaintiff's answer to defendant's counter claim.

The plaintiff herein denies each and every allegation contained in the reply of the plaintiff to plaintiff's answer to defendant's counterclaim.
Dated, March 17th 1916.

A. C. HART & VANDERWART,
Attorneys of plaintiff.

Rule for Judgment

(Filed June 14, 1916.)

BERGEN COUNTY CIRCUIT COURT

FERBER CONSTRUCTION COMPANY, a corporation of New Jersey, Plaintiff, vs. THE BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTE, COUNTY OF BERGEN, STATE OF NEW JERSEY, Defendant.	Action at law.

This Action having been tried before the Honorable William Mr. Seufert, with a Jury, in the presence of counsel and the respective parties on June 6, 1916; and the jury having returned a verdict in favor of the plaintiff, for $3,703.51:

It is ordered that judgment final be entered in favor of the plaintiff against the defendant fo the sum of $3,703.51, with interest from June 10, 1916, and the plaintiff's costs be taxed.

W. M. SEUFERT, J.

Judgment Entry

(Entered June 14, 1916.)

BERGEN CIRCUIT COURT

FERBER CONSTRUCTION COMPANY, a corporation of N. J. vs. THE BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS,	Action at law.

A. C. Hart & Vanderwart, Pltffs, Atty.

Amount of damages on trial Three thousand seven hundred and three dollars and fifty-one cents. And costs Forty-four dollars and eighteen cents.

Damages	$3,703.51
Costs	44.18
	$3,747.69

Judgment signed and entered June 14, 1916 at 10 a. m.

Transcript of Testimony

BERGEN COUNTY CIRCUIT COURT

FERBER CONSTRUCTION COMPANY,
a corporation,
Plaintiff,
vs.
BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS,
Defendant.

Transcript of shorthand notes of testimony proceedings taken at the trial of the above entitled case, at the Court House in Hackensack, N. J., on June 6th, 1916.

Before HON. WM. M. SEUFERT, Judge and jury.

For the plaintiff, A. C. Hart & Vanderwart.
For the defendant, Luce & Kipp.

The Court: Let me get the issue framed in this case. As I understand it from your statement in the opening, there is no contest about the amount involved, and that there is to be a deduction allowed for not completing the contract within the proper dates. What is the amount agreed upon?

Mr. Luce: That amount due is $3,591. That is what you claim in your statement. Let us look at it and see. (Referring).

The Court: Let us get that fixed so that we know where we start.

Mr. Hart: $3,590.99 is the amount.

Mr. Luce: I think there is a mistake of one cent—$3,590.99 with interest from November 29th.

Mr. Hart: The interest matter is figured from November 29th.

The Court: For the purpose of calculation now, the figures will be taken as $3,590.99?

Mr. Hart: $3,591.

The Court: That is the agreed amount due between these parties to this action, without taking into calculation any allowance to be made for the non-performance of the work within the specified time—the allowance for which is the subject of this litigation, and is a matter to be presented to the jury for their adjudication.

Mr. Hart: May I add, if your Honor please, this amount does not include the amount of $1,629.65, which is the per centage retained for one year from the date of the completion of the work, according to the terms of the contract. In short, that the amount we claim owing us is $5,220.64, of which $1,629.65 will be payable at the end of one year from the completion; the balance being payable now; that is to say, the amount that your Honor has named.

The Court: That sufficiently appears from the pleadings.

Mr. Hart: Counsel for the defendant and I have agreed to produce all papers without notice, or to permit the one who demands to prove the same by secondary evidence. I have asked, in accordance with that understanding, counsel to produce two certificates signed by the architect, dated November 29th, 1915.

Mr. Luce (handing papers).

Mr. Hart: I have here the papers, and according to the agreement with counsel, it seems to me that we might abbreviate the trial by just presenting the contracts, specifications and these two certificates; then allow counsel for the defendant to proceed on the affirmative proofs.

Mr. Luce: Well, I think perhaps, in the brief conversation I might have misunderstood you. I did not mean, a few moments ago, in agreeing upon the sum that should be figured as due the plaintiff, that we hereby dispense with the proof of performance. My idea is that the plaintiff should put in evidence the contract and specifications, architect certificates and some proof of performance.

The Court: That is what he said. The certificate is conclusive of that, isn't it?

Mr. Hart: That makes a *prima facie* case. That is what I had in mind.

Mr. Luce: Very well.

Mr. Hart: I will say that with your Honor's permission, I will reserve the right, should there be any weakness in the procedure, to ask your Honor to permit me to re-open the case.

I offer in evidence what purports to be an agreement between the Feber Construction Company and the Board of Education of the Borough of Hasbrouck Heights, dated the 27th day of May, 1915, and signed by the parties.

Marked Exhibit P-1.

I also offer in evidence what purports to be specification number two of the work, which is described in P-1.

Marked Exhibit P-2.

I offer in evidence two architects' certificates,

both of them dated November 29th, 1915; both directed to the Board of Education of Hasbrouck Heights, New Jersey, directing the payment of moneys to the Ferber Construction Company of Hackensack, signed by Henry C. Pelton, who purports to be the architect named in Exhibit P-1; one in the sum of $2,610.32 and the other in the sum of $2,610.32.

Marked Exhibits P-3 and P-4.

I will ask counsel for the defence to admit that these certificates have not been honored.

Mr. Luce: I will admit that.

Mr. Hart: I assume that makes out a *prima facie* case.

Mr. Luce: Now, if the Court please, these certificates were accompanied by guarantees, as described in a letter attached hereto; that letter ought to be produced too.

The Court: Yes.

HERMAN B. FERBER, sworn for the plaintiff, testifies as follows:

Direct-examination by Mr. Hart:

Q. Mr. Ferber, what was your business on November 29th, 1915? A. Secretary and treasurer of the Ferber Construction Co., builders and contractors.

Q. The plaintiff in this action? A. Yes, sir.

Q. How long had you been in your office? A. Five years.

Q. Immediately prior thereto? A. Yes, sir.

Q. I show you Exhibits P-3 and P-4 and ask you whether you have seen them at any time prior to this morning? A. Never saw these until today.

Q. Did they ever come to your corporation? A. No, sir.

Q. I show you a letter dated November 29th, directed to the Ferber Construction Company, signed Henry C. Pelton, and ask you when you first saw the letter? A. Just a few moments ago, when it was shown to me.

Q. This is the first time you have seen it? A. The first time I have seen it.

Q. The first time that that letter was seen by any member of your corporation? A. Yes, sir.

Mr. Hart: I offer it in evidence.

Marked Exhibit P-5.

(Mr. Hart reads the letter.)

Q. When did you first learn that this architect desired these several items to be taken care of? You may refer to this letter, if you please? A. (Referring) I will take these item by item and explain them. The first item refers to a wash basin; I never heard from the architect about that. This is the first intimation I ever had from the architect although I knew that a wash basin had been damaged, and the plumber was instructed to replace it, which he did.

Q. Do you know when that was? A. I could not tell you the date, no sir; it was shortly after the accident, after the damage was reported to us.

Q. Then the wash basin had been placed in and this was a repair damage? A. This was a repair damage, which damage by the way was not due to our fault; but I understand one of the children was the cause of it.

Q. The next item? A. Finishing up and pointing up brick work on both ends, that is all we

knew about that condition, and the matter has already been attended to, to the best of my knowledge.

Q. When? A. I don't know just when.

Q. Will you swear that it has been attended to? A. Yes sir, it has been attended to, if that is what I think it refers to—unless that is something else. And the finishing and setting of hardware in both schools. So far as I know, all the hardware is on—all the hardware that they furnished us has been placed.

Q. Has the architect ever told you it was not furnished and placed? A. No, that is a question that never came up before. Terra cotta block to entrance to school A; that refers to blocks at the front entrance, where there was some discrepancy in the dimensions.

Q. Had you finished this work? A. The work was finished, and is finished now; these blocks have been replaced; at least, they have been ordered and the blocks are now in our possession; we have the blocks to replace these if they want these taken out and replaced. The blackboards, I never heard any complaint about the blackboards whatever. In regard to the guarantees, I never saw the guarantees so I don't know what they refer to. (Referring) I see it says here they are shown in specifications, but I don't know what that is. That takes care of all the items.

Q. What would be the aggregate cost of doing all that work, that is specified here? A. Well, the only thing I see here that has not been is the question of these terra cotta blocks.

Q. Well, the entire thing? A. The whole thing would not amount to $20.00.

CROSS-EXAMINATION by Mr. Luce:

Q. This new wash basin that was to be installed, that did have to be done, did it, Mr. Ferber? A. That had to be done, yes.

Q. Mr. Hart asked you when that was done, and you told him you could not give him the date; can you give us some idea when it was with reference to the date of this letter? A. Mr. Luce, let me refer to one or two things; I understand from the plumber that there was a wash basin damaged at one time and also understand from the plumber that there was a wash basin damaged at another time. To the best of my knowledge both of those wash basins have been replaced. As to the dates I could not say but right after the damage was reported to us, we got right after our plumber and told him to go up there and make it good.

Q. Do you remember having an inspection of the building made? A. Yes, sir.

Q. Do you remember when it was? A. We have had several inspections. To which do you refer, Mr. Luce?

Q. I refer to the one about November 18th? A. That is November 19th, we had an inspection at the buildings.

Q. Was that for the purpose of seeing whether the buildings were done or not? A. I presume so. I tried for months to get the buildings inspected.

Q. Was this wash basin done then? A. I could not answer that, Mr. Luce; I don't know.

Q. When did you say that you completed the buildings, Mr. Ferber?

Mr. Hart: I don't know whether that should be introduced here. It does not

seem to be cross-examination. I just formally object to it.

The Court: I will allow it.

Mr. Hart: Exception.

A. To the best of my recollection I am not positive about this. We had no work on those buildings after about the 7th of October, except in connection with the installation of hardware. That was the first week in October, as I recall it. We got through there.

Q. Wil you look at these two papers? A. (Referring).

Q. Is that the signature of your firm at the bottom? A. Yes, sir that is my signature.

Q. That is your own signature? A. Yes, sir.

Q. In each case? A. In each case.

Q. Will you tell us what this left-hand column of the two indicates on those papers? A. That indicates uncompleted work.

Q. And the date of that paper is—A. October 1st.

Q. And that is on each paper, the amount of work on each building that was then uncompleted? A. That is the estimated amount of uncompleted work.

Q. Your own estimate? A. Yes.

Q. On School A, that amounted to how much on October 1st? A. $1,647.

Q. On school B? A. $3,050.

Q. Do you think you did all that work between then and October 7th? A. Yes—I did start to look at this a moment. (Referring) Yes sir, I think that work was completed between the 1st and the 7th.

Q. Let me got over that in detail with you.

What was the structural iron and steel work on school A, that had to be done? A. I could not answer that question from memory, Mr. Luce.

Q. You could not tell me when it was done then, can you? A. No.

Q. What was the plumbing and gas fitting, $143 that had to be done? A. That would apply to all the items; I could not answer the question from memory.

Q. I don't want to take up the time of the jurymen and the Court in going over that; I understand you to say that if I asked you that same question—A. I would have to answer the same way. There are a few items on the bottom, such as installation of telephones, and so forth, which Mr. Pelton would not allow us to put in before. That is the reason those items were put in as incomplete.

Q. School B, plumbing and gas-fitting, $1,296, what was to be done? A. I could not answer, I don't remember that, Mr. Luce what that is.

Q. Do you have time books that your men worked under on that job? A. Yes.

Q. Have you them here? A. I haven't them here.

Q. You knew this was quite an important part of this case, didn't you? A. No, sir, I didn't know that you wanted the time sheet. If you said so, I would have had them here.

Q. Is it not a fact, Mr. Ferber, that on October 20th, on School B, you had an electrician at work and two plumbers and five painters? A. Not to my knowledge. I could not answer that.

Q. Is there anybody in your employ that can answer that? A. My brother might know; I don't

know whether he remembers that or not. Our superintendent is also here.

Q. Is it not a fact that on October 14th, on school A, there were two tilers at work and two plumbers and five painters? A. On school A? I doubt it. School A was finished long before that.

Q. At all events, there was somebody at work doing substantial work, after October 1st? A. Your janitor was there doing a lot of work.

Q. I don't refer to anybody of ours, but your employees were there working after October 1st? A. Putting on the hardware; that is the only thing they ever did to my knowledge, Mr. Luce.

Q. Well, I want to see—A. After October 1st —I should say about October 7th is the date. I misunderstood your question.

Q. Would your brother know better than you as to who was working there? A. He may remember better than I, yes.

Mr. Hart: Q. I am going to—I assume that your Honor will permit me to return to the question—

The Court: Use your own judgment about the trial of the case.

Mr. Hart: Then I will take up the entire subject.

By Mr. Hart: Q. Mr. Ferber, these papers that have been shown to you, what are they? A. They are requests for payments, made up by the architect.

Q. Who are they made up by, and in what manner? A. They probably—

Mr. Luce: I object to that; signed in the name of the plaintiff; I don't think it is material at all who made it up.

The Court: Well, as to their accuracy, I think the question is involved into it.

Mr. Luce: It seems to me it would be the same as asking a man who signed a contract, who drew it for him and whether it meant what was said before he signed.

The Court: I will allow it.

Mr. Luce: Exception.

A. They were probably prepared by myself in conjunction with the Board of Education representatives.

Q. Who is he? A. A man by the name of Thompson.

Q. Do you see him in Court today? A. I have not seen him, sir.

Q. He was superintendent, was he not? A. Yes.

Q. Represented the Board of Education? A. Yes.

Q. The hardware was placed upon this building after October 7th, was it not? A. Yes, sir, long after the 7th of October.

Q. What period of time? A. The last hardware arrived on that building on November 29th.

Q. Who placed it? A. We placed it. We worked in the building until 7 o'clock to get it on that night.

Q. I show you Exhibit P-2, and ask you whether that work was done by you in accordance with subdivision of hardware, page 34 of P-2? A. This work was done in accordance therewith.

Q. Was painting necessary when that hardware was placed after it was placed? A. I believe there was some painting necessary.

Q. And some plumbing too, was there not? Did you have to have plumbers to finish up the

hardware in certain places? A. I don't recall about that.

A. The toilet out doors? A. Yes, sir.

Q. You were obliged to have plumbers and carpenters to finish the hardware? A. Yes, they must have gone back there to touch it up.

Q. When did this hardware reach there? A. The first lot, as I recall it, reached there on the 1st day of October, and the last lot reached there on the 29th of November.

Q. When did you first order it? A. We did not order it; we never ordered any hardware.

Q. Who ordered it? A. I believe the Board of Education of else the architect, their agent; I don't know. I do know that the question came up and the discussion that was made by the Board of Education. I believe it was on the 18th of August. I was there one evening trying to get a certificate—

Mr. Luce: I object. This is something that is not responsive.

The Court: Answer the question.

Mr. Hart: I suppose counsel has a right to object because answer is not responsive.

Q. I show you what purports to be a letter from Henry C. Pelton to the Ferber Construction Company, dated August 19th 1915, and ask you whether you received that on the day indicated or thereabouts? A. Yes, sir, this was received by us on August 22nd.

Mr. Hart: I offer it in evidence.

Marked Exhibit P-6.

(Mr. Hart reads it to the jury.)

Q. Did you receive that hardware soon after it was ordered? A. About 6 weeks.

Q. About 6 weeks after it was ordered? A. No—

Q. It was ordered on August 19th? A. The 1st of October, we got the first hardware.

Q. You got the first lot of hardware on the first of October? A. Yes, sir.

Q. What did you do?

The Court: Was this stock ordered, or made to order?

Witness: All special.

The Court: Made to order?

Witness: Yes sir.

Q. What did you do between August 19th, when you received Exhibit P-6th, and October 1st, when the first shipment of hardware came, to hasten the shipment of hardware? A. Wrote numerous letters, asking the hardware company if they would not please deliver the hardware.

The Court: How soon was the building ready before the hardware?

Witness: The building was ready for the hardware about the middle of September.

Q. In P-6, the contractors from whom the Board of Education purchased this hardware, is named P & F. Corbin Company; did you write to P. & F. Corbin Company according to the answer of your last question.

Mr. Luce: I do not quite see the pertinency of this line of examination; so I object to it.

Mr. Hart: I am going to show by the numerous letters, that these gentlemen were writing to the P. & F. Corbin Company, time and again, to send them the hardware, and we have answers describing

why it was that they did not send the hardware.

The Court: Aren't you rather anticipating the defence?

Mr. Luce: My objection goes further than that. Suppose it is true that the firm from whom the hardware was ordered did delay in sending the hardware; what relevancy has that in this case? The hardware clause is clear. (Reads clause.)

The Court: Do you press the objection?

Mr. Luce: Yes.

The Court: Then the objection will be sustained.

Mr. Hart: I ask an exception.

The Court: You are anticipating the defence, Mr. Hart. It is immaterial at this time, under objection.

Mr. Hart: I objected to the other side going into this, and after he went into it, I felt that it was necessary that I must respond.

The Court: You will have ample opportunity.

Mr. Hart: All right, sir. That is all, sir; excepting the presentation of these guarantees.

I offer in evidence what purports to be guarantees, and release affecting this work together with the bond.

The Court: You have agreed upon the amount due; that is not involved in the question of the allowance after completion?

Mr. Hart: Perhaps I am using too much

caution, sir, but I am a little nervous about it.

Mr. Luce: You needn't show that you furnished guarantees so far as that is concerned. We will waive the question of furnishing the guarantees.

Mr. Hart: That is all.

Plaintiff rests.

Mr. Luce: I think that is our case. I ask the Court to—

The Court: Perhaps it is a question of law as to the construction of this contract. There must be a direction of a verdict either one way or the other.

Mr. Luce: There is nothing further, I understand, to come from the other side?

Mr. Hart: Is there any request to make?

Mr. Luce: I am going to when you get through.

Mr. Hart: I am not going to make a request, sir.

Mr. Luce: Then I will ask the Court to direct the jury to find on our counterclaim at the rate of $15.00 per day from the 1st of October to the 29th of November; the only evidence in the case as to the completion of the building being that they were not completed until November 29th.

The Court: Isn't the proof the other way? I don't want to anticipate, Mr. Luce.

(After argument.)

I am inclined to deny your motion.

Mr. Luce: Allow me an objection?

The Court: Yes. I think this certificate is final.

Mr. Hart: If your Honor please, it may abbreviate the case by asking the Court to direct a verdict for the plaintiff for the amount involved.

The Court: A verdict will be directed for the plaintiff for the amount of $3591 with interest from November 29th, 1915, the date of the certificate of the architect.

Mr. Luce: I may note an objection to that ruling?

The Court: Yes, certainly.

Exhibit P-1

Agreement dated May 27, 1915, between the Ferber Construction Company and the Board of Education of the Borough of Hasbrouck Heights. A copy of this Exhibit is the same as the copy annexed to the plaintiff's complaint, hereinbefore set forth.

Exhibit P-2

SPECIFICATION

of the

Masonry, carpentry, plumbing, heating and ventilation, electric work, lighting fixtures, labor and materials required in the erection and completion

Exhibit P-2

of

TWO SCHOOL BUILDINGS
for the
BOARD OF EDUCATION, HASBROUCK HEIGHTS, N. J.

One building, known as School A, will be erected on the north-west corner, Burton Avenue and Passaic Street.

One building, known as School B, will be erected on the south-east corner, Burton Avenue and Patterson Street.

Both buildings will be built alike from the same plans and specifications, except that the finished grades of the ground will vary on the two properties, and the stairs and steps in basement, as well as amount of exposed wall above grade will vary accordingly in the two buildings.

HENRY C. PELTON, Architect,
8 West 38th Street,
New York City.

May 10th, 1915.

GENERAL CONDITIONS

The following conditions are a part of this contract.

PROPOSAL:

The proposals are to be returned together with the plans and specifications on date as called for in the proposal; they must be made out in duplicate on the blank forms accompanying the plans and specifications, and are to be addressed to Mr. John G. Martin, District Clerk, Board of

Education, Hasbrouck Heights, N. J. The proposals will state in writing and figures without interlineation or erasures, the total sum of money for which the bidder proposes to supply all the materials and perform the entire work called for by the plans and specifications.

The above proposals must be signed with the full name and address of the bidder.

LIABILITY:

This contractor is to be responsible for all damage to plants, trees, roads, curbs, side-walks, pavements, buildings or grounds and must make good all damage to same at his own expense. He is also to be responsible for any and all damage that may occur on the works or during the progress of the same to life and limb of persons either employed by him or by the owner, or the general public, and the owner is not to be held responsible in any case whatsoever.

LIABILITY INSURANCE:

Furnish the Owner with a policy insuring the Owner, this Contractor and the public from damage by accident, during the execution of this contract, or furnish the Owner with a letter from an Insurance Company approved by the Owner that such a policy as described above is already issued covering this Contractor during the execution of this contract. Policy should read $5,000 for one accident, $10,000 for two accidents.

This Contractor will protect the owner in addition to the insurance called for in the policy, by a policy in a company to be approved by the Owner, protecting the Owner against damage suits under Senate bill #27, becoming a law

April 4th, 1911, generally known as the "Working Men's Compensation and Employees' Liability Act" and with all amendments thereto to date.

BOND:

Furnish the Owner with an unconditional bond from a Surety Company approved by the Owner for 25% of the amount of this contract. The only condition of any kind which will be accepted in this bond will be the fulfillment of this contract. Accompanying this bond with a certificate stating that the Bonding Company is legally entitled to do a bonding business in the State of New Jersey.

OWNER'S PRIVILEGES:

THE OWNER RESERVES THE RIGHT TO REJECT ANY OR ALL ESTIMATES.

No estimate will be considered unless the plans and specifications are returned to the District Clerk with the estimate.

DRAWINGS:

All dimensions are to be taken from the drawings as shown by the scale marked thereon; figures to be take in preference to measurements in all cases. If any discrepancies occur this Contractor is to confer with the Architect on same before proceeding with the work.

These specifications are intended to explain the drawings, therefore anything mentioned herein and not shown on the drawings, or shown on the drawings and not mentioned in these spe-

Exhibit P-2

cifications, is to be executed the same as though represented by both.

All the work is to be according to these specifications and the accompanying drawings, together with such additional details, acceptances, approvals and explanations as may be necessary from time to time to insure the thorough completion of the work.

SCALE DRAWINGS:

A complete set of all scale drawings and of all full-size or scale details and specifications are to be kept constantly on the work at each building.

All drawings, details and specifications are to remain the property of the Architect.

DETAIL DRAWINGS:

This contractor is to furnish to the Architect in duplicate all the scale and full-size details wherever the Architect considers it necessary, and any work executed in advance of the receipt of the approved drawings or details will be at the Contractor's risk.

LABOR:

This contractor will be required to furnish a sufficient number of skilled workmen to speedily carry forward the work all over each of the entire buildings at one time. No small force of men covering only part of the buildings will be permitted.

RISK:

The entire work is entirely at the risk of this Contractor until same is completed and accepted by the Owner, and he will be held liable and responsible for its safety to the amount of money paid to him by the Owner on account of same.

Exhibit P-2

MEMORANDA:

These specifications and all the scale drawings are included in this contract, and are to be signed by Contractor and Owner when the contract is signed.

All notes appearing on any or all of the plans are to be strictly followed, as they are to form a part of this specification.

Any work that is not especially mentioned in these specifications or shown on drawings but is obviously required structurally, is to be done without additional cost to Owner, as directed by the Architect or his representative on the work.

PERMITS:

This Contractor must, at his own cost, obtain and pay for all necessary permits, give all necessary notices and comply with all the building laws, rules and ordinances of State, County, Township and Borough and the Governing Board of Fire Underwriters, relating to building or the preservation of the public health.

Any labor or materials required in addition to that called for or shown, to comply with the above requirements must be furnished by this Contractor without additional cost to the Owner.

BLUE-PRINTS:

The Architect will furnish this Contractor with one set of paper blue-prints. Any additional blue-prints desired by this Contractor will be furnished to him at cost.

WATER SUPPLY & SANITATION:

This Contractor will install at once the water tap, and will pay for all water used during tne

progress of the work. Furnish Owner with receipted bills for all water used, before final payment to Contractor by Owner.

This Contractor is to provide sufficient suitable sanitary conveniences for the use of his men and all other workmen on the building or grounds, removing and thoroughly cleaning the site after the work is completed, and to the entire satisfaction of the Architect.

SUPERINTENDENCE BY CONTRACTOR:

This Contractor is to give the work a fair amount of his personal supervision, and place a competent foreman in charge of the work, who shall remain constantly in charge from start to finish of same, unless removed for cause, or by permission or orders of the Architect.

CLEANING:

This Contractor shall clean the works from time to time, or when requested so to do by the Architect, of all rubbish inside and out.

CUTTING, PATCHING & FITTING:

This Contractor shall do all the cutting and patching of any and all materials and all fitting and chases for all pipes, conduits, etc., of heating plumbing and electric work.

SCAFFOLDING:

This Contractor is to provide and set all the necessary supports, platforms, scaffolding, ladders, derricks, blocks and tackles as may be required to carry out the entire work covered by this contract.

(The remainder of Exhibit P-2 consisted of 59 type written sheets, numbered

Exhibit P-2

from 7 to 65, and containing voluminous provisions arranged under the following main headings—

Excavation and Filling.
Mortar and Concrete materials & mixture.
Drains.
Cesspool.
Concrete work.
Brick Masonry.
Steel and Iron.
Lathing and Plastering.
Carpentry.
Kalamein Doors & Frames.
Glazing.
Slag roofing & sheet metal.
Painting and Finishing.
Plumbing.
Basement.
Heating and Ventilating.
System of Heating.
Electric work.
Electric lighting fixtures.
General clauses.

On pages 34 and 35, is the provision relating to finishing hardware, under the heading, carpentry, which is set out next below. The other voluminous provisions of the specifications are here omitted as not material to any question arising in the case.)

HARDWARE:

The Architect will select the finishing hardware, in addition to that already previously specified, costing $175., net for each building, F. O.

B. N. Y. City without any profit to this Contractor, and the Architect will order and bill this hardware to this contractor who will *set* same complete and who is to pay bill for the hardware selected after same is O. K'd by the Architect.

The above amount does not include any nails, screws, door stops, shelving brackets, or any rough hardware of any description, which is to be *furnished* and *set* by this Contractor.

If the Architect can buy this finishing hardware for less than $175 then the Owner shall be entitled to the entire saving; or if this finishing hardware should cost more than $175., then the Owner will pay this Contractor the exact amount only of the extra cost of this hardware.

The setting of the finished hardware is not to be included in the above $175 net allowance.

Exhibit P-3

Henry C. Pelton, Architect
No. 8 West 38th Street
New York

Board of Education, Date, Nov. 29th, 1915
Hasbrouck Heights, N. J.

Dear Sir:

Please pay to Ferber Const. Co. of Hackensack NJ Two thousand six hundred ten 33/100 ($2610.-33) being the 5th payment on account of contract for General Contract School "B" New High School Building at Hasbrouck Heights NJ

Exhibit P-4

Contract		$17345.50
Previous Payments,	$14735.17	
Present Payment,	2610.33	17345.50
Balance on Contract,		None

Respectfully,
HENRY C. PELTON.

This certificate is payable when presented accompanied by guarantees, and when small items have been completed as described in letter attached hereto.

Exhibit P-4

Henry C. Pelton, Architect
No. 8 West 38th Street
New York

Board of Education, Date, Nov. 29th, 1915
Hasbrouck Heights, N. J.

Dear Sir:

Please pay to Ferber Const. Co. of Hackensack, N. J. Two thousand six hundred ten 32/100 ($2610.32) being the 6th payment on account of contract for General Contract School "A" High School Buildings at Hasbrouck Heights, N. J.

Contract		$17345.50
Previous Payments,	$14735.18	
Present Payment,	$ 2610.32	17345.50
Balance on Contract,		None

Respectfully,
HENRY C. PELTON.

Exhibit P-5

This certificate is payable when presented accompanied by guarantees, and when small items have been completed as described in letter attached hereto.

Exhibit P-5

HENRY C. PELTON
ARCHITECT
8 West 38th Street
New York City

Tel. 4032 Greeley — Nov. 29th, 1915

Ferber Const. Co.
Hackensack, N. J.

Re Hasbrouck Heights Schools.

Gentlemen:

I am issuing to-day your final certificates on Schools "A" and "B." Before these certificates are paid a new wash basin will have to be installed in boys' toilet, School "A," which was damaged by having something fall upon it. Also, the finishing up and pointing of brickwork of both schools, previously directed by me and the finishing and setting of cabinet hardware and umbrella hooks in both schools. Set all new terra cotta blocks at entrance to School "A." Go over all black-boards, both schools, at joints where glue has oozed out. I am also enclosing guarantees for you to sign and return. These are as shown on your specifications—pages 22, 39 and 51.

Exhxibit P-6

After heat has been on in the building for a month go over all doors, both buildings, regarding panels and easy opening and closing of all doors.

Yours very truly,

HENRY C. PELTON,

Per Henry C. Pelton.

Exhibit P-6

Aug. 19, 1915.

Ferber Construction Co.,
Hackensack, N. J.

Re Hasbrouck Heights Schools.

Gentlemen:

According to the terms of the contract, I wish to advise you that I have this day accepted the estimates of P. F. Corbin Co., for the complete finished hardware for both school buildings. The cost of the finished hardware for school "A" is $145.00 and for school "B" $145.00.

The specifications on page 34, under the heading of "Hardware" state that the Architect will select the finishing hardware in addition to that already previously specified costing $175.00 net for each building, F. O. B. New York City, without any profit to this contractor and the architect will order and bill this hardware to this contractor, who will set same complete and who is to pay bill for the hardware selected after same is O. K.d by the Architect.

The specifications also state that if the Architect can purchase this finished hardware for less than $175.00 the Owner is then entitled to the en-

tire saving. As the cost of this hardware is only $145.00 per building, I am enclosing to you herein two credit orders for $30.00 for school "A" and $30.00 for school "B."

Trusting the above is satisfactory, I am

Very truly yours,

HENRY C. PELTON
per

Clerk's Certificate

State of New Jersey, } ss:
County of Bergen. }

I, George Van Buskirk, Clerk of the County of Bergen, and also Clerk of the Circuit Court, in and for said County, do hereby certify, that the foregoing are true copies of the papers filed in the case and copy of Judgment as the same is entered in Book I of Circuit Court Judgments page 179 for said County.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court at Hackensack this 26" day of June, A. D. 1916.

(Seal)

GEORGE VAN BUSKIRK,
Clerk.

W. S. Doremus,
Dy. Clerk.

(10¢ revenue stamp)

New Jersey Court of Errors and Appeals

FERBER CONSTRUCTION CO., Plaintiff-Appellee, v. THE BOARD OF EDUCATION OF HASBROUCK HEIGHTS, Defendant-Appellant.	On Appeal.

BRIEF OF LUCE AND KIPP FOR THE APPELLANT

Statement

By written contract, dated May 27, 1915, the plaintiff undertook to construct for the defendant two school buildings for the contract price of $32,653, which, by extra works agreed upon pursuant to contract provisions, became subsequently increased to $34,751.

The plaintiff, in his pleadings, admitted that, in cash and other agreed allowances, it had been paid the sum of $29,530.36, as the work had progressed; and also that, of the balance of the increased contract price, namely, of the sum of $5220.64, the defendant was entitled to retain the sum of $1629.65, under the terms of the contract,

and so claimed the sum of $3590.99 (or $3591 in round figures) with interest from November 29, 1915, as the sum to which only it was entitled, on the day of suit begun (January 18, 1916).

The contract contained a provision which provided (art. 6) that the defendant should be entitled to be paid by the plaintiff $15 for each day that the completion of the contract was delayed beyond October 1, 1915; and the only defense which the defendant made on the trial was, that the completion *had* been delayed beyond October 1, 1915; and that it was, therefore, entitled to recoup, under said contract provision, its insistment being that a delay of 59 days had occurred, and that the amount it was consequently entitled to recoup was $885.

The counter-claim thus insisted on was adequately pleaded by the defendant. In its answer thereto, the plaintiff pleaded (*a*) that completion was not delayed; and (*b*) that any delay that there had been was the fault of the defendant and that the plaintiff had complied with the provisions of the contract relating to an extension of the time for completion in such case. To this latter defense, the defendant replied (1) by denying that any delay was caused by its fault; and (2) by specifying the particular conditions which the contract required the plaintiff to comply with, in order to be entitled to any extension of time, and denying that they had been complied with, its allegation being:

(1) That the plaintiff had in no case presented any written notice of claim to the architect within 48 hours; and

(2) That the architect had in no case granted any extension.

See Article 7 of the contract (Case, p. 12), for the provisions upon this topic.

The facts necessary to be determined were, therefore, (1) the date when the contract was completed; and (2) if that was after October 1, 1915, whether or not, the time for completion had been duly extended for the corresponding period.

The only proofs produced were those produced by the plaintiff. They comprised the contract and specifications (Exhibits P-1 and P-2; Case, p. 59); four papers each signed by the architect (Exhibits P-3, 4, 5, 6; Case, p. 67, etc.), and the testimony of Mr. Hermann B. Ferber (Case, p. 41, etc.).

Both parties rested upon these proofs. The Court then refused the defendant's request that the jury be directed to find in favor of the defendant's counter-claim; and over defendant's objection, granted plaintiff's request to direct a verdict for the full amount claimed by the plaintiff.

The claim, on this appeal, is that the Court erred both in refusing defendant's request and in granting plaintiff's.

POINT I

The $15 per day for delayed performance stipulated for in Art. 6, was intended and agreed upon as liquidated damages.

The decisions of this Court in *Monmouth Park Assn. v. Wallis;* 26 Vr., 132; and *Van Buskirk v. Bd. of Ed.,* 49 Vr., 650, are precisely in point.

Here as there, the stipulation was single; the damages by reason of delayed performance would be uncertain in amount, and not readily susceptible of proof; the sum named was not dispropor-

tionate to the presumable loss; and the parties agreed upon it, as the measure of compensation in case of a breach.

POINT II

It was conclusively proved on the trial that the contract was not completed until November 29, 1915.

The undisputed testimony of Mr. Ferber (Case, p. 47, *et seq.*) was, that, on October 1, 1915, there was work to the value of $4697. remaining to be done; that some of this may have been completed by October 7th; but that the hardware was not placed in the buildings until November 29th, 1915 (Case, p. 54); and that even then there remained some painting and other work, to be done (Case, pp. 54-55).

Mr. Ferber's testimony was all the evidence that there was in the case on the topic. It is true that the Trial Judge and plaintiff's counsel seemed to think that the documents, P-3 and P-4, were in some way, evincive on the point: but, when read, they plainly corroborate his testimony, and in no wise assert that the contract was completed before November 29, 1915. Indeed they assert not only that it was not completed before that date but that it had not even *then* been entirely completed.

POINT III

It was not shown, and it could not legally have been held, that the time for completion had been extended.

1

Under the provisions of Art. 7 of the contract, there could be no extension of time *unless,*

(*a*) completion was delayed by the act, neglect, or default of the owner, or of the architect, or of some other contractor employed by the owner, or by damage caused by fire, or other casualty for which the contractor was not responsible, or by combined action of workmen in nowise caused by, or resulting from default or collusion on the part of the contract or; *and also unless*

(*b*) a written claim for an extension for any such cause was presented, by the contractor to the architect within 48 hours after the occurrence of such cause; *and also unless*

(*c*) the architect thereupon determined that an extension of time should be allowed, and fixed the period thereof.

The burden of proving that the delayed performance was so caused, and that an extension had been accordingly allowed in conformity with these provisions, was upon the plaintiff; since the defendant's counter-claim was made out as soon as it appeared that performance had been delayed.

Stephen Pl. (Heard's Ed.), p. 443, rule X;
Turner v. Wells, 35 Vr., 269, 272;
Greeley v. Passaic, 13 Vr., 87;

and it was incumbent upon the plaintiff to show, not merely that delay was caused by the fault of the owner, etc., but also that notice was thereupon given and that an extension for the requisite length of time was allowed.

Feeney v. Bardsley, 37 Vr., 239;
Van Buskirk v. Bd. of Ed., 49 Vr., 650, 654;
American Co. v. Paterson Co., 7 C. E. Gr., 72, 74.

2

There was no evidence that completion was delayed by any act, neglect, or default of the owner or architect, etc.

The only contention to the contrary that is possible is that the Corbin Company's delay in delivering the hardware was due to the fact that the architect did not order it until August 19th. This contention would assume that it was not ordered in due season. There was no proof that that was so, and there is no such presumption. It may well be judicially noted, on the contrary, that it is ordinarily easily possible for $290. of builder's hardware to be procured and delivered in the space of time between August 19th and October 1st, in this locality.

3

But conceding, not admitting, that the hardware was not ordered in due season, it would then follow that the alleged cause of the delay occurred at least as early as August 19th; and written notice of claim was, therefore, required to be given to the Architect as early as August 21st, *Feeney v. Bardsley, supra; Van Buskirk v. Bd. of Ed., supra.*

No such notice was ever given, and, of course, no extension of the time for completion was, or could have been, allowed.

POINT IV

There was no waiver of the contract provisions in regard to timely performance, or extension of time, or of the defendant's right to compensation for delay.

There can be no pretence that there was any evidence of a waiver of any of those rights by the defendant itself.

There was also no evidence that the architect attempted to waive any of them, and it is entirely settled that he had no authority or power to do so, had he attempted it.

Van Buskirk v. Bd. of Ed., 49 Vr., 650;
Leverone v. Arancio, 179 Mass., 431; 61 N. E., 45;
Wagner Co. v. Cawker, 112 Wis., 532; 88 N. W. 599;
Kelly v. Fejerrary, 78 N. W., 828 (Iowa);
Charleston Lumber Co. v. Friedman, 64 W. Va., 151; 61 S. E., 815;
Bond v. Newark, 4 C. E. G., 376, 382.

POINT V

There was nothing in the case that could operate to estop the defendant from claiming damages for the delay in completion.

The view of the Trial Judge was to the contrary. He considered that the documents, Exhibits P-3 and P-4, *did* operate to preclude defendant's counter-claim.

We are at a loss to comprehend upon what theory he so held; but, we submit, that upon any possible theory his holding was palpably and egregiously erroneous.

Such a holding necessarily asserted that those documents conclusively established, without other affirmative evidence, and in spite of plenary evidence to the contrary (1) either that the contract had been fully performed by October 1, 1915; or (2) that the time for performance had been legally extended for a period equivalent to any delay.

1. Those documents certainly do not expressly assert anything of the kind.

2. Neither are their contents compatible with any such inference.

No such inference can be drawn from the fact that they request the defendant to pay the plaintiff the sum of $5220.55, and show that this sum is the difference between the total already paid to the plaintiff and the total contract price. As we have already pointed out, the plaintiff was not, under any circumstances, entitled to be then paid the whole of such difference, and so admits in his pleadings; and the only inference to be drawn from the architect's request to pay any such sum is the inference that such request was a mistake.

3. But had there been no such palpable mistake, and had the request been to pay the sum of $3590.99, those documents could not have precluded the defendant from showing that so much was not, in fact, due; neither could they have any weight to overcome the indisputable proof in the case that so much was not due. The sufficient reason for this assertion is that the Architect, under the contract in this case, had no authority to certify to any such matter, and the documents in question were, therefore, not even evincive, much less conclusive, thereupon.

The contract, in the present case, required the work to be done under the direction of the architect, and made his decision, as to the true construction and meaning of the drawings and specifications, final (Art. 2). See *Welch v. Hubschmidt,* 32 Vr., 57, as to the narrow limits of that power. In Art. 7, it constituted him a judge under some circumstances and limitations, and in Art. 12, it provided for an appeal from his

decision in such cases. In Art. 9, it provided that payments should only be made to the contractor on his (the architect's) certificates, and defined the course to be pursued by providing that payments were to be made as of the first day of each month in such amounts as, in his opinion, might be warranted by the progress of the work, and each such payment was to equal 85 per cent of the value of the labor and material then installed into the buildings. On the completion of the buildings, and their acceptance by the owner, 5 per cent of the contract price was to be retained by the owner for one year thereafter, and the residue (or so much thereof as was still unpaid) was to be paid. It provided that "all payments shall be due when certificates for the same are issued." (This prohibited the issuance of a certificate for any sum before the contractor should have earned it. *Mackinson v. Conlon,* 26 Vr., 564.) In Art. 10, it was provided that no certificate or payment, except the final one, should be conclusive evidence of the performance of the contract in whole or in part, and that no payment should be construed as an acceptance of defective work or improper materials.

A perusal of these provisions makes it manifest that although the Architect *was* empowered, by his certificate, to determine conclusively that the contract had been completed, he had no authority whatsoever to determine how much the contractor, in that event, would be entitled to be paid. As a consequence, no inference, that the contract had been completed, could be drawn from a certificate that merely stated that a certain sum was due the contractor, even although such sum was the correct sum that would be due upon completion. And so are the decisions.

Thus, in *Pashby v. Birmingham,* 18 C. B., 2; 86 E. C. L., 2, it was held that a certificate that the contract has been completed, is sufficient, without mentioning the amount that is thereupon due; while in other cases it has been held that a final certificate is not sufficient if it omits expressly to state that the contract has been performed, although such in fact is the case and the certificate correctly states the balance that is thereupon due. *Roy v. Boteler,* 40 Mo. Ap., 213; *Gay v. Haskins,* 11 Misc., (N. Y.), 134; 31 N. Y. Supp., 1022; 65 N. Y. St., 53; *Beharrel v. Quimby,* 162 Mass., 571; 39 N. E., 407. So, in *Downey v. O'Donnell,* 86 Ill., 49, where the contract provided that on all questions in difference the architect's certificate should be final, it was held that a certificate which stated that a certain sum was due the contractor and that the work was completed but did not state whether the completion was within the time fixed by the contract therefor, did not preclude the owner from claiming damages for delay.

So in this state it is entirely settled that the powers of the Architect, and the character of any certificate he may give, are determined strictly by the contract; and when it is such as the one here in question, he is not the representative of the owner, and any certificate that he gives, in so far as it purports to determine particulars, which the contract does not commission him to determine, is without force against the owner.

Newark v. N. J. Asphalt Co., 39 Vr., 458;
Welch v. Hubschmidt Co., 32 Vr., 57;
Gerisch v. Harold, 53 Vr., 605;
Van Buskirk v. Board of Ed., 49 Vr., 650;
Mackinson v. Conlon, 26 Vr., 564.

4. It is thus manifest that, from the documents in question (Exhibits P-3 and P-4), it was not permissible to infer either that the contract had been performed in due season or that the time for performance had been legally extended. There was, therefore, nothing that tended to contradict, much less anything that precluded the defendant from availing itself of, the testimony which, as we have seen, established, beyond any question, that the contract was not performed before November 29, 1915.

5. And furthermore, the documents, Exhibits P-3 and P-4, are expressly incompatible with the inference that it was supposed could be drawn from them. Such an inference would have rested solely on the *amount* that they indicated as due. We have seen that their statement of that was a palpable mistake. To that extent, they were a nullity, and *ex nihilo nihil fit*. But on the other hand, they expressly state that on November 29, 1915, the contract still remained unperformed in certain specified particulars, and they do not pretend to say that anything will be due the contractor until those particulars are attended to.

POINT VI

For the reasons above stated, we submit that the defendant was clearly entitled, on the proofs, to recoup the $885 claimed, and that the verdict should have been directed accordingly, as was requested.

POINT VII

The judgment of the Circuit Court should be reversed and judgment should be ~~entered in this Court~~ directed in favor of the plaintiff for ($3591 - $885) = $2706, with interest from November 29, 1915.

Eatontown v. Monmouth, etc., Co., 49 Vr., 493, 498 (E. & A.).

Both parties at the trial having rested their respective contentions upon the proofs produced by the plaintiff, and the facts essential to the determination of the controversy between the parties having thus been indisputably ascertained, and the judgment below being manifestly erroneous, it is entirely settled that this Court should reverse that judgment, ~~retain the record,~~ and give such judgment as the Trial Court should have rendered.

Garr v. Stokes, 1 Harr., 403;
State v. Hoxsey, 11 Vr., 186; 10 Vr., 489;
Lehigh R. R. v. McFarland, 15 Vr., 674;
Smith v. Ocean Castle, 30 Vr., 198;
Vorrath v. Burke, 34 Vr., 188;
Van Mater v. Lucas, 35 Vr., 182;
Central R. R. v. McCartney, 39 Vr., 165;
Taylor v. Reed, 39 Vr., 178;
Sullivan v. Visconti, 39 Vr., 543;
Dubelbeiss v. West Hoboken, 53 Vr., 683;
Eatontown v. Monmouth Co., *supra.*

Respectfully submitted,

E. J. LUCE & W. A. KIPP,
Attorneys.

New Jersey Court of Errors and Appeals.

FERBER CONSTRUCTION COMPANY, Plaintiff-Appellee, v. THE BOARD OF EDUCATION OF THE BOROUGH OF HASBROUCK HEIGHTS, Defendant-Appellant.	On Appeal From the Bergen Circuit Court. Brief of Plaintiff-Appellee.

The plaintiff contracted to erect two school buildings described as "A" and "B" for the defendant, in consideration of $34,751.00 (including one or two items of extra work). It also agreed (Article 6, page 12) to suffer liquidated damages of $15.00 a day for every day the work remained unfinished after October 1st, 1915. It was further agreed (Article 7, page 12) that should the contractor be delayed in the prosecution or completion of the work by others, or by fire, etc., "then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all causes aforesaid, *which extended period shall be determined and fixed by the Architect;* but no such allowance shall be made unless a claim therefore is presented in writing to the Architect within forty-eight hours of the occurrence of such delay."

The plaintiff proceeded with its work to completion, and demanded that part of the balance of the consideration not paid (the whole being $5,220.64, a part thereof $1,629.65 to be withheld for one year) and then due, to wit, $3,591.00.

The defendant refused to pay—this action was instituted, and the defense pleaded but two reasons for the non-payment!

First:

Evidence of liens or claims against the contractor, which, if not paid, might become chargeable against the defendant.

That this defendant was fictitious was demonstrated by the defence producing no witnesses. In short, this will not be considered, as there is no evidence to support it.

Second:

That the completion of the work was not accomplished on October 1st, 1915, but was delayed fifty-nine days beyond that—the defendant counter-claiming $885.00 as a penalty.

Upon the trial of the issues, the plaintiff testified concerning the completion of the work:

"On November 19th, we had an inspection of the building." "I tried for months to get the buildings inspected." (Page 50-30.)

"We had no work on those buildings after about the seventh of October, except in connection with the installation of the hardware. That was the first week in October, as I recall it. We got through there." (Page 51-10.)

"I think the work was completed between the 1st and the 7th." (page 51-40.)

"School A was finished long before then." (Oct. 14, 1915.) (Page 53-10.)

"Q. Your employees were there working after October 1? A. Putting on the hardware; that is the only thing they ever did to my knowledge, Mr. Luce.

"Q. Well, I want to see. A. After October 1—I should say about October 7th is the date." (Page 53-20.)

The testimony established the fact that the entire work was completed at least on October 7th, 1915, and probably earlier—the exact date is not determined—

that is to say, the entire work for which the plaintiff and all the sub-contractors were responsible.

The specifications (page 66, Exhibit P-2) discloses that the hardware was to be selected and ordered by the Architect, the owner's agent.

The Architect delayed supplying this hardware, and only on August 19th, 1915 (Exhibit P-6, page 70), announced that he had ordered it.

The testimony indicates (page 54-20) that the hardware arrived in part on November 29th; that it was placed by the plaintiff, who worked until seven o'clock to "get it on that night." The plaintiff further testified that between August 19 and October 1, 1915, he "wrote numerous letters asking the hardware company if they would not please deliver the hardware" (page 56-20). "The building was ready for the hardware about the middle of September." (Page 56-20.)

The non-delivery of this hardware, the selection, ordering and delivery of which was beyond the control of the plaintiff, resulted alone in *it not being placed! But no other part of the work had been delayed*—it had been entirely completed.

> "Where a building contract calls for the completion of the work by a certain day, acts done by the defendant which delay the contractor, are excuse for non-completion on the day specified. Acquiescence by the contractor in the acts of defendant, does not alter the case."
>
> Van Buren v. Digges, 52 U. S., 11.

> "If defendant caused delay in the work in any way, plaintiff is discharged from any liability for liquidated damages in not completing the building within the time specified."
>
> Weeks v. Little, 89 N. Y., 566.
> Stewart v. Keteltas, 36 N. Y., 388.
> Heckmann v. Pinkney, 81 N. Y., 211.

> "Where defendant was to do certain work, preparatory to the work to be done by plaintiff under

the contract, he could not complain of delay on the part of the plaintiffs, because they waited for him to do his preparatory work."

Fairbanks v. Jacobs, 69 Iowa, 265.
Mansfield v. N. Y. Cent. & H. R. R., 3 Cent., Rep. 199, 102 N. Y., 205.

There is no evidence that the plaintiff did not comply with the contract in all its parts, and indeed no evidence that if the plaintiff had offended (Article 6, page 12) of the contract, he did not come within the provision of Article 7 (page 12-13). Affirmatively, however, we have that which in the Trial Court disposed of the issues!

On November 29th, 1915, the Architect presented to the defendant two certificates (Exhibit P-3, page 67 and P-4, page 68) in which he directed the defendant to pay the plaintiff the balance of the contract price! In short, final certificates. There is nothing upon the certificates to indicate the date upon which the work was finished, or the inspection made. We might as well assume that they referred to October 1st, 1915, as to November 29th, 1915. They are complete and unqualified except along the following foot note:

"This certificate is payable when presented, accompanied by guarantees, and when small items have been completed as described in letter attached hereto." (Pages 68-69.)

We should not consume the time of the Court in discussing the foot note.

The plaintiff was never shown this foot note, nor the letter (page 48-10).

The letter, however, describes several small items, to do which in the aggregate Mr. Ferber testified (page 49-40) would cost less than $20.00. His testimony on pages 48 and 49 will dispose of these. It is admitted in the defence that the work was completed, the only difference in fact being the date of completion! That

these items were not done is not pleaded, and we may avoid serious consideration of them.

Something was written about "guarantees," but there is nothing in the printed book concerning them, it does not appear that they were not given, and the fact is not pleaded in defence.

Against the plaintiff's testimony, not a word was said; the Architect, who might have described the exact date of completion of work did not testify! The evidence then disclosed that all things necessary for the contractor to do, were done within time, excepting alone the fixing of *hardware;* which depended upon the defendant supplying it, and which the defendant failed to supply! It cannot take advantage of its own wrong!

Again, when the time within which the work was to be completed was determined, certain work was in the minds of the contracting parties, which was subsequently changed by "extra work."

There is evidence of such extra work, which itself should defeat the obligation to complete the work within a given time!

> "When a house was not finished until a few days after the time stipulated, but extra work was ordered, it cannot be said without evidence, that delay was longer than necessary to complete the extra work."
>
> Sweeny v. Davidson, 68 Iowa, 386.

This contract provided:

> "that the work included in this contract is to be done under the direction of the Architect, and that his construction as to the true construction and meaning of the drawings and specifications shall be final." (Page 9.)

Further:

> "In case the owner and contractor * * * or should either of them, dissent from the decision of the Architect referred to in Article 7 of this con-

tract, which dissent shall have been filed in writing with the Architect within ten days of the announcement of such decision—then the matter shall be referred to arbitrators! (Pages 14-15.)

What is the authority given to the Architect in Article 7:

"Should the contractor be delayed * * * then the time shall be extended * * * which extended period shall be determined and fixed by the Architect." (Pages 12-13.)

The Architect presented his certificate that the work had been completed, and the contractor was entitled to its final payment—naming the amount without any deduction because of delayed work. He had authority to do so, and his decision was not appealed from.

"The parties to a building contract are legally bound by a provision that the decision of the Architect shall be final and conclusive, subject, however, to the implied condition that the decision shall be an honest one."

Welch v. Hubschmitt, Q. 32 Vr., 57.
Chism v. Schipper, 22 Vr., 1.
Bradly-Currier Co. v. Bernz, 55 Eq., 10.
Kirtland v. Moore, 40 Eq., 106
Byrne v. Sisters of Charity of St. Elizabeth, 45 Law, 213.

"A contract, providing for a certificate of approval to be given by a third person, will be construed to mean an approval of the subject matter comprised within the terms of the contract unless a contrary meaning clearly appear."

Schaffelee v. Greenberg, 83 Law, 737.

In Gerich v. Herold, 79 Atl., 1028, it was decided:

"In an action on a building contract making the Architect the arbitrator between the parties on the question of performance, the burden was on defendant in an action on the contract to show fraud

of the Architect or mistake by him relating to the matters certified."

The judgment in the case was reversed in the Court of Errors and Appeals (83 Atl., 892) for the reason that the contract required the approval of the owner, or his "representative" and it was found the "Architect" was in that case not the "representative" charged with the "approval."

Under title of "Point III" the appellant asks the Court to find that the burden of proving that the delayed performance of the contract was due to one of the causes presented in Article 7, is upon the plaintiff. Whatever might have been the case in the absence of an Architect's certificate (such as occurred in the cases quoted) the presence of the Architect's certificate here, shifts the burden to the defendant.

The plaintiff-appellee respectfully submits that the verdict of the Trial Court should be sustained.

Respectfully submitted,

A. C. HART & VANDERWART,

Of Counsel with Plaintiff-Appellee.

Dated, November 8th, 1916.