**Appeals Court of Massachusetts**

**C. MAX, INC.**
**v.**
**CRESTA CONSTRUCTION, INC., & United States Fidelity and Guaranty Company.**

**No. 07-P-392.**
**Aug. 12, 2008.**
**By the Court (DUFFLY, ARMSTRONG & BERRY, JJ.).**

**MEMORANDUM AND ORDER PURSUANT TO RULE 1:28**

This is a construction contract case involving construction of a police and ambulance building, including a receiving deck and platform, for the town of Harvard. Cresta Construction, Inc. (Cresta) was the general contractor and C. Max, Inc. (C. Max) was the steel fabrication subcontractor. The project got off to a rocky start because the foundation subcontractor was not timely and did its work so badly that much of the foundation work had to be redone. C. Max was delayed in starting work, first, because it could not come on site while the foundation work was being done (actually, misdone), and second, when it was finally given access to the site, it was ordered to fix the foundation subcontractor's mistakes. It was also told the project was behind and it would not be paid unless it finished its augmented work on the original schedule (i.e., put the project back on schedule). It was given little assistance from Cresta on decisions it had to make and it was not given any leeway from the architect on reasonable deviations from specifications. A Superior Court judge, after hearing the evidence, took the view that C. Max soldiered on the best it could in extremely difficult circumstances and was entitled to be paid for its work.

On the primary issue, the evidence admitted below is reasonably susceptible of at least two conflicting interpretations: (i) that C. Max performed shoddy work; or (ii) that the problems noted by Yankee Engineering and Testing, Inc., were the result of preexisting foundation and other errors not attributable to C. Max. The judge apparently adopted the latter interpretation, and we are not prepared, on this record, to find the judge's perception clearly erroneous. Moreover, contrary to the defendants' suggestion, the judge's findings as to C. Max's substantial performance, the additional work performed by Goldsmith, Prest, & Ringwall; Champion Steel, LLC; and others, and any claim of delay caused by C. Max are internally consistent and adequately supported. Accordingly, we find no reason to question the judge's decision to disallow the defendants' affirmative defenses as well as Cresta's counterclaim.

Also well supported is the judge's finding that Cresta did not timely pay C. Max on its, among other, March, May, June, and July progress applications (amounting to some $62,452, or roughly 73 percent of C. Max's total claim). Because these applications were submitted before Cresta had cause to complain of unfinished or defective work, we can perceive no adequate excuse for such withholding.FN1 Accordingly, as the judge held, such prior material breach excused C. Max's subsequent performance failures, if any. See Ward v. American Mut. Liab. Ins. Co., 15 Mass.App.Ct. 98, 100-101 (1983); Lease-It, Inc. v. Massachusetts Port Authy., 33 Mass.App.Ct. 391, 396-397 (1992).

FN1. Without deciding, in a proper case we assume that a general contractor may justifiably withhold progress payments when necessary to remedy a subcontractor's deficient

work. Such proposition conceivably could excuse Cresta's decision to withhold payment on C. Max's August application. The same rationale does not apply to excuse any earlier withholding.

On a related note, we need not address the judge's comments regarding G.L. c. 30, § 39F. Contrary to the defendants' suggestion, the judge neither awarded damages pursuant to § 39F nor held that a § 39F violation constitutes a breach of contract. Instead, the judge's dicta, primarily boilerplate observations, appear to have been intended merely to highlight that C. Max was entitled to prompt payment upon Cresta's receipt of payment by the awarding authority, a proposition that would seem not to be in serious question. Also, the judge's findings that C. Max was not responsible for any project delays were well supported.

We find no fault in the judge's award of $8,000 to C. Max for corrective foundation work. Without deciding, and assuming Cresta preserved the point, we doubt that a change order was required.FN2 Regardless, given the judge's well-supported findings that C. Max had been compelled to perform this additional work, and that its additional work was reasonable, the judge's alternative quantum meruit based award was appropriate. See PDM Mechanical Contractors, Inc. v. Suffolk Constr. Co., 35 Mass.App.Ct. 228, 231-233 (1993). Contrary to the defendants' implication, there is no indication that the judge awarded duplicative damages under contract and quantum meruit theories.

FN2. We note that nothing in C. Max's subcontract required C. Max, as opposed to Cresta, to obtain a written change order before undertaking new or additional work. Contrast Exh. 15 at 4, 4. Neither general contract paragraphs 4.3.1 (defining "claims"), 4.3 .5 (requiring written notice of a "claim" for additional cost), nor 7.2.1 (defining a "change order") would appear to require a written "change order" or notice of a "claim" as between C. Max and Cresta, being instead limited to matters concerning Harvard's-as opposed to Cresta's-duty to pay, a matter not at issue here. See Exh. 1, 4.4.1; Exh. 15 at 4, 1(a)-(b).

While we agree that the judge, on this record, could reasonably have found in C. Max's favor on its c. 93A claim, the evidence, as suggested, is not so overwhelming or without dispute that C. Max may be said to have carried its burden of persuasion as matter of law. See Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 476 (1991) (determination of c. 93A violation ordinarily reserved for fact-finder and must stand unless clearly erroneous). The judge did not err in dismissing C. Max's c. 93A claim.

Requests for postjudgment interest should be directed to the Superior Court. C. Max may apply to this court within fourteen days of the date of the rescript, under Fabre v. Walton, 441 Mass. 9, 10-11 (2004), for an award of its attorney's fees and costs reasonably incurred defending the judgment on appeal. See G.L. c. 149, § 29, sixth par. The defendants' opposition, if any, shall be submitted within ten days thereafter.FN4

FN4. The Superior Court docket sheet references judgments for costs and attorney's fees that we deem are orders incorporated in the judgment (entered January 10, 2006). As no party has raised or made any argument as to these costs or attorney's fees, these issues are waived on appeal. See Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

Judgment affirmed. Order denying motion for new trial affirmed.