IN THE RECORDS OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, STATE OF MARYLAND,
AMONG OTHER PROCEEDINGS
IS THE FOLLOWING, TO WIT:

SOUMAYA TOHAMY
Plaintiff

vs.

Case No. 451637-V

MHIC CONSTRUCTION INC, ET AL
Defendant

NOTICE OF JUDGMENT
(817)

I HEREBY CERTIFY that the following Judgment was entered in the above entitled case on March 3rd, 2020:

JUDGMENT ENTERED AND RECORDED IN JUDGMENT INDEX IN THE AMOUNT OF $20,985.00 TO BE PAID JOINTLY AND SEVERALLY BY MHIC CONSTRUCTION, INC. AND BRUCE WAGNER.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of this Court.

CONFIDENTIAL

Clerk of the Circuit Court for
Montgomery County, Maryland

SOUMAYA TOHAMY
8509 THORNDEN TERRACE
BETHESDA MD 20817

MHIC CONSTRUCTION INC
PO BOX 224
ASHTON MD 20861

BRUCE ALLEN WAGNER
T/A BRUCE WAGNER
18430 NEW HAMPSHIRE AVE
ASHTON MD 20861

GARY DIAMOND, ESQ
WALDMAN, DIAMOND & WILSON,
CHARTERED
2815 UNIVERSITY BLVD W
KENSINGTON MD 20895-1916

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

SOUMAYA TOHAMY	*	
	*	
Plaintiff,	*	
v.	*	**Case No. 451637-V**
	*	
MHIC CONSTRUCTION, INC., et al	*	
	*	
Defendants.	*	
	*	

ORDER

The parties appeared before the Court on December 16, 2019 to December 18, 2019 for a bench trial. Having found, pursuant to the foregoing Memorandum Opinion, that Defendant, Bruce Wagner, was at fault and contributed to Plaintiff's "actual loss," it is this **28th day of February, 2020**, by the Circuit Court for Montgomery County, Maryland,

ORDERED, that MHIC Construction, Inc. is found to be in default; and it is further

ORDERED, that Plaintiff is awarded judgment in the amount of $20,985.00 to be paid jointly and severally by MHIC Construction, Inc. and Bruce Wagner; and it is further

ORDERED, that both parties' request for attorneys' fees be, and hereby is, **DENIED**.

CONFIDENTIAL

GARY E. BAIR, Judge
Circuit Court for Montgomery County, Maryland

ENTERED

MAR 3 - 2020

Clerk of the Circuit Court
Montgomery County, Md.

120

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

SOUMAYA TOHAMY	*	
	*	
Plaintiff,	*	
v.	*	
	*	**Case No. 451637-V**
MHIC CONSTRUCTION, INC., et al	*	
	*	
Defendants.	*	
	*	
	*	
	*	
	*	

MEMORANDUM OPINION

I. INTRODUCTION

On July 25, 2018, Plaintiff, through counsel, filed a Complaint and a Demand for a Jury Trial (D.E. #1) alleging breach of contract and violations under the Maryland Code, Business Regulation Article, Title 8 (Home Improvement). On November 19, 2018, Defendants, through counsel, filed an Answer to Complaint (D.E. #10) and a Counterclaim (D.E. #11). In the Counterclaim Defendants raised breach of contract, promissory estoppel, and unjust enrichment claims. Plaintiff, through counsel, filed an Answer to Counterclaim on November 29, 2018 (D.E. #14). The parties appeared before the Court for a bench trial from December 16, 2019 through December 18, 2019 on these claims.[1] Gary Diamond, Esquire appeared for Plaintiff, Soumaya Tohamy, and Defendant, Bruce Wagner, appeared *pro se*.

[1] On October 10, 2019, the parties appeared before Judge Greenberg for a pre-trial hearing. At this hearing, Plaintiff indicated that the case would proceed as a bench trial, rather than as a jury trial. Defendant, who appeared at the pre-trial hearing without counsel, did not object to this characterization. At the instant hearing, when the Court ensured that the case would be proceeding as a bench trial, Defendant did not object. Therefore,

As a preliminary matter, Plaintiff moved for a default judgment against MHIC Construction, Inc.[2] because the corporation was unrepresented. Under Maryland Rule 2–131(a), "a person other than an individual may enter an appearance only by an attorney" for a civil case in the circuit court. *See Turkey Point Property Owners' Ass'n, Inc. v. Anderson*, 106 Md. App. 710, 713–14 (1995). For the purposes of this rule, a corporation is a person. *See* Md. Rule 1–202(t). Maryland Rule 2–131 does not set forth a sanction for failure of a corporation to appear with counsel. Defendant, Bruce Wagner, conceded pre-trial that MHIC Construction, Inc. would not be able to defend itself without an attorney. Therefore, because MHIC Construction, Inc. is a corporation unrepresented for a civil case in the circuit court, MHIC Construction, Inc. was barred from proceeding on the counterclaim.[3] Plaintiff acknowledged that any order of default against MHIC Construction, Inc. would still require Plaintiff, ex parte, to prove damages.

Before any testimony was taken, Plaintiff also moved to dismiss the counterclaim as to Defendant, Bruce Wagner. In the counterclaim, Defendant asserted that he is not a party in real interest to the contract, but also requested damages for breach of contract under the contract. Plaintiff argued that Defendant either admitted to being a party under the contract by seeking damages under the contract, in which case Plaintiff would concede that Defendant could proceed on the counterclaim or that Defendant would be barred from proceeding on the counterclaim. When the Court inquired as to whether Defendant understood what Plaintiff's counsel was saying, Defendant responded in the affirmative. Defendant further

this Court finds that Defendant consented to Plaintiff's withdrawal of her jury demand as required by Maryland Rule 2–325(f).

[2] MHIC Construction, Inc. should not be confused with the Maryland Home Improvement Commission (MHIC), which licenses and regulates home improvement contractors.

[3] For the remainder of this Memorandum Opinion, "Defendant" shall refer exclusively to Bruce Wagner as an individual.

indicated that he wished to proceed on the counterclaim, thereby admitting that he was a real party in interest to the contract. Plaintiff's oral motion to dismiss Defendant's counterclaim was then moot.

Following these preliminary arguments, the Court confirmed that the issues to be tried were Plaintiff's Complaint and the Counterclaim as to Defendant, Bruce Wagner. The Court then received evidence, heard testimony, and considered the arguments of the parties. The matter was taken under advisement. The parties were given leave to file supplemental written arguments. Plaintiff filed a Post-Trial Memorandum on January 3, 2020 (D.E. #40). For the reasons set forth below, the Court finds Defendant, MHIC Construction, Inc. to be in default, and, further, awards Plaintiff damages in the amount of $20,985.00, to be paid jointly and severally by Defendants, MHIC Construction, Inc. and Bruce Wagner.

II. STATEMENT OF FACTS

For the most part, the facts underlying this matter are not in dispute. On July 1, 2017, Plaintiff entered into a Residential Improvement Agreement ("the Agreement") with MHIC Construction, Inc. to renovate Plaintiff's house. The Agreement identified MHIC Construction, Inc. as the contractor and Bruce Wagner as the president of the corporation. The Maryland Home Improvement license number used in the Agreement, license number 90612, is that of Bruce Wagner. Defendant Bruce Wagner is a licensed contractor under the Business Regulation Article. Md. Code, Bus. Reg. Art., § 8–101(j). No license is or has been issued to MHIC Construction, Inc. within the timeline of the events at issue here.

Plaintiff resides at 8509 Thorden Terrace, Bethesda, Maryland 20817. This property is the subject of the Agreement. The Agreement provided that in exchange for $521,117.00, Defendant would undertake to renovate Plaintiff's home. The Agreement set forth the scope

of the project, which included constructing a second story addition, moving the existing kitchen to a new location and installing a new kitchen, installing a new front porch and a new back deck and patio, and replacing windows and doors. Pl.'s Ex. 1. The Agreement further provided that the construction was to be completed in accordance with the architectural drawings. Pl.'s Ex. 3. Article 2 of the Agreement provided for monetary allocations for tiling, plumbing, lighting fixtures, hardware, permits, and other similar materials. The Agreement noted that a change in the cost of these listed materials required a change order. Pl.'s Ex. 1. Article 6 of the Agreement covered change orders. Pl.'s Ex. 1. Article 6.1 stated in its entirety, "[f]or any and all change in the work, the Contractor shall initiate a 'Change Order.' The work change order shall be signed by the Owner before the work will commence." The Agreement provided that substantial completion of the work was to be no later than January 1, 2018, with a penalty provision of $150.00 per day that the work was not completed.

As things would have it, Defendant proposed numerous change orders pursuant to the Agreement, which ultimately increased the original price of the contract and extended the original deadline of January 1, 2018. Plaintiff signed many of the proposed change orders, indicating her approval; however, she withheld her signature from several of them. Defendant provided the first change order to Plaintiff on September 6, 2017, which Plaintiff signed on September 29, 2017. The last change order signed by Plaintiff, number 41, was dated February 20, 2018 and provided for a new contract amount of $562,403.00, an increase of $10,163.00 from the preceding change order. There were 41 signed change orders in total, although Defendant ultimately initiated a total of 57 change orders.

On March 9, 2018, Defendant halted work on Plaintiff's home and indicated that work would resume on March 19, 2018 to allow the crew to complete a small project at another

jobsite. Plaintiff alleged that on March 19, 2018, instead of returning to work on the project, Defendant ceased work and took keys, paint, light fixtures, hardware, and documents from the jobsite. Defendant, through previously retained counsel, had sent Plaintiff a cease work order on March 19, 2018. The letter indicated that Plaintiff owed an outstanding balance of $78,586.00 for work that was already completed and an additional $13,726.00 for work that would be accomplished, for a total of $92,312.00, plus a 5 percent late fee for unpaid invoices.[4]

Plaintiff alleged that Defendant returned to Plaintiff's home on March 27, 2018 and took from the jobsite a storage pod, which housed supplies purchased by Plaintiff. Defendant asserted that work on the project only stopped because Plaintiff ordered Defendant not to return to the jobsite and that Plaintiff failed to make proper payments, thus breaching the contract. Defendant testified that in the process of moving items from the project off the jobsite, he did take several items paid for by Plaintiff because Defendant felt he may be able to complete the job eventually.

The parties agree that over the course of their relationship, Plaintiff paid Defendant $543,706.00 for work done on Plaintiff's home. As of change order number 41, the cost of the project totaled $562,403.00, not inclusive of supplies which Plaintiff purchased and future supplies Plaintiff would purchase. Defendant argued that Plaintiff would make representations that she would pay certain sums but did not follow through by paying for the work. Plaintiff, on the other hand, testified that the only reason she agreed, in some instances, to pay more money was to keep the project moving along. For example, Plaintiff paid an

[4] On cross examination, Defendant admitted that the amount stated in the cease work letter from counsel may not have been entirely accurate as there was a rush to send the letter to Plaintiff. Defendant testified that the amount represented in the cease work order was to the best of his knowledge.

additional $10,000.00 toward plumbing in accordance with change order number 41 which she expressed that she paid under duress because Defendant indicated that he had already spent the money required by the change order before Plaintiff had signed the change order assenting to the work.

On March 15, 2018, Plaintiff offered to pay one final change order and have Defendant finish the job. Plaintiff testified that it was her understanding that she would pay Defendant $20,000.00 to have everything completed. *See* Def.'s Ex. 3. Plaintiff asked Defendant to produce one final change order, number 42, and mark it as "final" for Plaintiff's signature. Defendant did not do this because he alleged that this was not his understanding and that he did not accept this offer. Rather, Defendant wanted all of the outstanding change orders signed and all payments completed. On March 8, 2018, Defendant sent Plaintiff a text message stating, "[S]ign the paper, cut the check, and le[t] me know I can pick them up tomorrow. Ten is not enough, I need $20k. We will be back Monday [March 19, 2018]. Guys are finishing up a small job they started this week. Let me know." Pl.'s Ex. 22. Defendant testified that he went to Plaintiff's home on March 19, 2018 expecting to receive a $20,000.00 check from Plaintiff as a partial payment for the change orders not yet signed by Plaintiff. This did not occur, and Defendant stopped work on the project.

Following the cessation of work by Defendant, Plaintiff engaged DLS Contractors, Inc. to complete the project. Mr. Michael Apergis testified at the trial on behalf of DLS Contractors, Inc. regarding the unfinished work. DLS Contractors, Inc. began work on the project in June of 2018. Plaintiff signed two contracts with DLS Contractors, Inc., the original contract and an additional contract for "extra work." Pl.'s Ex. 5, 6. In October of 2018, Plaintiff's home passed inspection and the work was completed by DLS Contractors, Inc.

According to the contract between DLS Contractors, Inc. and Plaintiff, the remaining work to be completed at Plaintiff's home totaled $19,660.00[5] plus an additional cost of approximately $1,000.00 for paint.[6] This work included painting, installing appliances, repairing drywall, insulation, replacing hardwood flooring, and other miscellaneous repairs and installations.

Mr. Apergis testified that he would need more than one week in order to complete the project. Mr. Apergis estimated that he would need three to four weeks, with three crew members working in order to complete the project. Mr. Apergis explained that change orders are used for additional work above and beyond the additional contract and that work based on change orders should not be done until the change order is signed by both parties.

Plaintiff averred that after Defendant ceased work on the project, she incurred numerous expenses to complete the project and so that it would pass inspection. These expenses included purchasing items for the project, paying DLS Contractors, Inc., hiring an electrician, cleaning up the jobsite, etc. Plaintiff expended $65,977.40 on these items and services in order for the home to pass inspection. Plaintiff argued that Defendant ultimately owed her $91,997.75[7] with a penalty of $100,350.00[8] as provided for in the contract, for a total of $192,347.75.[9]

[5] The total on Plaintiff's Exhibit 7 was $21,160.00, but Mr. Apergis noted on redirect examination that section G.3 should be removed from the cost estimate because that work was already completed.

[6] Mr. Apergis indicated that the estimate of $8,800.00 for painting work as listed on the cost estimate as Plaintiff's Exhibit 7 is exclusive of the cost of the paint, which Plaintiff would be responsible for providing.

[7] At trial, Plaintiff argued Defendant owed her $100,301.94, which represented the expenses as enumerated above plus legal fees, expert witness fees, and miscellaneous refunds Defendant allegedly owed Plaintiff. However, the testimony at trial came out slightly different as Plaintiff conceded in the Post-trial Memorandum. Plaintiff averred that instead of $100,301.94, Defendant owed Plaintiff $91,997.75.

[8] Plaintiff argued that the $150.00 penalty as contemplated by the Agreement commenced on February 15, 2018, which means that from that date until the date of trial on December 16, 2019, Defendant would owe $100,350.00 in fees (669 days x $150.00 per day = $100,350.00).

[9] Plaintiff's argument with regard to damages is as follows: $65,977.40 (Plaintiff's expenses) + $9,227.00 (legal expenses) + $35,490.35 (miscellaneous refunds owed to Plaintiff) = $110,694.75 - $18,697.00 (amount

Ms. Stephanie Sola-Solé was the architect for the project. She was hired by Plaintiff to design the renovations for Plaintiff's home. During the impasse between Plaintiff and Defendant in March of 2018, Plaintiff requested that Ms. Sola-Solé observe the progress of the project. On March 23, 2018, Ms. Sola-Solé toured the jobsite and created a "punch list" noting the work that had not been completed as of her inspection. Ms. Sola-Solé testified that the project was not close to final approval and that even if Defendant had continued to work on the project, it would not have completed within one or two weeks. She further expounded on this testimony on re-cross examination noting that there was a significant amount of work which needed to be done on the home in order to pass a final inspection.

III. RELEVANT LAW

A. Breach of Contract

In an action for breach of contract, the burden is on the plaintiff to prove "that the defendant owed the plaintiff a contractual obligation and that the defendant breached that obligation." *Taylor v. NationsBank, N.A.*, 365 Md. 166, 175 (2001); *Kurvant v. Dickerman*, 18 Md. App. 1, 3 (1973) (stating that the burden of proof in a breach of contract case is on the plaintiff and the burden does not shift). A breach of contract action is a civil case; thus the standard of proof is a preponderance of the evidence. *Mathis v. Hargrove*, 166 Md. App. 286, 311 n.5 (2005).

Generally, a breach of contract is "a failure, without legal excuse, to perform any promise that forms the whole or part of a contract." *Weaver v. ZeniMax Media, Inc.*, 175 Md. App. 16, 51 (2007) (quoting 23 *Williston on Contracts* § 63:1 (4th ed. 2019)). A promise is "a manifestation of intention to act or refrain from acting in a specified way, so made as to

remaining for Plaintiff to pay under change order number 41) = $91,997.75 (net owed by Defendant) + $100,350.00 (penalty for 669 days) = $192,347.75.

of Contracts: Promise; Promisor; Promisee; Beneficiary § 2 (Am. Law Inst. 1981); *see also* *Goldstein v. Miles*, 159 Md. App. 403, 430–31 (2004). A breach of contract can only exist where the contract contemplated that specific act or performance. Where a specified act is not contained in the contract, or such performance is beyond the scope of the contract, there is no breach. *Parker v. Columbia Bank*, 91 Md. App. 346, 365–67 (1992).

A breach is material where "the act failed to be performed [goes] to the root of the contract or. . . render[s] the performance of the rest of the contract a thing different in substance from that which was contracted for." *Maslow v. Vanguri*, 168 Md. App. 298, 323 (2006) (quoting *Traylor v. Grafton*, 273 Md. 649, 687 (1975)). Upon a material breach by one party, the other party may waive the material breach and seek only damages for a partial breach, withhold performance and seek full damages under the contract, or rescind the contract and seek restitution. Under *Traylor*, where a contract has been substantially performed, rescission of the contract is unavailable, and the non-breaching party is limited to the recovery of damages. 273 Md. at 687.

It is "uniformly acknowledged" that when a party continues to perform in spite of "a known breach by the other party and accepts further performance from the party who has committed the breach," he "waives the breach. . . ." *Pumphrey v. Pelton*, 250 Md. 662, 667 (1968) (quoting *John B. Robeson Assocs. v. Gardens of Faith, Inc.*, 226 Md. 215, 222–24 (1961). Under well-established Maryland law, "one may waive the breach of the contract and later be bound by his election." *Key v. Dent*, 6 Md. 142, 143 (1854). When one party acquiesces to a breach of the other party and then himself breaches, he is still liable for his own breach. *See Pumphrey*, 250 Md. at 667; *see also Restatement (First) of Contracts*: Re-

Creation of Duty by Performance or Acceptance of Performance § 324 (Am. Law Inst. 1932)).

A non-breaching party may recover damages for a breach of contract if the damages were proximately caused by the breach, the damages were reasonably foreseeable, and the non-breaching party has proven the damages with reasonable certainty. *Hoang v. Hewitt Ave. Assocs., LLC*, 177 Md. App. 562, 594 (2007). When the non-breaching party has established a breach of the contract, that party is entitled to recover damages "such as may fairly and reasonably be considered as arising naturally. . .from such a breach of contract. . . ." *Id.* (quoting *Hadley v. Baxendale*, 9 Exch. 341, 354 (1854)). Additionally, the plaintiff may also recover damages "such as may fairly and reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." *Id.* at 594–95 (quoting *Hadley*, 9 Exch. at 354)). Damages cannot be speculative, remote, or uncertain. *McAlister v. Carl*, 233 Md. 446, 455–56 (1964).

Expectation damages are generally recoverable in a breach of contract action. *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 202 Md. App. 307, 474 (2011). Such damages are measured at the time of the breach. *Id.* Expectation damages "include losses sustained, *i.e.*, 'out of pocket damages,' and gains lost, *i.e.*, 'benefit of the bargain' damages." *Hall v. Lovell Regency Home Ltd. P'ship*, 121 Md. App. 1, 13 (1998) (quoting *Beard v. S/E Joint Venture*, 321 Md. 126, 133 (1990). Worded another way, the purpose of expectation damages is to place the non-breaching party in the same position that he or she would have been had the contract been fully performed.

The Court of Appeals has further articulated this concept by explaining that "a party injured by a breach of contract has a right to damages based on his expectation interest as

measured by "(a) the loss in value to him of the other party's performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach, less (c) any cost or other loss that he has avoided by not having to perform.'" *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 407 (quoting *David Sloane, Inc. v. Stanley G. House & Assocs., Inc.*, 311 Md. 36, 42 (1987) (citing *Restatement (Second) of Contracts*: Measure of Damages in General § 347 (Am. Law Inst. 1981)).

A contract may contain a liquidated damages clause, which is "a reasonable measure of compensation in the event of a breach where, at the time the provision is agreed to the damages are indeterminable or will be otherwise difficult to provide." *Willard Packaging Co. v. Javier*, 169 Md. App. 109, 122 (2006). For a liquidated damages clause to be valid and enforceable, it must comply with three "essential elements." *Bd. of Educ. of Talbot Cty. v. Heister*, 392 Md. 140, 156 (2006). First, the clause must provide for a certain sum "in clear and unambiguous term. . . ." *Mass. Indem. & Life Ins. Co. v. Dresser*, 269 Md. 364, 368 (1973) (quoting *Siler v. Marshall*, 251 Md. 342, 346 (1968)). Second, any damages may be reasonable in terms of the anticipated damages from a breach. *Id.* at 369. Third, liquidated damages are binding and may not be altered to correspond to the actual damages stemming from a breach. *Id.* In determining whether a liquidated damages clause is an unenforceable penalty, courts look to the intent of the parties, examining the subject matter, language of the contract, and the circumstances of execution. *See Barrie Sch. v. Patch*, 401 Md. 497, 508 (2007) (quoting *Balt. Bridge Co. v. United Rys. & Elec. Co. of Balt.*, 125 Md. App. 208, 214–15 (1915)). Where damages are easily ascertainable at the time of contracting, a liquidated damages clause will be deemed an unenforceable penalty. *United Cable v. Burch*, 354 Md. 658, 662–63 (1999).

B. Promissory Estoppel

For a party to prevail on a claim of promissory estoppel, four elements must be satisfied: "(1) a clear and definite promise; (2) where the promisor has a reasonable expectation that the offer will induce action or forbearance on the part of the promisee; (3) which does induce actual and reasonable action or forbearance by the promisee; and (4) causes a detriment which can only be avoided by the enforcement of the promise." *Oliveira v. Sugarman*, 226 Md. App. 524 553–54 (2016); *see Pavel Enters., Inc. v. A.S. Johnson Co., Inc.*, 342 Md. 143, 166 (1996) (adopting the promissory estoppel test as set forth in the *Restatement (Second) of Contracts*: Promise Reasonably Inducing Action or Forbearance § 90(1) (Am. Law Inst. 1979)).

C. Unjust Enrichment

Maryland courts have stated that in order to prevail on a claim of unjust enrichment, the proponent must prove three elements, "[a] benefit conferred upon" one party by the other, "[a]n appreciation or knowledge by the" party receiving the benefit, and "[t]he acceptance for retention [by the receiving party] of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value." *Everhart v. Miles*, 47 Md. App. 131, 136 (1980) (quoting 26 *Williston on Contracts* § 68:5 (4th ed. 2019)). When one party has been unjustly enriched "at the expense of another," that party "is required to make restitution to the other." *Id.* (quoting *Restatement (First) of Restitution*: Unjust Enrichment § 1 (Am. Law Inst. 1937)).

IV. ANALYSIS OF CLAIMS

As a threshold matter, this Court will address Plaintiff's claims under the Home Improvement statute in the Business Regulation Article of the Maryland Code. The Home

Improvement Commission. Md. Code, Bus. Reg. Art., § 8–208. However, in some instances, such as when an owner seeks damages for "actual loss" to be paid from the Home Improvement Guaranty Fund, an owner can bring the case in a court of competent jurisdiction. *Brzowski v. Md. Home Improvement Comm'n*, 114 Md. App. 615, 631–32 (1997).

In her Complaint, Plaintiff alleged numerous violations under the Home Improvement statute. First, Plaintiff argued that the entire Residential Improvement Agreement is invalid for failure to comply with the licensing provisions of the statute. *See* Md. Code, Bus. Reg. Art., § 8–301. The Agreement identified Defendant, MHIC Construction, Inc. as the contractor on the project, when, in fact, Defendant Bruce Wagner's license number is listed on the Agreement and MHIC Construction, Inc. is not a licensed contractor in the State of Maryland. Second, Plaintiff argued that Defendant "abandon[ed] or fail[ed] to perform, without justification. . ." the project, and "deviate[d] materially from [the] plans or specifications without consent of the [Plaintiff]. . . ." Md. Code, Bus. Reg. Art., § 8–605. Third, Plaintiff alleged that Defendant misrepresented to Plaintiff that certain subcontractors were paid and then sought additional money from Plaintiff in order to mislead Plaintiff. As a result of these violations, Plaintiff averred that she suffered "actual loss" as defined by the Home Improvement statute as, "the cost of restoration, repair, replacement, or completion that arise[s] from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code, Bus. Reg. Art., § 8–401.

Subtitle 4 of the Home Improvement statute, which provides for a Home Improvement Guaranty Fund, contains a "scope of subtitle" provision which explicitly

"availability of other remedies to a claimant" meaning that a claimant is not required "to exhaust administrative remedies before the Commission before bringing an action in court." Md. Code, Bus. Reg. Art., § 8–402. Damages arising from "actual loss" as contemplated by the Home Improvement statute can be paid from the Home Improvement Guaranty Fund, which "was created to provide an additional remedy for homeowners who suffer 'actual loss' because of unsatisfactory work performed by a home improvement contractor." *Fosler v. Panoramic Design, Ltd.*, 376 Md. 118, 131 (2003); Md. Code, Bus. Reg. Art., §§ 8–405(a), 8–409.

The first issue raised by Plaintiff which arises under the licensing provisions of the statute is not resolved through a calculation of "actual loss" and therefore the "primary jurisdiction" of this claim is the Maryland Home Improvement Commission. *See Fosler*, 376 Md. at 129–32. The next two issues, Defendant's abandonment of the project and alleged misrepresentations to Plaintiff, do fall under "act[s] or omission[s] by a licensed contractor" which can be compensated through a determination of "actual loss." Therefore, this Court can properly decide Defendant's fault in not completing the project and the calculation of "actual loss" under the statute.

At trial and in her post-trial memorandum, Plaintiff contended that the Court should apply the definition of "actual loss" as set forth in the Home Improvement statute, in conjunction with the law of foreseeable damages, to calculate Plaintiff's damages. Presumably, Plaintiff suggested this route because in order to recover from the Home Improvement Guaranty Fund, the award from a court of competent jurisdiction "must contain

Md. App. at 631–32. This Court will analyze Plaintiff's damages through the lens of "actual loss;" however, it is notable that the definition of "actual loss" is remarkably similar to the well-established law of expectation damages, which seeks to bestow the benefit of the bargain.

A. Plaintiff and Defendant breached the Agreement, but Defendant acquiesced to Plaintiff's breach and Defendant's breach was material.

Plaintiff and Defendant both testified at the trial. This Court finds both Plaintiff's and Defendant's testimony, on the whole, to be credible. Defendant has extensive experience in contracting work and construction, having worked in the field for over thirty years. Both parties explained that there were numerous misunderstandings throughout the course of their relationship and both parties admitted to not fully complying with the Agreement executed on July 1, 2017. Indeed, as more fully discussed below, this Court finds that both parties breached the contract.

This case is not cut and dry in terms of the moment a breach of the Agreement occurred. For example, Plaintiff breached the contract by failing to comply with the payment schedule as set forth in the Agreement. However, Defendant acquiesced to Plaintiff's breach by continuing to complete work and by submitting further change orders. On the other hand, Defendant materially breached the contract by failing to complete the project.

1. Plaintiff breached the Agreement by failing to timely tender payment, but Defendant acquiesced to this breach.

It is undisputed that Plaintiff provided Defendant with multiple credit cards to allow Defendant to purchase items for the renovation. The Agreement stipulates that "[a]ll other

completion of the change order." Pl.'s Ex. 1, Art. 6. The premise behind the change orders was that Defendant would tender a change order to Plaintiff, who would sign the change order, and then Defendant would complete the work. Both parties testified that this often was not how the change order process worked. Plaintiff testified that while she signed 41 change orders in total, she signed several of them after Defendant represented to her that he had already spent the money requested in the change order. Even so, Plaintiff did retroactively assent to several change orders despite not being required to do so by the Agreement. Because Plaintiff signed the change orders, she was then required to submit payments to Defendant in accordance with the Agreement.

Defendant testified that Plaintiff made statements and promises to Defendant regarding payments for the work completed, but that Plaintiff would fail to comply with the payment schedule as set forth in the Agreement and in her oral representations. While Plaintiff did pay a majority of the contract price, as modified by 41 change orders, Plaintiff failed to comply with the payment schedule as stipulated in the Agreement. Thus, Plaintiff breached the Agreement. Nonetheless, Defendant allowed this pattern to develop and persist, and as such, acquiesced to this breach. *See Pumphrey*, 250 Md. at 667. Even though Plaintiff's failure to pay the required amounts was ongoing, Defendant consistently acquiesced to this practice by continuing the renovation and initiating further change orders.

On March 19, 2018, Defendant sent an email communication to Plaintiff indicating that his attorney would be sending Plaintiff a cease work order. Pl.'s Ex. 2.[10] In a letter dated the same day, Defendant's prior attorney, Mr. William Francis Xavier Becker, Esq. indicated that Plaintiff owed Defendant a sum of $78,586.00 for services rendered. The cease work order further explained that "[u]ntil the outstanding amount due is satisfied, MHIC Construction, Inc., shall cease operations at the site." Pl.'s Ex. 23. On cross examination, Defendant testified that his impression of the letter was not that Plaintiff must pay the full amount for Defendant to resume work, but simply engage in negotiations with Defendant and make a good faith payment toward her arrearage. However, the cease work order speaks for itself and Defendant's subjective interpretation of the letter is not controlling. The legal effect of the cease work order was that it was a material breach by Defendant. Even though Plaintiff followed up on the cease work order by disallowing Defendant to return to the jobsite, this was merely superfluous given the language of the cease work order.

Plaintiff and Defendant had many miscommunications concerning their obligations under the contract. It is evident that neither party strictly complied with the terms of the Agreement regarding the change orders. Defendant started work based on change orders before Plaintiff executed the same. On several occasions, Plaintiff retroactively signed the change orders. Defendant testified that he and Plaintiff would communicate extensively and regularly during the course of the project. Defendant further explained that he presented the issues contained in the change orders to Plaintiff, received her consent, commenced work,

[10] The email communication indicated that the cease work order was also attached to the email Defendant sent to Plaintiff. Plaintiff confirmed in her testimony that the cease work order was attached to the email she received.

provides that any and all change orders must be signed by Plaintiff before Defendant commenced work on change orders. Plaintiff acquiesced to this process by continuing to sign change orders presented to her after work had been completed or materials ordered.

Despite the miscommunications and Plaintiff's failure to timely tender payment, to which Defendant acquiesced, it was ultimately Defendant who materially breached the contract. *See Maslow*, 168 Md. App. at 323 (discussing materials breaches and the remedies provided by law). Defendant was not entitled to cease work on the project because of Plaintiff's failure to pay for work because Defendant had acquiesced to Plaintiff's practice of tendering late payment and portions of required payments. As a result of Defendant's material breach, i.e., failure to complete the project, Plaintiff is entitled to damages which can be proven by a preponderance of the evidence. *See Hoang*, 177 Md. App. at 594.

B. Plaintiff is awarded damages in the amount of $20,985.00.

As a preliminary issue, the penalty provision in the Agreement providing that Defendant must pay Plaintiff $150.00 per day of delayed completion was waived and also unenforceable. Plaintiff acknowledged in the Agreement that change orders may affect the date of completion. Plaintiff acquiesced to the delay of the project as evidenced by her actions in signing change orders which would ultimately push back the date of completion. Additionally, Plaintiff ordered that Defendant not return to her property to complete the project. Therefore, Plaintiff waived her right to seek an additional $150.00 per day for late completion. Further, this Court also finds that such a provision, by the terms of the contract itself, was a penalty rather than an enforceable liquidated damages clause. Therefore, as such,

Defendant alleged that Plaintiff agreed to a series of change orders but did not sign several of these change orders. Defendant argued that he detrimentally relied on Plaintiff's representation regarding the unsigned change orders, so Defendant completed the work. Plaintiff disagreed arguing that the only valid change orders were only those bearing her signature. The Agreement itself provides that the change orders must be signed by both parties. The only valid change orders were those signed by both parties as specified in the Agreement. Any work Defendant undertook to complete outside of the 41 signed change orders was done without the consent of Plaintiff per the Agreement. Further, Mr. Apergis, Plaintiff's expert witness, testified that it was not common practice to complete the work set forth in a change order without both parties' agreement represented by a signature. Therefore, Plaintiff is not obligated to pay Defendant for work completed in unsigned change orders.

In his counter-claim, Defendant argues that he is entitled to $84,173.49 in damages, which represents storage of materials acquired for the project and services rendered based on Plaintiff's representations that she would sign additional change orders. Defendant did not provide the Court with sufficient evidence to sustain this amount. In any event, Defendant is not entitled to recover damages in this case because while he did expend resources to attempt to complete the project, he did not, in fact, complete the project as specified in the Agreement. Neither Plaintiff nor Defendant sustained their burdens in proving the full sum of their respective requests for damages. Plaintiff failed to provide adequate proof as to her damages with regard to the amount of money it would take for her complete the project. While Defendant proved the amount it would cost to complete the project under the Agreement, he

contemplated by the parties in the Agreement, but which Defendant was unable to complete.

Defendant conceded that the total sum to complete the project from his cessation of work would equal $20,985.00.[11] Plaintiff contended that it would cost more than $20,985.00 to complete the portions of the project which Defendant did not finish. Plaintiff alleged that in addition to the amount projected by Defendant in Defendant's Exhibit 43, there were further corrections or installations that needed to occur under the original Agreement. Plaintiff testified that some portions of the project were unfinished, workers acted with disregard for her property, and mistakes were made in the construction that was completed by Defendant.

The portions of the project Plaintiff alleged were unfinished are as follows: (1) a new keypad entry was to be installed on the garage door, but this was not completed; (2) Defendant removed a wooden structure on the basement stairs leaving an exposed wall and did not take steps to replace the structure with paneling; (3) Defendant tore out drywall in order to reach the pipes in the basement and did not replace the dry wall; (4) the mudroom did not have insulation on the bottom; (5) the gas line was not connected; (6) lights were not installed on the deck stairs and neither were path lights along the front walkway; (7) other electrical work as specified by Plaintiff and Ms. Sola-Solé.

Next, Plaintiff argued that workers at the jobsite acted with disregard for her property and caused damage, including that: (1) workers moved a tree to the backyard where it subsequently died; (2) workers broke the light fixture to the back door in the basement and

[11] Defendant compiled a spreadsheet of work that still needed to be done on the project. Defendant's projections indicated the total cost to finish the project was $20,985.00. Def.'s Ex. 43.

[redacted] system motion detectors and did not replace it; and (5) workers left construction debris littered across the yard when they left.

Finally, Plaintiff averred that Defendant made mistakes in several areas of construction around the home. Plaintiff's allegations are as follows: (1) that the fireplace was installed with the wrong material and incorrect dimensions around the opening, which meant that the fireplace did not meet code requirements; (2) that Defendant installed windows in three bathrooms which were not tempered glass and that the paint in the bathrooms was not glossy as required by code; (3) there were gaps in her hardwood floor, which the floor subcontractor was supposed to fix, but did not; (4) that a water filtration system was not installed in the kitchen as set forth in the Agreement and that the plumbing permit did not include a water filtration system; (5) the stove did not meet code because Defendant failed to install an anti-tipping bracket; and (6) the door from the garage to the new mudroom was to be fire resistant and self-closing, but the door installed did not meet those specifications and, therefore, failed inspection.

Mr. Apergis testified on behalf of Plaintiff and explained the cost estimate to finish Defendant's job. Plaintiff introduced and the Court admitted Plaintiff's Exhibit 7, which was Mr. Apergis's cost estimate for the remaining work to be completed. However, Mr. Apergis admitted that he had not seen the original Agreement and could not identify whether any of his list of projects to be completed was even contemplated by the original Agreement. Therefore, this Court will exclude Mr. Apergis's cost estimate of the remaining work from

testimony, and Defendant's representations.

This Court credits Defendant's testimony with regard to the amount of money it would cost to complete the project and permit the home to pass inspection. Defendant provided to the Court an extensive chart detailing the items to complete, the labor required, and the cost, if any, of the materials. Def.'s Ex. 43. Defendant has approximately thirty years of experience in contracting and construction and the Court finds his testimony to be credible. Defendant conceded that the total sum to complete the project from his cessation of work would equal $20,985.00. This amount is inclusive of what the parties agreed to in the Agreement and additions or changes which would permit the home to pass inspection.

Plaintiff received the benefit of a substantial amount of work done by Defendant, including work for which Defendant completed without payment. Plaintiff suffered "actual loss" because Defendant did not complete the project and this Court finds that it would have cost $20,985.00 in order to complete the project as contemplated by the Agreement.

Defendant testified on cross examination that Plaintiff requested that he used her credit cards to purchase materials for the project. Defendant conceded that he did in fact purchase materials with Plaintiff's credit cards. Defendant further conceded that while the contract price as of February 20, 2018 was $562,403.00, Plaintiff was paying additional sums from her credit cards to purchase necessary materials for the project. Defendant argued that while he was using Plaintiff's credit card to purchase materials for the jobsite, it was not Plaintiff paying for the materials directly, but rather Plaintiff paying Defendant to purchase the materials. Defendant did concede, however, that Plaintiff did not and still has not received those items back that were removed from her property when Defendant ceased work on the

such items.

Plaintiff, at no point, provided the Court with an accounting of how much Defendant spent on materials using Plaintiff's credit card. In fact, during closing arguments, Plaintiff's attorney even stated that the price of the contract as of February 20, 2018, the date of change order number 41, was $562,403.00 "plus whatever materials he was paying for with [Plaintiff's] credit card." CourtSmart 12/18/2019, 10:54:15-20. Plaintiff submitted numerous receipts for purchases after Defendant left the project but did not provide the Court with a way to calculate the amount Defendant expended on materials using Plaintiff's credit card. Further, Plaintiff failed to provide adequate proof of the materials purchased by Plaintiff's credit card.[12]

As a result of Defendant's failure to complete the project, Plaintiff suffered "actual loss" as defined in the Home Improvement statute. Defendant did not complete the home improvement project and therefore Plaintiff was forced to expend resources to complete the project. Plaintiff did not sustain her burden of proving damages in the amount of $192,347.75. Subtracting the legal fees, penalty, and DLS Contractors, Inc.'s estimate, Plaintiff still failed to provide the Court sufficient evidence to award Plaintiff her requested $65,977.40 which she alleged was the total cost of the work to bring the house up to code. Thus, while Defendant did not complete the project, the only damages proven by a preponderance of evidence is $20,985.00, which represents the amount of money it would have cost to complete the project as set forth in the Agreement.

[12] Plaintiff testified about several of the items purchased using her credit card, including a barn door, light fixtures, and appliances for the kitchen. However, Plaintiff did not provide credit card statement reflecting purchases made on her credit card or receipts. And, Plaintiff did not submit a comprehensive list specifying the price of the items Defendant removed from the jobsite when he left.

Defendant projected it would cost $20,985.00 to complete the project on Plaintiff's home to the specifications as set forth in the Agreement. This Court does acknowledge that pursuant to change order number 41, Plaintiff owed Defendant an additional $18,697.00 on the contract. However, the changes made to the contract under this change order were specifically for plumbing materials and labor. Def.'s Ex. 38. It is evident from both Plaintiff's and Defendant's testimony that the plumbing was not completed on the project and therefore, Plaintiff is not liable for this amount despite her signature authorizing the work to be completed. This Court further credits Plaintiff's argument that if all of the work established in the various change orders had been completed, then and only then, would Plaintiff owe Defendant the remaining balance of the contract price of $18,697.00. However, as Defendant failed to complete the work specified in the change orders, Plaintiff does not owe this amount to Defendant.

As a note, Defendant did not testify as to lost profits resulting from Plaintiff's breach of the contract. Therefore, this Court cannot award lost profits to Defendant as the burden to prove damages rested with him as the counter-plaintiff.

C. Neither attorneys' fees nor expert witness fees are recoverable in an action for damages, unless special circumstances are proven.

Plaintiff sought attorney's fees and expert witness fees as part of the calculation of damages in this case. The Agreement is devoid of any mention of attorney's fees. Notably, Plaintiff does not request attorney's fees in the Complaint for Damages. The "American Rule" for attorneys' fees is that "[i]n the absence of statute, rule, or contract expressly allowing recovery of attorneys' fees, a prevailing party in a lawsuit may not ordinarily recover attorneys' fees." *Bausch & Lamb Inc. v. Utica Mut. Ins. Co.*, 355 Md. 566, 590–91 (1999). Maryland generally follows this principle. *Garcia v. Foulger Pratt Dev., Inc.*, 155

Md. App. 634, 660 (2003). An exception to the "American Rule" is for an award of attorney fees for "bad faith." *Id.* at 661.

In determining an award of attorneys' fees, this Court considers whether the "conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification. . . ." Md. Rule 1–341(a). A party seeking attorneys' fees must file a separate statement in support of such an award setting forth a description of the work performed, and the rate charged for services. *See* Md. Rule 1–341(b)(3). Plaintiff did not submit or file an affidavit or invoices concerning counsel's representation. Plaintiff sought attorney's fees in the amount of $8,227.00. In light of the substantial justification on both sides and given Plaintiff's failure to comply with Maryland Rule 1–341(b)(3), the request for attorney's fees is also denied. For the same reason, Plaintiff's request for expert witness fees is denied. *See Kilsheimer v. Dewberry & Davis*, 106 Md. App. 600, 623–739 (1995). Defendant's counsel in the counterclaim also requested attorney's fees; however, given that this issue was not raised by Defendant at trial and that no sum of attorney's fees was set forth, Defendant's request for attorney's fees is also denied.

V. CONCLUSION

The parties entered into an Agreement for the renovation of Plaintiff's home on July 1, 2017. The Agreement was modified by 41 valid and executed change orders. Both parties breached the Agreement. Plaintiff breached the Agreement by failing to comply with the payment provisions of the Agreement, but Defendant acquiesced to this breach. Defendant materially breached the contract by his failure to complete the project. Further, Defendant did not comply with the practices regarding change orders as set forth in the Agreement. Defendant projected that it would cost $20,985.00 from the time of his cessation of work to

complete the project under the terms of the Agreement between the parties. The Court finds that the evidence presented provides a sufficient basis for the Court to award Plaintiff $20,985.00 in damages for Defendant's failure to complete the project. An accompanying Order effectuating these rulings shall be filed herewith.

February 28, 2020
Date

Gary E. Bair, Judge
Circuit Court for Montgomery County, Maryland

STATE OF MARYLAND

COUNTY OF MONTGOMERY, to wit:

I HEREBY CERTIFY that the foregoing is a full, true and correct copy of

MEMORANDUM OPINION, ORDER OF COURT AND NOITCE OF JUDGMENT ENTERED ON 3/3/2020

No. 451637-V, truly taken and copied from the record of proceedings in the Circuit Court for Montgomery County, Maryland, in the foregoing case.

NOTE: A raised seal authenticates each document herein.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the Circuit Court for Montgomery County this 17th day of April, A.D. 2020.

CONFIDENTIAL

Barbara H. Meiklejohn

Clerk of the Circuit Court for Montgomery County

IN THE MATTER OF	*	**MARYLAND HOME**
THE CLAIM OF SOUMAYA TOHAMY		**IMPROVEMENT COMMISSION**
AGAINST THE	*	
MARYLAND HOME IMPROVEMENT		
GUARANTY FUND ON ACCOUNT OF	*	**Case No. 20(75)1181**
ALLEGED VIOLATIONS OF		
BRUCE WAGNER t/a MHIC	*	
CONSTRUCTION, INC.	*	

* * * * * * * * *

FINAL ORDER

On this 15th day of October 2020, Panel B of the Maryland Home Improvement Commission ORDERS that:

1. Pursuant to Business Regulation Article, §8-408(b)(3)(i), Annotated Code of Maryland, the Claimant has provided the Commission with a copy of a civil Judgment entered on March 3, 2020, in which the Circuit Court for Montgomery County found on the merits that the conditions precedent to recovery, as set forth in Business Regulation Article, §8-405(a), Annotated Code of Maryland, have been met, and found that the Claimant sustained an actual loss of $20,985.00. All rights of appeal are exhausted.

2. The Commission, in a letter dated August 31, 2020, advised Respondent that the Commission intended to award the Claimant $20,000.00 and that the Respondent had 21 days to submit to the Commission any reasons why the Commission should not pay the award to the Claimant.

3. The Respondent did not reply to the Commission's letter.

4. The Commission directs payment from the Home Improvement Guaranty Fund of $20,000.00 to the Claimant, Soumaya Tohamy.

5. Pursuant to Business Regulation Article, §8-411(a), Annotated Code of Maryland, any home improvement licenses held by the Respondent, Bruce Allen Wagner t/a MHIC Construction, Inc., shall be suspended, and the Respondent shall be ineligible for any home improvement licenses until the Respondent has repaid any money paid from the Home Improvement Guaranty Fund pursuant to this Order, with 10 percent annual interest.

6. The records and publications of the Maryland Home Improvement Commission shall reflect this decision.

Joseph Tunney
Chair