

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY
COUNTY, PENNSYLVANIA**

**JAMES CORPORATION d/b/a JAMES
CONSTRUCTION, in its own name and
right, and for the use and benefit of its
subcontractors,**

Plaintiff,

vs.

**NORTH ALLEGHENY SCHOOL
DISTRICT and THOMAS &
WILLIAMSON, LLC,**

Defendants,

vs.

**D&L INC., FOREMAN ARCHITECTS
ENGINEERS, INC., CHAMBERS DESIGN
ASSOCIATES, P.C., f/k/a CHAMBERS
VUKICH ASSOCIATES, P.C.,**

Additional Defendants.

CIVIL DIVISION

No.: GD00-5674

**MEMORANDUM ORDER and
NON-JURY VERDICT**

**Filed by: The Honorable
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Pittsburgh, PA 15219**

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Additional Defendants.

MEMORANDUM ORDER

O'REILLY, J.

I. PRELIMINARY STATEMENT

This case involves a dispute between a building contractor, **James Corporation, d/b/a James Construction**, (“James”) and a school district, **North Allegheny School District** (“North Allegheny”), and its

Project Manager, **Thomas & Williamson, LLC**, (“**T&W**”) with respect to the renovation of, and addition to, one of the school buildings operated by **North Allegheny**. The matter was tried before me, non-jury, from November 3, through November 23, 2004. **North Allegheny** has joined as **Additional Defendants, D&L, Inc.**, (“**D&L**”), its prior construction manager, **Foreman Architects Engineers, Inc.**, (“**Foreman**”), its architect, and **Chambers Vukich Associates, P.C.**, (“**Chambers**”) a consultant to **Foreman**.

Specifically, **James** was awarded the bid for the renovation of, and the addition to the Hosack Elementary School (“**The Project**”) by **North Allegheny**. **North Allegheny’s** project manager was the firm of **T&W**. **James**, in its complaint, asserts that the delays in the project, which were not of its making, required it to speed up its work in order to complete the project, and as a result seeks damages from **North Allegheny** and from **T&W**. It also seeks payment on several unpaid invoices, and further asserts a defamation claim against **T&W**. It also seeks the attorney’s fees and other exemplary damages available under the **Pennsylvania Procurement Code, 62 Pa. C.S.A. § 3901 et. seq.** **North Allegheny** has named as **Additional Defendants**, under **Rule 2252**, its architect, **Foreman**,

and its consultant, **Chambers**, for delays and errors in the design that may have led to the claims of **James. Additional Defendant, D&L** was the predecessor project manager to **T&W**, and in the course of this litigation filed for bankruptcy, and has received the protection of the same. Accordingly, while **D&L** is named in the caption, it is not a party to this matter under the protections afforded by the **Bankruptcy Code**.

The complaint was filed on March 31, 2000, and worked its way through the various procedural and pre-trial steps typical to a case of this type and magnitude. I conducted a bench trial which ran for three weeks from November 3, 2004 to November 23, 2004.

I set a briefing schedule based on the time that the transcript should be filed. The transcript ran to 5 volumes, consisting of 2200 pages and was provided to the parties on or about March 10, 2005. There were also over 200 exhibits offered in the cases.

The parties thereafter filed various post-trial briefs and memoranda, exhibits and supplements, so that the final reply from **James** was filed on May 27, 2005. This was after I had entered an Order on May

19, 2005, to the effect that any and all post-trial briefs, supplements, memoranda or anything else must be received by me on or before May 27, 2005, after which time the record would be closed.

I have, indeed, received approximately fifteen post-trial submissions from all the parties, which I have duly read, analyzed and independently researched. At the outset, I commend counsel for all parties for their able, professional, and courteous presentation of the case. They have all filed excellent and able briefs, setting forth their positions with clarity and vigor.

II. FACTS

A. OVERVIEW

North Allegheny is a large School District located in the northern reaches of Allegheny County, and operates a myriad of school buildings, and other structures for the elementary, middle, and secondary education services it provides. In 1998, it undertook the monumental task of renovating, and making additions to five of the school buildings operated by it. To finance the same, it had a bond issue in excess of 15 million dollars.

It retained the services of various professionals to develop the plans and specifications for the project, and to supervise the construction. It used **Foreman** as its architect, and hired a project manager, **D&L**. While **Foreman** was the architect for the overall project, it sub-contracted the erosion and sedimentation control plan to another architectural firm, **Chambers**. During the course of construction, the original project manager, **D&L**, was terminated by **North Allegheny**, and hired in its place was **T&W**. The **D & L** project manager was Jon Thomas until he left it in November, 1998 to form **T & W**, which became the successor project manager in January, 1999. **James** was the successful general contractor

bidder on one of the schools, Hosack Elementary. While **James** has been denominated a general contractor, in fact it was not responsible for the work of numerous other contractors on the site, and **North Allegheny** had direct contracts with plumbing, electrical and other contractors. Thus, the parties have denominated this project as one involving multiple “prime” contractors. By this, they mean to indicate that there was a direct contractual relationship between **North Allegheny** and several contractors, rather than the typical arrangement where there is a single contract with a general contractor, who then subcontracts other portions of the work to other trades.

The over-riding consideration for **North Allegheny** in this extensive project was that not a single day of school would be missed by students, faculty or other staff. Accordingly, time of completion was important, and necessarily, a tight schedule of work had to be followed. Therein lies the nub of the dispute. A compounding factor was that there was no true general contractor who could co-ordinate the work of all trades. Efforts at a comprehensive schedule applicable to all, and observed by all, was an ongoing problem on this project.

B. FACTS**Up to January 11, 1998, when D & L was discharged**

The target date for completion of the Hosack Project was September 19, 1999. The bids were solicited in the summer of 1998 and the bid documents consisted of job plans and specifications, plus voluminous general condition documents. These were first made available to prospective bidders in the summer of 1998, but were modified to both add, delete and modify terms and conditions of the prospective contract. Ultimately, **James** was declared the successfully bidder on the Hosack Project, and was awarded the contract on August 28, 1998.

One of the first elements to be performed was certain excavation for the addition, as well as for a sedimentation pond to control water run-off from the site. This was to be installed pursuant to an erosion and sedimentation plan that **North Allegheny's** architect, **Foreman**, and its consultant, **Chambers**, was to present to Allegheny County for approval and issuance of a permit. This process was delayed, due to concerns of the Hosack principal over the size and location of a detention pond, and the final approval for the erosion and sedimentation plan was not received until

October 15, 1998. **James** suggests this delay in issuing the permit was the first of many hurdles to his prompt and efficient work. In contrast, **North Allegheny** asserts that **James** was not ready to proceed even if the erosion and sediment plan and permit had been timely approved, and that this particular issue is a make weight. It also refers to an agreement it had reached with the municipality in which the building was to be built, to-wit, the Town of McCandless, and that it had waived the necessity for the erosion and sedimentation permit. In rebuttal, **James** argues that the waiver by McCandless cannot waive the requirements imposed by Allegheny County, which, if excavation were performed without the approval of the erosion and sediment plan, **James** would have been subjected to a fine by the County. Further, **James** was never told of this waiver by McCandless.

James next asserts that there was further delay in getting the project under way by reason of a chain link fence that **North Allegheny** had installed prior to soliciting bids. That fence and the installation thereof had been handled by **North Allegheny** in conjunction with **Foreman**. The issue raised by **James** is that the fence was mis-located and had to be moved so as to permit the erection of the addition. The excavation for the addition, as well as the detention pond as part of the erosion and sediment plan impinged

on the underground utilities that served the existing structure. The bid and contract documents advised bidders that the underground utility service (called the duct bank) was to be removed in the course of the project, and that the utility needs of the building would be served by over-head lines.

North Allegheny, however, changed its mind with respect to the utility access, and decided that the duct bank would remain. (**Vol. II, pp. 395-396**). As a result, according to **James**, the excavation for the sedimentation pond, and for the ultimate re-contour of the land, and finished landscaping were adversely affected since the non-removal of the duct bank now made the area available for the location of the sedimentation pond too small. The issue raised its head again at the conclusion of the project. Related to this, **North Allegheny** requested **James** to have its employees, dig, by hand, to locate this underground duct bank as part of this re-configuration and the determination to retain the underground utilities. **James** submitted an invoice for performing this extra work, which **North Allegheny** denied.

As the work progressed, other problems arose and delays in progress were becoming apparent. These included delays caused by the plumbing contractor interfering with excavation and grade beam installations; and the finding of asbestos in roofing that was to be removed. To that end, **North Allegheny's** project manager, **D&L**, advised **North Allegheny** that an extension of the completion date would be necessary. This recommendation was contained in a memorandum dated December 22, 1998, from the **D&L** representative on the site, Andrew Mollino. The **North Allegheny** reaction was to summarily discharge **D&L** as its project manager effective January 11, 1999, (**Volume III, p. 45**). This Memorandum was received in evidence as Exhibit "19", and it shows 4 areas that need to be adjusted because of delays. This memorandum was in a context of **D & L** adjusting the schedule to accommodate those delays, to which, Rob Gaertner, the **North Allegheny** Facilities Manager said, "**...Andy, How can you accept this part of the schedule. Does this not in effect leave us open to a delay claim because you have accepted and included in the projected schedule. I don't think this is a wise thing to do!!! Please call to discuss.**"

Shortly before the removal of **D&L** as project manager, two of its employees, to-wit, John Thomas and Ralph Williamson, left their employment with **D&L** and established **Thomas & Williamson, LLC**, ("**T&W**") a corporation, to engage in similar work as project managers. The record reflected their date of incorporation to be October 28, 1998. **T&W** later hired several employees from **D&L** including a site engineer and a clerical employee. **T & W** was then hired as the project manager, and began its duties on January 21, 1999. (**Volume II, 162**).

During the period from December, 1998, and until **North Allegheny** hired **T & W** as the replacement project manager, Jon Thomas of **T & W** was acting as a "consultant" to **North Allegheny**. **North Allegheny's** Project Facilities Manager, Rob Gaertner, was also involved. (**Volume II, p. 285**). At the time **T & W** became Project manager, the project was 2-1/2 months behind. When **T & W** was hired, Thomas bluntly told the contractors that some of them may be fired, and any extensions of the project were "non-negotiable." (**Volume II, pp. 230-233**).

C. FACTS

After T & W became Project Manager

The first order of business under **T & W's** management was the attempt to develop a schedule that all contractors could work under. The schedule that **D & L** had been working on with **James** was jettisoned, and **T & W**, by Jon Thomas, prepared one. This schedule was imposed on the project on February 25, 1999, (**Exhibit 100**) and each contractor placed a signature on the schedule.

North Allegheny asserts such signing signifies acceptance of the schedule and waiver of all claims, both prior thereto and any that may arise thereunder. **James** argues its signature was merely one of acknowledgement, and it waived nothing.

Work progressed under the schedule, and which involved a lot of interior fit out work which **James** had anticipated doing much earlier in the Project. It was also developed that delays in completion of a certain multi-purpose room impinged on progress.

Further, an issue over dumpsters also arose. While **James**, the general contractor, had obligations in regard to trash clean-up and removal, it disputed its obligation under the contract to provide dumpster for the roofing contractor. **North Allegheny's** representative, however, pointedly told **James** to provide the dumpster, which it did. Later, that representative acknowledged his error and said **James** would be paid. Still later, **North Allegheny** refused to pay on the theory that this payment was not authorized by the school code. This dumpster claim is one asserted by **James**.

At the time of **T & W** becoming Project Manager, another concept appeared – that of “recovery budget.” By that **North Allegheny** and Thomas meant taking steps during the project to reduce costs by substituting materials, or deleting work. It was never made clear whether the “recovery budget” was to recover cost overruns or simply to monitor costs and keep them under control. **T & W** did, however, solicit suggestions from the contractors as to where savings could be found. **James** proposed several, but none were ever accepted.

ANALYSIS AND CONCLUSIONS

The defenses offered here basically are:

- 1) **James** caused his own problem; or
- 2) A close reading of the contract shows the problems to be **James'** responsibility; or
- 3) The procedures of the School Code were not followed so **North Allegheny** owes nothing.
- 4) **James** failed to "quantify" his claims when they arose, and has waived them.

North Allegheny has also mounted a Counterclaim against **James** asserting it incurred costs to finish work which **James** either refused to do, or had done improperly. I am not persuaded by these defenses, which basically reflect the decision of **North Allegheny** to open the Hosack School on September 9, 1999, at all costs. Its inability to orchestrate the work to avoid delays and its disingenuous efforts to avoid paying **James** for work and/or speed up caused by 1 and 2 above likewise militates against these defenses. Further, I am persuaded by **James'** legal argument that quantification of its damages could only be accomplished once the project was finished, and financial analysis could disclose the true losses suffered.

An additional defense theme that runs through this case is that there could be no delay because the project finished on time (Wilkinson and Defense Expert Rhodes). I find this to be unpersuasive, and indeed supportive of **James'** argument for compression of his work, and other "speed up" that he incurred so as to finish on time. In short, it finished on time and without delay, because **James** speeded up. Now, it wants paid for that speed up.

The foregoing assertions by the defense also ignore the conditions and circumstances that prevailed on this Project before **T & W** replaced **D & L**. One cannot turn a blind eye to the **Mollino** Memorandum of December 22, 1998, which **Gaertner** did not dispute – he just responded "Don't mention it."

Initially, the delay in the **E & S** plan in and of itself is not so monumental so as to warrant relief to **James**. It, however, is just the first element in a cascade of problems that got worse and which **T & W** and **North Allegheny** could not or would not fix. Thus, following the delayed

E & S plan was the problem with the sedimentation pond which was unrealistically reduced because of the duct bank. Later the plans for that pond had to be re-drawn, and its configuration modified again. The duct bank problem arose because **North Allegheny** changed its mind about overhead utilities. The misplaced fence, which I do not find to be **James'** responsibility, further aggravated cramped conditions.

From here, the re-design of the grade beam is not intrinsically significant, but this was concurrent with the inordinate delay by the plumbing contractor, which inhibited the proper installation of the grade beam, and the necessary excavation and undercutting needed in the front of the building. The plumbing contractor was to complete its work in one week, but in fact took 2 months. Those delays were revealed in the concern expressed by Andy Molino in his December 22, 1998 Memorandum.

At that point, **James** had developed a good working relationship with Mollino, and a revised work schedule was being developed. The delays in the Project were acknowledged in that Project Schedule. The termination of **D & L**, resistance by **North Allegheny** to even acknowledge delays, and the "take no prisoners" attitude of **Jon**

Thomas dashed all hope of developing an ameliorative relationship on this struggling project.

An ongoing problem from the start of the Project was the absence of a schedule. While I heard much testimony about a CPM (critical path method) schedule, none was ever produced. On the first day of trial I observed a large rolled up document about 6 inches in diameter and 2 feet long. I thought this was the schedule promulgated at the start of the Project that all would follow.

What developed was that by December 1998, after 4 months of work there still was no comprehensive schedule. **D &L** was aware of the problem, and its representative **Mollino** was working with **James** to finally produce one.

Such schedules as were developed were intermittent, and incomplete. Indeed, some contractors never tendered a schedule for their work. Indeed **D & L** and **James** were still working on a schedule to address the delays in December 1998, when **Mollino** advised that an extension to address those delays would be necessary. As noted by **James** CEO, Craig

Stevenson, he and **Mollino** were close to developing a workable schedule when **D & L** was fired. Ultimately, **Thomas** prepared a schedule that he contends the contractors “accepted” on February 25, 1999, and which attempted to address the existing problems. **James** denied “accepting” that schedule, and placed his initials on it simply to acknowledge receipt and not to waive any claim. I find it significant that a “final” or “comprehensive” schedule was only achieved half-way through the Project.

Things did not improve under **Thomas’** direction, but the project did finish on time. That timely finish was due to the speed up and/or compression of work by **James**. The acceleration as testified by **James’** expert **Jon Jackson**, and the damages resulting therefrom. He calculated those damages as \$294,000.

North Allegheny’s expert, Andrew B. Rhodes, while discounting **Jackson’s** testimony, and reiterating the rubric of “no damage because finished on time” conceded that **James’** damages, at best, would be \$137,929. After evaluating these competing experts’ testimony, and admiring their knowledge, skill and experience, I find there to have been compression or acceleration caused by **North Allegheny**, and it is more

probable than not that those damages resulted from the delays, but they are less than calculated by Jackson. I place them at \$215,000. (See *Department of Transportation v. Anjo Construction Co.*, 666 A.2d 753 (Pa. Cmwlth. 1995).

I am also persuaded that the “measured mile” analysis used by Jackson is an appropriate method to calculate damages. While it may not be the only method, it is acceptable as a means to do so. I have analyzed Jackson’s testimony and calculations. While there may be some areas in which the perceived “impact” was not as great as Jackson asserted, I am nevertheless convinced of the applicability of this theory, but have simply reduced the areas in which I believe the impact was not as severe. Hence, my reduction to \$215,000 of the compression claim. See generally, *Clark Concrete Contractors v. General Service Administration*, GSBCA No. 14340, 99-1 BCA (CCH ¶ 30, 280) (1999).

Issues distinct from the acceleration claim are the claim for unpaid invoices for change orders relating to hand digging to find the duct bank (\$2,263.80); claims for being directed to provide dumpsters for the roofing contractor (\$8,064); claims for \$13,000 withheld for an alleged

violation of the **Pennsylvania Prevailing Wage Act** by a **James** sub-contractor, which were neither paid to the **Pennsylvania Department of Labor**, or the employees; claims for moving the fence in the amount of \$7,117.07; and delays relating to selection of a decorative limestone treatment of the building facade, as well as delays in selection of pre-finished wood doors.

With respect to **North Allegheny's** Counterclaim, it asserts that **James** refused to either complete unfinished work, or return to make repairs. As a result contracts were let to other contractors to complete this work. The successful bidder was K.J. Johnson, who came on the site to install the sedimentation basin to the specification of **North Allegheny**, and do punch list items, The evidence shows that significant re-configuration of the site was done by Foreman and/or Chambers, and the **North Allegheny** claim for this is \$94,000. **North Allegheny** also claims additional expenses and counsel fees and penalties against **James**.

After analysis, I am not inclined to rule for **North Allegheny**, given the endemic problems with this part of the work and the overlay of the duct bank, the required dimensions of the basin to be effective, and the

concern of the principal at Hosack for the steepness of the basin and the danger it would pose to elementary school children. I, therefore, **DENY** this claim.

North Allegheny also claims additional funds due for work done on the punch list, which **James** refused to do. This issue of the punch list became something of a “moving target” since it was constantly escalating after **North Allegheny** accepted possession of the project on September 2, 1999. At that time, **James** gave possession of the school building and requested a punch list of the items not yet completed. The punch list is typically presented to a contractor after it tenders the project, and asserts it is finished. Punch list items usually cover the final finish of the project, and do not involve major projects. The contract likewise provided that the creation of the punch list was a tripartite process involving the contractors, the owner, and its architect. Here, no such joint assessment of punch list items was done.

After acceptance of the project, the punch list presented to **James** valued the remaining work at \$24,325. Later, it escalated to \$36,000. This last number was arrived at by imposing unilateral increases in the

hourly rate to be charged for said work, and the quantity to be performed. Finally, when **James** objected to both the scope and volume of the punch list, **North Allegheny** gave notice to **James'** bonding company of its dispute, and issued a claim on **James'** bond. When asked for an itemization of that claim, and a cost estimate of it, **North Allegheny** never responded.

While **North Allegheny** acknowledges it gave no specific claim to the bonding company, it defends on the basis of the insolvency of that company, Frontier Insurance. I am not persuaded by this defense since the bonding claim was never pursued with the conservator that was appointed for that insolvent insurance company. Further, that insolvency occurred after the claim could have been made by **North Allegheny**. **James** suggests no such claim was made because **North Allegheny** knew it was inflated, and could not be supported. Additionally, a bonding company typically retains another contractor to complete the work found to be covered by the bond. The cryptic claim filed by **North Allegheny** with no estimate of remaining costs prevented consideration by Frontier, and this tactic supports **James'** defense.

Under the circumstances, I am not inclined to accept the punch list arguments advanced by **North Allegheny**, but will permit a deduction of \$34,000 – the second evaluation of the punch list item made reasonably close to the time **North Allegheny** accepted the project, from the retainage held by it.

That retainage, as claimed by **James** in its pay request was \$63,123.22. I find that such retainage is due **James**, less the value of the punch list of \$34,000 for a net due **James** on the retainage issue of \$29,876.85.

Claims for Interest and Counsel Fees

My review and analysis of this involved case lead me to conclude that in addition to the funds due to **James** for acceleration/compression, retention, and outstanding pay requests, counsel fees and expenses are due.

James' claim for these is based on the **Pa. Procurement Code 62 Pa. C.S.A. § 3901 et seq.**, and in particular **Section 3935**, which provides

for a 1% per month penalty, plus attorney's fees and expenses, if I should determine that the withholding of payments were arbitrary or vexatious.

I am inclined to grant relief under this **Section**, but the calculation thereof leads me to a different conclusion than that reached by **James**.

North Allegheny points out that all of the legal work done did not apply to these claims, and discounted some of the time not properly attributed to this case. Further, **James** changed counsel in mid-stream. Thus, some costs were extraneous to that which was ultimately tried before me, and the \$165,000 claimed by **James**, to the date of trial, cannot all be attributed to it. I am persuaded by this argument, and find only 2/3 of the claim by **James** should be attributed to **North Allegheny**.

After analysis, I also find that there was bad faith by **North Allegheny** as most vividly shown by the recognition of delay yet the refusal to do anything about it, other than to threaten the contractors with dismissal. I, also find bad faith in the refusal to pay for the hand digging of the duct bank, relocating the fence, and refusing to pay for the dumpsters. As to the

dumpsters, their obligation was clear on 2 fronts: 1) the plain language of the contract, and 2) the commitment made by their project manager to pay.¹ This finding is bolstered by the escalating punch list claim, and the studied refusal by **North Allegheny** to commit itself to a value by refusing to deal with the bonding company. All of this leads me to find bad faith, and I will award the expenses incurred to date of trial of \$43,000, plus 2/3 of the counsel fees to date of the trial, or \$110,000. By reason of this finding, I have included the claims for interest and penalty made by **James'** in the subsequent damage awards made herein. I also find that while there is no libel by **T & W**, its unnecessary comments to Scabbo about **James** are additional evidence of bad faith.

James also asserts bad faith by **North Allegheny** in not paying for extras on the Project, to-wit, wall pads for the multi-purpose room, (N.T. pp. 11-99); hollow metal doors for the boiler room, (N.T. pp. 10-99), and replacement of interior wood doors (also in October 1999). These items were agreed to by **North Allegheny**, but not paid. It appears the same was based on **North Allegheny's** belief that its claims against **James** would

¹ The resort to the language of the school code on this point is unavailing since the clear meaning of the contract support James and the other defenses are irrelevant.

exceed these 3 claims. Since I have rejected that counterclaim, **North Allegheny** must pay these extras as calculated by **James**.

While **North Allegheny** has joined **Foreman**, and **Chamber Vukich** as additional defendants, and asserted liability over, I do not find any basis for such a claim. The delay in the **E & S** plan was not due to any fault of **Foreman** or **Chambers**, but rather the changing information from **North Allegheny**. **Foreman** and **Chambers** found themselves in the untenable situation of designing a sedimentation pond that could not be too steep; that could control adequately the run off from the acreage to be served, and yet did not interfere with the underground utilities – utilities that initially were going to be removed. Under these circumstances, **Foreman** and **Chambers** have no liability to **North Allegheny**.

With respect to the relation between **North Allegheny** and **T & W**, there is no claim of liability over by **North Allegheny**, but it has not foregone such a claim for the future. Evidence was developed that a “Mary Carter agreement” exists between the two. (As to “Mary Carter agreements”, generally, see, *Hatfield v. Continental Imports, Inc.*, 610 A.2d 446 (Pa. 1992)). This is not before me, however.

RECAPITULATION

Based on the evidence presented and my analysis thereof, I find that **James** did suffer compression or acceleration of its work at the hands of **North Allegheny**; that **North Allegheny** failed to pay invoices when due; that **North Allegheny** acted in an arbitrary and capricious manner demonstrating bad faith and is liable to **James** as follows:²

- 1 - Acceleration/compression \$215,000**
- 2 - Unpaid invoices including retainage of \$64,123 less punch list of \$34,000\$104,647**
- 3 - Invoices for wall pads and doors \$5,412 + \$13,511 = \$18,934**
- 4 - Prevailing wages withheld from JAMES' \$28,969**
- 5 - Counsel Fees\$110,000**
- 6 - Expenses\$43,000**
- TOTAL \$520,550**

North Allegheny's Counterclaims are DISMISSED. I find no liability against **Foreman**, or **Chambers Vukich Associates**, on **North Allegheny's** Additional Defendant claims. Any claims between **North Allegheny** and **T & W** are not before me, and I make no ruling thereon.

² As indicated infra, I believe these items are all subject to the interest and penalty provision of this Procurement Act and I have accepted James' calculations, which include those additional amounts.

Any claims for additional counsel fees and expenses for additional work performed beyond the date of this Memorandum Order and Non-Jury Verdict shall be subject to a separate hearing as appropriate.

In addition to the claim made by **James** against **North Allegheny**, it also has filed an action for libel against **T & W**, and Jon Thomas. Specifically, Ralph Scabbo of Babcock Contractors, **James'** excavating sub-contractor in the project, testified that in 1999, while at another project of **North Allegheny**, Jon Thomas asked Scabbo why he was still working for **James**, and didn't he, Scabbo, know that **James** was in financial difficulties. (**Volume III, pp. 10-14 and 22-23**).

Scabbo went on to say that this comment, coming from the Project Manager on both the Hosack Project as well as another school Project (McKinley School), on which he was also the excavator, affected his confidence in **James**, and he did not submit bids to it for several years. He

testified presently that he has a favorable view of **James**, and is patiently waiting for **James** to pay him the \$30,000 still due from the Hosack Project.

Thomas denied the statement, and also offered evidence from an accountant, who had reviewed **James**' financial records for the critical period, and which accountant opined that **James** was indeed in financial trouble at the time. This was offered as a "truth" defense to the libel. After analysis, I am not inclined to render verdict in favor of **James** on this count. While I do not credit Thomas' denial of the statement or statements made to Dominic Scabbo, I find that **James** was, indeed, undergoing financial difficulties at the time, largely due to the problem on the Hosack Project. That circumstance does not, however, give rise to a meritorious libel action. Accordingly, that element of **James**' complaint is **DISMISSED**.

An appropriate Non-Jury Verdict is attached.

BY THE COURT:

Dated: 12-30-05

 J.

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY
COUNTY, PENNSYLVANIA**

**JAMES CORPORATION d/b/a JAMES
CONSTRUCTION, in its own name and
right, and for the use and benefit of its
subcontractors,**

Plaintiff,

vs.

**NORTH ALLEGHENY SCHOOL
DISTRICT and THOMAS &
WILLIAMSON, LLC,**

Defendants,

vs.

**D&L INC., FOREMAN ARCHITECTS
ENGINEERS, INC., CHAMBERS DESIGN
ASSOCIATES, P.C., f/k/a CHAMBERS
VUKICH ASSOCIATES, P.C.,**

Additional Defendants.

CIVIL DIVISION

No.: GD00-5674

**MEMORANDUM ORDER and
NON-JURY VERDICT**

**Filed by: The Honorable
Timothy Patrick O'Reilly
711 City-County Building
Pittsburgh, PA 15219**

**Copies served by
First Class Mail upon:**

**Counsel for Plaintiff:
David E. Sweitzer, Esquire
RILEY HEWITT & SWEITZER
650 Washington Road
Suite 300
Pittsburgh, PA 15228**

**Counsel for Defendant, NORTH
ALLEGHENY SCHOOL
DISTRICT:
David Raves, Esquire
MAIELLO BRUNGO & MAIELLO
3301 McCrady Road
Pittsburgh, PA 15235**

**Counsel for Defendant, THOMAS
WILLIAMSON, LLC:
Alan E. Johnson, Esquire
MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN
US Steel Tower, Suite 2900
600 Grant Street
Pittsburgh, PA 15219**

FILED

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**COURT OF COMMON PLEAS
ALLEGHENY COUNTY**

**PROCLAMATORY
ALLEGHENY COUNTY
05 JAN 04 AM 8:39**

FILED

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY
COUNTY, PENNSYLVANIA**

**JAMES CORPORATION, d/b/a
JAMES CONSTRUCTION, in its
own name and right, and for the
use and benefit of its subcontractors,**

CIVIL DIVISION

No. GD00-005674

Plaintiff,

vs.

**NORTH ALLEGHENY SCHOOL
DISTRICT and THOMAS &
WILLIAMSON, LLC,**

Defendants,

vs.

**D & L, INC., FOREMAN ARCHITECTS
ENGINEERS, INC., and CHAMBERS
VUKICH ASSOCIATES, P.C.,**

Additional Defendants.

NON-JURY VERDICT

AND NOW, to-wit, this 30th day of December, 2005,

consistent with my attached Memorandum Order, I find as follows:

1. In favor of the Plaintiff, **James Corporation, d/b/a James Construction**, and against the Defendant, **North Allegheny School District**, in the total amount of \$520,550 (See Recapitulation, pg 29 of my Memorandum Order).

2. In favor of the Plaintiff, **James Corporation, d/b/a James Construction**, and against the Defendant, **North Allegheny School District** on the Defendant **North Allegheny School District's** Counterclaims.

3. In favor of the Additional Defendants, **FOREMAN ARCHITECTS ENGINEERS, INC., and CHAMBERS VUKICH ASSOCIATES**, and against the Defendant, **North Allegheny School District** on the Defendant **North Allegheny School District's** additional defendants' claims.

4. In favor of the Defendant, **Thomas & Williamson, LLC** and against the Plaintiff, **James Corporation, d/b/a James Construction**, on the Plaintiff **James Corporation, d/b/a James Construction's** libel claim.

BY THE COURT:

A handwritten signature in black ink, reading "O'Reilly J." with a horizontal line underneath the name and a small "J." at the end.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

JAMES CORPORATION d/b/a JAMES CONSTRUCTION, in its own name and right, and for the use and benefit of its subcontractors,

Plaintiff,

vs.

NORTH ALLEGHENY SCHOOL DISTRICT and THOMAS & WILLIAMSON, LLC.,

Defendants,

vs.

D&L INC., FOREMAN ARCHITECTS ENGINEERS, INC., CHAMBERS DESIGN ASSOCIATES, P.C., f/k/a CHAMBERS VUKICH ASSOCIATES, P.C.,

Additional Defendants.

CIVIL DIVISION

No. GD 00-5674

PLAINTIFF'S PRAECIPE TO ENTER JUDGMENT PURSUANT TO PA R.C.P. 227.4(2)

2

Filed on Behalf of:
James Corporation d/b/a James Construction, in its own name and right, and for the use and benefit of its subcontractors, Plaintiff

Counsel of Record for this Party:

David E. Sweitzer, Esquire
Pa. I.D. #49588

MEYER, UNKOVIC & SCOTT LLP
Firm #199
1300 Oliver Building
Pittsburgh, PA 15222

(412) 456-2800

SEARCHED INDEXED
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AUG 1 2006

[Handwritten signature]

ims 7/23/06

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

JAMES CORPORATION d/b/a JAMES CONSTRUCTION, in its own name and right, and for the use and benefit of its subcontractors,

Plaintiff,

vs.

NORTH ALLEGHENY SCHOOL DISTRICT and THOMAS & WILLIAMSON, LLC.,

Defendants,

vs.

D&L INC., FOREMAN ARCHITECTS ENGINEERS, INC., CHAMBERS DESIGN ASSOCIATES, P.C., f/k/a CHAMBERS VUKICH ASSOCIATES, P.C.,

Additional Defendants.

CIVIL DIVISION

No. GD 00-5674

NOTICE OF ENTRY OF JUDGMENT
PURSUANT TO PA R.C.P. 227.4(2)

Filed on Behalf of:
James Corporation d/b/a James Construction, in its own name and right, and for the use and benefit of its subcontractors, Plaintiff

Counsel of Record for this Party:

David E. Sweitzer, Esquire
Pa. I.D. #49588

MEYER, UNKOVIC & SCOTT LLP
Firm #199
1300 Oliver Building
Pittsburgh, PA 15222

(412) 456-2800

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

JAMES CORPORATION d/b/a JAMES CONSTRUCTION, in its own name and right, and for the use and benefit of its subcontractors,

CIVIL DIVISION

No. GD 00-5674

Plaintiff,

vs.

NORTH ALLEGHENY SCHOOL DISTRICT
and THOMAS & WILLIAMSON, LLC.,

Defendants,

vs.

D&L INC., FOREMAN ARCHITECTS
ENGINEERS, INC., CHAMBERS
DESIGN ASSOCIATES, P.C., f/k/a
CHAMBERS VUKICH ASSOCIATES,
P.C.,

Additional Defendants.

NOTICE OF ENTRY OF JUDGMENT

PURSUANT TO PA R.C.P. 227.4(2)

TO: David Raves, Esquire
Maiello, Andrews & Price, LLP
One Churchill Park
3301 McCrady Road
Pittsburgh, PA 15235
(Counsel for Defendant North Allegheny School District)

You are hereby notified that a judgment was entered for the Plaintiff and against Defendant North Allegheny School District in the amount of \$524,087.75 in accordance with the Order

entered by The Honorable Timothy Patrick O'Reilly dated July 11, 2006 (denial of Defendant's Post Trial Motion). I certify that a copy of this Praecipe has been mailed to counsel of record.

MEYER, UNKOVIC & SCOTT LLP

DATE:

July 21, 2006

By:

David E. Sweitzer
David E. Sweitzer, Esquire

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

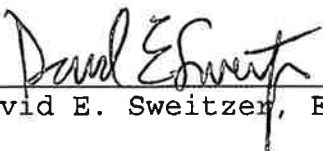
The undersigned hereby certifies that a true and correct copy of the within Notice of Entry of Judgment Pursuant to Pa. R.C.P. 227.4(2) was served upon all counsel of record by First-Class United States Mail, postage prepaid, this 21st day of July, 2006, at the following address:

David Raves, Esquire
Maiello, Andrews & Price, LLP
One Churchill Park
3301 McCrady Road
Pittsburgh, PA 15235
(Counsel for North Allegheny School District)

Alan Johnson, Esquire
Marshall, Dennehey, Warner, Coleman & Goggin
600 Grant Street
Suite 2900, USX Tower
Pittsburgh, PA 15219
(Counsel for Thomas & Williamson LLC)

Matthew M. Hoffman, Esquire
Tucker Arensberg
1500 One PPG Place
Pittsburgh, PA 15222
(Counsel for Foreman Architects Engineers, Inc.)

Scott Stephan, Esquire
Wayman, Irvin & McAuley
Suite 1624, Frick Building
Pittsburgh, PA 15219
(Counsel for Chambers Design Associates, P.C.)



David E. Sweitzer, Esquire

ATTORNEYS FOR PLAINTIFF

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

JAMES CORPORATION d/b/a JAMES CONSTRUCTION, in its own name and right, and for the use and benefit of its subcontractors,

CIVIL DIVISION

No. GD 00-5674

Plaintiff,

vs.

NORTH ALLEGHENY SCHOOL DISTRICT and THOMAS & WILLIAMSON, LLC.,

Defendants,

vs.

D&L INC., FOREMAN ARCHITECTS ENGINEERS, INC., CHAMBERS DESIGN ASSOCIATES, P.C., f/k/a CHAMBERS VUKICH ASSOCIATES, P.C.,

Additional Defendants.

PLAINTIFF'S PRAECIPE TO ENTER JUDGMENT

PURSUANT TO PA R.C.P. 227.4(2)

TO: THE PROTHONOTARY OF ALLEGHENY COUNTY, PENNSYLVANIA

Please enter judgment in favor of James Corporation and against North Allegheny School District in the amount of \$524,087.75 in accordance with the Memorandum and Order of Court of The Honorable Timothy Patrick O'Reilly (a copy of which is attached hereto and marked as Exhibit "A") dated July 11, 2006.

Said Order denied Defendant's Motion for Post Trial Relief and modified the verdict amount to \$524,087.75.

MEYER, UNKOVIC & SCOTT LLP

DATE: July 21, 2006

By: David E. Sweitzer
David E. Sweitzer, Esquire

ATTORNEYS FOR PLAINTIFF

IN THE COURT OF COMMON PLEAS OF ALLEGHENY
COUNTY, PENNSYLVANIA

**JAMES CORPORATION d/b/a JAMES
CONSTRUCTION, in its own name and
right, and for the use and benefit of its
subcontractors,**

Plaintiff,

vs.

**NORTH ALLEGHENY SCHOOL
DISTRICT and THOMAS &
WILLIAMSON, LLC,**

Defendants,

vs.

**D&L INC., FOREMAN ARCHITECTS
ENGINEERS, INC., CHAMBERS DESIGN
ASSOCIATES, P.C., f/k/a CHAMBERS
VUKICH ASSOCIATES, P.C.,**

Additional Defendants.

CIVIL DIVISION

No.: GD00-5674

**MEMORANDUM and
ORDER OF COURT**

**Filed by: The Honorable
Timothy Patrick O'Reilly
711 City-County Building
Pittsburgh, PA 15219**

**Copies served by
First Class Mail upon:**

**Counsel for Plaintiff:
David E. Sweitzer, Esquire
RILEY HEWITT & SWEITZER
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**Counsel for Defendant, NORTH
ALLEGHENY SCHOOL
DISTRICT:
David Raves, Esquire
MAIELLO BRUNGO & MAIELLO
3301 McCrady Road
Pittsburgh, PA 15235**

**Counsel for Defendant, THOMAS
& WILLIAMSON, LLC:
Alan E. Johnson, Esquire
MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN
US Steel Tower, Suite 2900
600 Grant Street
Pittsburgh, PA 15219**

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ALLEGHENY COUNTY

COURT OF COMMON PLEAS
ALLEGHENY COUNTY

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FILED

COPIES SERVED BY FIRST CLASS MAIL UPON:

**Counsel for Additional Defendant,
FOREMAN ARCHITECTS ENGINEERS, INC.:**

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**Counsel for Additional Defendant,
CHAMBERS DESIGN ASSOCIATES, P.C., f/k/a
CHAMBERS VUKICH ASSOCIATES, P.C.:**

Scott W. Stephan, Esquire
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IN THE COURT OF COMMON PLEAS OF ALLEGHENY
COUNTY, PENNSYLVANIA

JAMES CORPORATION, d/b/a
JAMES CONSTRUCTION, in its
own name and right, and for the
use and benefit of its subcontractors,

CIVIL DIVISION
No. GD00-005674

Plaintiff,

vs.

NORTH ALLEGHENY SCHOOL
DISTRICT and THOMAS &
WILLIAMSON, LLC,

Defendants,

vs.

D & L, INC., FOREMAN ARCHITECTS
ENGINEERS, INC., and CHAMBERS
VUKICH ASSOCIATES, P.C.,

Additional Defendants.

MEMORANDUM

O'REILLY, J.

I entered a Non-Jury Verdict in this matter in favor of James Corporation, d/b/a James Construction, ("James") and against the Defendant school district, North Allegheny School District ("North Allegheny"). I also dismissed other claims brought by James against Thomas & Williamson, LLC, ("T&W") as well as cross-claims by North

Allegheny against **D&L, Inc.**, ("**D&L**") **Foreman Architects Engineers, Inc.**, ("**Foreman**") and **Chambers Vukich Associates, P.C.**, ("**Chambers**"). **North Allegheny** filed a Motion for Post Trial Relief, and **James** responded thereto. After all other parties had filed either responses to that Post-Trial Motion or their own "cautionary" Motions, I heard Argument. Since I had ruled only against **North Allegheny**, and found no liability by any other **Defendants**, those **Defendants** filed "cautionary" Post Trial Motions so as to protect the record should I grant the **North Allegheny** Post Trial Motion.

North Allegheny raised 27 areas of exception, but the salient ones appear to be my crediting the testimony of **James'** witnesses over that of the School District, my accepting, in part, the damage calculation offered by **James'** expert, and my concluding that the evidence showed delay, and bad faith by **North Allegheny**.

As to my credibility resolution, **North Allegheny** focused on testimony of **James'** Representative, Michael Saulnier, which it said was hearsay, and which I should not have accepted. It further argues that the

Saulnier testimony is the only evidence about the delays, and problems on this project. The record belies both of these contentions.

The balance of the exceptions include a minute examination of individual issues in an effort to boot strap **North Allegheny** beyond the damning testimony of its representative, Rob Gaertner, who clearly said we cannot give **James** any more time to complete the project, and don't tell them we know they need more time because that will open **North Allegheny** to claims. This is as close to a "smoking gun" that I've seen. I believe my 33 page Memorandum and Non-Jury Verdict adequately addresses the issues raised, and further discussion is unnecessary.

One other issue was the **North Allegheny** contention that I had erroneously accepted the monetary calculation made by **James** and it submitted its own calculation on May 31, 2006. **James** responded on June 8, 2006, essentially contending that its original calculations, which I accepted, were accurate, and simply needed to be updated since the date of my original decision. It did acknowledge an adjustment was due on one pay application of \$2,540, but concluded the current damages are \$524,087.75, which include counsel fees to the date of argument. The damages are a

mixture of actual damages, plus interest as well as exemplary damages, and counsel fees under the Pa. Procurement Law, 62 Pa. C.S.A. § 3932(c).

Since the exceptions raised by North Allegheny demonstrate broad resistance to my Verdict, I do not believe it to be productive to evaluate contending mathematical claims until a Final determination has been made.

As to my verdict itself, it was produced only after long and thorough analysis of the facts and record and rendering of a 33 page Opinion, and I believe the exceptions filed to be without merit. Accordingly, the Motion for Post Trial Relief is **DENIED**, and my verdict is **AFFIRMED**.

Dated: 7-11-06

BY THE COURT:

O'Reilly, J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY
COUNTY, PENNSYLVANIA

JAMES CORPORATION d/b/a JAMES
CONSTRUCTION, in its own name and
right, and for the use and benefit of its
subcontractors,

CIVIL DIVISION

No.: GD00-5674

Plaintiff,

vs.

NORTH ALLEGHENY SCHOOL
DISTRICT and THOMAS &
WILLIAMSON, LLC,

Defendants,

vs.


D&L INC., FOREMAN ARCHITECTS
ENGINEERS, INC., CHAMBERS DESIGN
ASSOCIATES, P.C., f/k/a CHAMBERS
VUKICH ASSOCIATES, P.C.,

Additional Defendants.

ORDER OF COURT

AND NOW, to-wit, this 14th day of July, 2006, Defendants' Motion
for Post Trial Relief is hereby DENIED and the Non-Jury Verdict is
AFFIRMED.

BY THE COURT:

 J.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the within Plaintiff's Praecipe to Enter Judgment Pursuant to Pa. R.C.P. 227.4(2) was served upon all counsel of record by First-Class United States Mail, postage prepaid, this 21st day of July, 2006, at the following address:

David Raves, Esquire
Maiello, Andrews & Price, LLP
One Churchill Park
3301 McCrady Road
Pittsburgh, PA 15235
(Counsel for North Allegheny School District)

Alan Johnson, Esquire
Marshall, Dennehey, Warner, Coleman & Goggin
600 Grant Street
Suite 2900, USX Tower
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Matthew M. Hoffman, Esquire
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(Counsel for Foreman Architects Engineers, Inc.)

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Wayman, Irvin & McAuley
Suite 1624, Frick Building
Pittsburgh, PA 15219
(Counsel for Chambers Design Associates, P.C.)



David E. Sweitzer, Esquire

ATTORNEYS FOR PLAINTIFF