

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL**

ABRAHAM AND DOREEN HEWITT,

Plaintiffs,

vs.

OLIVER MORTON

Defendant.

CIVIL NO. 771/1992

**ACTION FOR BREACH OF
CONTRACT**

NOT FOR PUBLICATION

APPEARANCES:

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CABRET, Judge

MEMORANDUM OPINION

(Filed: April /~~4~~, 1999)

THIS MATTER came for trial before this Court on January 25, May 16, May 31, June 3, June 10, June 11, and November 13, 1996. The Plaintiffs seek damages against the Defendant for alleged breaches of two reconstruction and repair contracts that the parties allegedly entered into concerning two houses on Plots 22-B and 37 Estate Rattan. Defendant generally denies all allegations and counterclaims that he is entitled to further payment from the Plaintiffs for the

construction work under the legal principles of quantum meruit, unjust enrichment, and restitution.

The issues to be determined by this Court are:

- (1) Whether a contract existed between the parties regarding reconstruction and repair work at Plots No. 22-B and 37 Rattan;
- (2) If so, whether Defendant breached the parties' contracts;
- (3) If so, whether Defendant's breaches were material, thereby discharging Plaintiffs' obligation to compensate Defendant;
- (4) The amount of damages, if any, to which Plaintiffs are entitled; and
- (5) Whether Defendant is entitled to restitution.

STATEMENT OF FACTS

The Plaintiffs, Abraham and Doreen Hewitt, are an elderly married couple who own and principally reside at Estate No. 37 Rattan ("Plot 37"). They also own Estate No. 22-B Rattan ("Plot 22-B") which serves as a rental home. In September of 1989, the houses located on both plots suffered extensive damage during Hurricane Hugo. Both houses were insured but Plaintiffs' insurance company went bankrupt shortly after the passage of Hurricane Hugo. As a result of insufficient insurance funds to do post-Hurricane Hugo reconstruction work, Plaintiffs went to the Small Business Administration Office ("SBA") to obtain a loan for the purpose of reconstructing both their houses. Mr. Hewitt testified that he wanted to do the reconstruction work himself but SBA required somebody with a license to do the work.

After talking to several other contractors, Mr. Hewitt approached Defendant to find out if he had a construction license. At this time, Defendant was engaged in post-Hugo construction work on

the house of Ms. Alberta Akin, Mr. Hewitt's sister. Upon learning that Defendant was a licensed repair and maintenance contractor, Mr. Hewitt asked Defendant to give him estimates for the repair of the houses on Plots No. 22-B and 37.

Pursuant to the Defendant's instructions, Jennifer Morton, Defendant's wife, prepared a handwritten estimate for each property, dated October 12, 1989. The estimate for the house on Plot 37 was \$80,000¹ and the estimate for the house on Plot 22-B was \$75,000.²

¹ See Plaintiffs' Exh. No. 6 and Defendant's Exh. No.20 which provides in pertinent part:

Estimate for work to be done due to storm damage.

- (1) 3,040 sq. ft. of roofing to be replace with Tex. I-II and galvanize top.
- (2) Replacement of missing rafters
- (3) Replacement of three (3) damage windows.
- (4) Replacement of damage doors as follows three (3) bed room, 2 baths, garage and back.
- (5) repairs of damage walls inside of house.
- (6) Clothes closets to be restored to original.
- (7) All electrical work to be rechecked.
- (8) Complete inside of house to be repaint due to water stains.
- (9) One (1) picture window to be replaced.

² See Plaintiffs' Exh.No.7 and Defendant's Exh.No.19 which states in pertinent part:

- (1) Total lost of property from floor slab. Upward consist of three (3) bed rooms, two (2) baths, living room, dining room, kitchen and others such as clothes closets storage spaces.

The Defendant gave the Plaintiffs the handwritten estimates. Mrs. Hewitt then took the estimates to SBA in order to get the \$10,000 down payment on their loan. Mrs. Hewitt testified that SBA found the estimates to be insufficient and required that they be typewritten and in a certain format.³ Plaintiffs subsequently told Defendant what was required by SBA and Mr. Hewitt gave Defendant a handwritten document allegedly done in cursive as well as a form that one of the subcontractors did through SBA for his brother Albert Hewitt⁴ so the Defendant could get an idea of what the final documents should look like. Defendant, in turn, gave the documents along with his handwritten estimates to his wife so she could get the documents typed by a professional secretary. Once the formal documents were typed⁵, Defendant took the copies⁶ to Plaintiffs at their home. Plaintiffs allege that the Defendant signed both documents in front of them. However, Defendant

(2) Minor damages to first floor that can be also estimated.

(3) Floor space 1,104 sq.ft.

(4) Building top section was prefab construction.

(5) Cleaning of cistern water supply.

³ Carl Christensen of SBA further testified that a construction contract signed by both parties is needed if the amount of the loan is over \$25,000.

⁴ See Plaintiffs' Exh.No. 26.

⁵ See Defendant's Exh.No.21, typewritten estimate/contract for Plot 37 and Defendant's Exh.No. 22, typewritten estimate/contract for Plot 22-B.

⁶ See Plaintiffs' Exh.No.1, typewritten estimate/contract for Plot 37 and Plaintiffs' Exh.No. 2, typewritten estimate/contract for Plot 22-B.

claims that he never signed the documents⁷ and never entered into any written contracts for the construction or reconstruction of the Plaintiffs' houses.

After obtaining the typed documents, Plaintiffs took them to SBA. SBA authorized a loan in the amount of \$77,600⁸ for the house at Plot 37 and \$34,900⁹ for the house at Plot 22-B. Upon receiving the first check of \$10,000 for the work at Plot 37 from SBA, the Plaintiffs went to Defendant while he was working at the home of Alberta Akins, Mr. Hewitt's sister, and gave him the \$10,000 check. Defendant took the check and placed it in his truck. Plaintiffs claim that Defendant signed a receipt for the check. However, Defendant denies signing any type of receipt.

Sometime in June of 1990, Defendant began work on the house on Plot 37. Several months later, around October of 1990, Defendant started work on the house on Plot 22-B. Defendant allegedly completed his work at Plot 37 around November of 1991 and stopped working on Plot 22-B on or about March of 1992. The house at Plot 22-B was about 75-85% complete when Defendant stopped working due to an alleged dispute with the Plaintiffs concerning the installation of certain tiles and windows. Upon leaving, Defendant locked the house at Plot 22-B and nailed a door to the garage and other areas. As a result, Plaintiffs were unable to gain access to the house for over a year until this Court ordered Defendant to return the keys to Plaintiffs in March, 1993.

⁷ Defendant alleges that he would never sign as a contract documents that lacked sufficient detail to inform him what he would need to do in order to perform under the document.

⁸ Plaintiffs subsequently requested and received a reduction in the loan from \$77,600 to \$65,000.

⁹ Plaintiffs subsequently requested and received a reduction in the loan from \$34,900 to \$10,000.

From the time Defendant started work at Plot 37 until he quit working at Plot 22-B on or about March of 1992, the reconstruction process was beset by problems and disputes. The first problem Plaintiffs claim they encountered was Defendant's frequent absence from the worksite. Specifically, Plaintiffs claim that while Defendant was working at Plot 37, Defendant would work off and on and that sometimes he never showed up to work. Antonio Ayala, a worker who worked on Plaintiffs' property for the Defendant, corroborated Plaintiffs' allegations by testifying that Defendant was probably on the job about 50% of the time. Furthermore, Mr Ayala, along with another of Defendant's workers, Roger Hector, testified that Defendant was working on at least three other jobs while working for the Plaintiffs. They also testified that they never submitted time sheets or kept records showing how long they were working on a particular property. In response to these allegations, Defendant claims that he had to work at other jobs to support himself since the Plaintiffs allegedly told him that they would not compensate him for the work until he was finished.

A second problem Plaintiffs claim they encountered were numerous unauthorized changes made to the building structures by Defendant. Although Plaintiffs testified that they requested certain changes not originally contemplated by the parties, they argue that most of the extra work done by Defendant was not authorized by them. Furthermore, Plaintiffs testified that they specifically told the Defendant not to do any extra work unless he provided them with an estimate. Defendant, in turn, alleges that Plaintiffs were constantly requesting changes to the plans during the reconstruction process and that he either informed them of the changes or they authorized him to do so.

Another serious problem Plaintiffs claim they encountered was Defendant's constant refusal to provide them with itemized bills of his labor and material costs as well as estimates for any extra

work, despite being asked on numerous occasions. Defendant's response is that during the reconstruction at Plot 37, he was required to turn over his receipts to SBA, which he did. Defendant says he attempted to present Plaintiffs with the receipts after SBA stopped requiring him to turn over the receipts to it, but Plaintiffs refused to accept them.

Plaintiffs claim they paid Defendant over \$132,000 for work at Plot 37 and over \$97,000 for work at Plot 22-B. When Defendant departed from Plot 22-B, Plaintiffs allege that they had to spend an additional \$36, 000 to complete the job at Plot 22-B. Furthermore, Plaintiffs claim there were several structural problems with the house on Plot 37. As a result, Plaintiffs filed the instant action against Defendant for breach of contract and damages. Defendant, in turn, filed a counterclaim against Plaintiffs alleging he is entitled to further payment from the Plaintiffs for the construction work under the legal principles of quantum meruit, unjust enrichment, and restitution.

DISCUSSION

I. A Contract Existed Among the Parties for the Construction of Plots 22-B and 37.

A building and construction contract, just as any other contract, must be based upon an offer and acceptance between two or more competent parties for sufficient consideration, and certainty is essential to the validity of such a contract. 13 Am. Jur. 2d Building and Construction Contracts § 1 (1964); *See also Johnston the Florist v. Tedco Constr.*, 652 A.2d 511 (Pa. Super. 1995). To be binding, the terms of a contract must be reasonably certain so as to provide a basis for determining the existence of a breach and for giving an appropriate remedy. *See Restatement (Second) of Contracts* § 33 (1) and (2)(1981); Total Medical Management, Inc. v. United States, 104 F.3d 1314

(Fed. Cir. 1997); Haft v. Dart Group, 877 F.Supp. 896 (D.Del. 1995); and Dahar v. Grzandziel, 599 A.2d 217 (Pa. Super. 1991). Once it is determined that the parties did indeed intend to create a contract, a court should be slow to deny enforcement on the basis of indefiniteness of the contract. Aviation Contractor Employees Inc. v. United States, 945 F.2d 1568, 1572 (Fed. Cir. 1991)(citing Corbin on Contracts § 97 (1963)).

Certain agreements must be evidenced by a writing signed by the party sought to be bound. *Cf.* 13 Am. Jur. 2d Building and Construction Contracts §3. A construction contract, however, does not have to meet this requirement if it is possible that it will be performed within a year. *Id.* Moreover, the fact that the party sought to be bound has not signed the contract is not essential to the issue of liability under the contract. *Id.* Signing a building and construction contract is not necessary to render it binding when the terms of the contract are agreed upon and understood between the parties, and work is done pursuant to the terms of the contract. 13 Am. Jur. 2d Building and Construction Contracts § 3 and Girard Life Ins. Annuity & T.Co.v. Cooper, 162 U.S. 529 (1896); *See also* Mountain Fuel Supply v. Reliance Ins. Co., 933 F.2d 882 (10th Cir. 1991)(One can become bound by contract without signing it if intent to accept contract has been demonstrated through other means) and Hershey Foods Corp. v. Ralph Chapek Inc., 828 F.2d 989, 995 (3d Cir. 1987)(Correspondence may constitute a contract and it is not necessary for both parties to sign the writing if the parties, acting pursuant to its terms, evidence their acceptance). In such a case, performance is the only thing needed to complete the agreement and to create a binding promise. 17 C.J.S. Contracts § 41 (1963). To make performance of a thing proposed sufficient as an acceptance of the proposal, performance must have been induced by, and in accordance with, the proposal. *Id.*

In the case *sub judice*, the Plaintiffs present two documents they claim to be the construction contracts entered into with the Defendant for the repair of the houses on both Plots 22-B and 37.

The alleged contract for Plot 37¹⁰, dated April 16, 1990, states in pertinent part:

SCOPE OF WORK

1. Replace, repair and paint all damaged walls, doors, etc.
2. Replace damaged roof.
3. Replace electrical, plumbing and repair other utilities.
4. Repair, replace structural or real property improvements (bathrooms, etc.).
5. Repair disaster-damaged windows.
6. Repair damaged windows.
7. Remove debris.

COST

Cost of all repairs is \$80,000 to be paid as follows:

- \$10,000.00 upon the signing of this agreement.
- \$20,000.00 existing slab to bond beam.
- \$20,000.00 upon completion of roof
- \$20,000.00 upon completion of windows, floor tiles and doors.
- \$10,000.00 upon completion of entire job.

TIME. Work will commence two weeks after receipt of first installment. Job will be completed within ninety (90) working days thereafter.

The alleged contract for Plot 22-B¹¹, which is dated April 26, 1990, states in pertinent part:

SCOPE OF WORK

1. Fully reconstruct disaster-destroyed real estate (dwelling).
2. Clean cistern and repaint.
3. Demolish and rebuild front stairway.
4. Remove debris.

COST

Cost of all repairs is \$75,000, to be paid as follows:

\$10,000.00 upon the signing of this agreement.
\$20,000.00 existing slab to bond beam.
\$20,000.00 upon completion of roof
\$20,000.00 upon completion of windows, floor tiles and doors.
\$5,000.00 upon completion of entire job.

TIME. Work will commence two weeks after receipt of first installment. Job will be completed within ninety (90) working days thereafter.

The trial testimony establishes that both of these documents were formally prepared by the Defendant in accordance with his handwritten estimates and some other documents handed to him by the Plaintiffs. Plaintiffs claim both alleged contracts were signed in the presence of all the parties. Defendant, however, denies that he ever signed the documents before the Plaintiffs. Both alleged contracts contain the signatures of all the parties.

A review of the trial testimony and submitted documents mandates the finding that Plaintiffs' Exhibits No.1 and 2 constitute express contracts validly entered into by the parties for the repair and

¹¹ See Plaintiffs' Exhibit No. 1.

reconstruction work at Plots 22-B and 37. Although the Defendant denies that he ever signed the documents in front of the Plaintiffs, thus implying that the purported signatures are forgeries, Defendant's mere denial of the genuineness of his signature is simply insufficient for this Court to conclude that his signatures are not on both contracts. See C.J.S. Signatures § 8 (Denial of the genuineness of a signature by a subscribing witness is not conclusive evidence that the signature is not genuine or sufficient, and a question of fact remains as to whether or not the signature is genuine or sufficient). Without sufficient evidence to support Defendant's denial that his signatures are on the contracts, this Court cannot accord much weight to Defendant's testimony.

Moreover, even if the purported signatures on Plaintiffs' Exhibit Nos. 1 and 2 were not those of the Defendant, Defendant did not have to sign the contracts to render them binding upon him so long as he performed the contemplated work according to the contracts. Once again, the record in this matter clearly demonstrates that such was the case. First, Carl Christensen, an official from SBA testified that no loan obtained from SBA over the amount of \$25,000 could be approved or disbursed unless it received a formal construction contract signed by the parties. Second, Defendant admitted preparing the documents produced by Plaintiffs for the purpose of allowing Plaintiffs to get the \$10,000 loan installment from SBA. Third, Defendant accepted the \$10,000 loan payment from Plaintiffs and began reconstruction work at Plot 37 several weeks thereafter in accordance with the terms of Plaintiffs' written agreement. Specifically, Defendant replaced the roof, made structural improvements to the house, and replaced damaged windows and doors. Fourth, Plaintiffs made their scheduled payments to the Defendant in accordance with the agreement. Additionally, virtually the same scenario was repeated on the Plot 22-B agreement. When Defendant received the \$10,000

payment for reconstruction work at Plot 22-B, he eventually began the work on the property according to the terms of the parties' written agreement. In light of these undisputed facts, this Court finds that the Defendant's acceptance of the \$10,000 down payment and his subsequent work on both properties are sufficient evidence to create a binding express contract among the parties for the repair and reconstruction of the houses on Plots 22-B and 37.

II. The Construction Contracts Were Breached By Defendant

Having determined that contracts for the reconstruction of the houses on Plots 22-B and 37 existed between the parties, the next issue to be addressed is whether Defendant breached the contracts. A contractor's liability is fixed by the terms of his contract, and he is obligated to perform according to those terms. 13 Am. Jur. 2d Building and Construction Contracts § 27 and 17A C.J.S. Contracts § 494(2); *See also Whitfield Constr.Co., Inc. v. Community Dev. Corp.*, 392 F.Supp. 982 (D.V.I. 1975). In the absence of special provisions in the contract, the contractor's obligations end upon the completion of the structure in accordance with the terms of the contract. 13 Am. Jur. 2d Building and Construction Contracts § 27. Where a party to a building or construction contract fails to comply with the duty imposed by the terms of the contract, a breach results for which an action may be maintained to recover the damages sustained thereby. 13 Am. Jur. 2d Building and Construction Contracts § 72; *See also Restatement (Second) of Contracts* §235(2)(When performance of a duty under a contract is due any non-performance is a breach). One who has contracted to construct a specified product can commit a breach of his contract either by delay in completion or defective construction or by repudiation and abandonment. 5 Corbin on Contracts § 1089 (1964). Furthermore, "[I]t is well settled that in building or construction contracts, whenever

someone holds himself out to be specially qualified to do a particular type of work, there is an implied warranty that the work will be done in a workmanlike manner, and that the resulting building, product, etc. will be reasonably fit for its intended use" Raimer v. Stout, 14 V.I. 568, 579 (Terr. Ct. 1978)(citing Lewis v. Anchorage Asphalt Paving Co., 535 P.2d 1188, 1196 (Alaska 1975).

A. Plot 37

With regard to Plot 37, Plaintiffs allege that Defendant breached the respective construction contract by (1) delaying the job and (2) failing to perform the work according to the contract.

1. Job Delay

The Plot 37 contract states that once work on the property commenced, "the job will be completed within ninety (90) working days thereafter." However, Defendant worked at Plot 37 for a period of almost 17 months. Plaintiffs allege that one of the reasons for the delay was Defendant's frequent absence from the job site. Plaintiffs claim that they were at Plot 37 every day from about 10:00 a.m. to 2:00 p.m. and that the Defendant sometimes never showed up to work or would only leave a few men at the place without any supervision. Plaintiffs further claim that they questioned Defendant several times about the time he was taking off from work and that SBA was writing them asking why the work was not getting done and the house not yet completed.

Defendant provides several explanations for the time it took to complete the job at Plot 37. First, Defendant argues that the 90-day reconstruction period contemplated rebuilding the structure on Plot 37 as a wooden (prefabricated) structure, the way it originally existed. Defendant claims, however, that right before he began construction, Plaintiffs decided they wanted the house rebuilt as

a concrete block structure, which required more time, materials, and labor. Second, Defendant argues that it took longer than expected to complete the work at Plot 37 because of the many changes Plaintiffs requested during the reconstruction process. Specifically, Defendant claims that Plaintiffs requested the following changes: (1) a change in the roof structure; (2) an addition or extension to the back of the house; (3) enclosing of the back porch; (4) combining two bathrooms into one and building an additional small bathroom; (5) digging a foundation for the outside pump; and (6) building a six-inch concrete block wall on the inside of a four inch concrete block wall previously built by Abraham Hewitt. Third, Defendant disputes Plaintiffs' claim that he was frequently absent from the jobsite. He claims that he was on the jobsite about 80-85% of the time or about 60 to 65 hours a week. Defendant also claims that when he was not present at Plot 37, he was picking up materials, which was difficult to do after the hurricane. Finally, Defendant admits that he was working on other properties at the same time he was working on Plaintiffs' property. However, he claims he was only working on one or two other houses and that he maybe had about one or two of his workers working on other properties for no more than an hour at the most.

Provisions as to time in building and construction contracts are to be construed to give effect to the intention of the parties as shown by the language employed, which, in case of ambiguity, is to be considered in connection with the subject matter of the contract, the surrounding circumstances, and the practical construction, if any, given by the parties. 17A C.J.S. Contracts § 360 (1963); *See also Central Coast Constr. v. Lincoln-Way Corp.*, 404 F.2d 1039 (10th Cir. 1968). Where a construction contract is to be performed "by" a particular time, it must be performed before such time. 17A C.J.S. Contracts § 360; A.A. & E.B. Jones Co. v. Boucher, 530 P.2d 974 (Col.Ct.App.

1975); and M.F.G. Trading Co. v. Jensen, 107 S.E.2d 441 (Va.Sup.Ct.App. 1959). However, as a general rule, if a contractor agrees to do certain work within a specified time, and he is prevented from performing the contract by the act or default of the other party, the delay thus occasioned is excused. 13 Am. Jur. 2d Building and Construction Contracts § 48. In such a case, courts have held that the stipulation as to the time for completion becomes inoperative, and the contractor is entitled to a reasonable time to complete the work. Hood v. Meininger, 105 A.2d 126, 129 (Pa. 1954).

Furthermore, an owner may waive or extend the time within which a building contract is to be performed by the contractor. Ryan v. Thurmond, 481 S.W.2d 199, 206 (Tex.Civ.App. 1972). The waiver or extension may be implied as well as express; and what acts or omissions will constitute a waiver depends on their nature and circumstances of the case. *Id.* (citing 17A C.J.S. Contracts § 506(2)(a)). Thus, an owner waives the delay when he either (1) makes payments to the contractor after expiration of the stipulated time for completion of the work,¹² (2) assents to the continuance of the work after the time for the completion of the work has expired,¹³ or (3) accepts and pays for the work without objection.¹⁴ The effect of an extension or waiver of time for performance is merely to substitute a new time for the old; it does not affect the other provisions of the contract; and where the agreement for extension or waiver is silent as to the duration of the extension, the law implies that

¹² See Swink v. Smith, 113 N.W.2d 515, 517 (Neb. 1962).

¹³ See Ryan, 481 S.W.2d at 206; Oklahoma State Fair Exposition v. Lippert Bros., Inc., 243 F.2d 290, 292 (10th Cir. 1957)(When work is to be done by a time certain, employer, by allowing it to go on afterwards, thereby treating contract as still in force, waives materiality of time and can claim only such damages as he has sustained by reason of delay); and Jackson v. L.S. Brown Co., 71 S.E.2d 521 (Ga.Ct.App. 1952).

¹⁴ 17A C.J.S. Contracts § 506(2)(a).

it shall be for a reasonable time. Ryan, 481 S.W.2d at 206 (citing 17A C.J.S. Contracts § 506(2)(b)); *See also* Cotton v. Deasey, 766 S.W.2d 874 (Tex.App. 1989) and United Pac.Ins.Co. v. Collins, 389 S.W.2d 242, 244 (Ky. 1965). However, the mere fact that the owner permits the contractor to continue the work after the time of performance, as far as concerns the right of the contractor to recover on the contract, has been held not to waive the owner's right to recover damages for the delay in performance. 17A C.J.S. Contracts § 506(2)(b); *See also* Elkins Manor Assoc.s v. Eleanor Concrete Works, Inc., 396 S.E.2d 463 (W.Va. 1990); May v. Martin, 137 S.E.2d 860, 865 (Va. 1964); and Western Irr.Co. v. Reeves County Land, 233 S.W.2d 599, 602 (Tex.Civ.App. 1950). Thus, in the absence of a "time is of the essence" provision in the contract, a mere failure to complete the work within the specified time does not *ipso facto* terminate the contract, but only subjects the contractor to damages for the delay. *See* 13 Am. Jur. 2d Building and Construction Contracts § 47; Barnard-Curtiss Co. v. United States, 257 F.2d 565, 568 (10th Cir. 1958); DeSombre v. Bickel, 118 N.W.2d 868, 871 (Wis. 1963).

In the case *sub judice*, the Plot 37 contract contained a provision fixing the time for completion of work within 90 days once work began. However, there is a dispute among the parties as to whether the house on Plot 37 was to be rebuilt in concrete, as Plaintiffs posit, or in wood, as Defendant claims. Having carefully considered the evidence, this Court finds that the parties originally contemplated rebuilding the Plot 37 house in concrete. Plaintiffs were adamant at trial that they told Defendant that they wanted both houses to be rebuilt in concrete before entering into the contracts. Furthermore, Abraham Hewitt testified several times that the inclusion of the term "bond beam" in the Plot 37 contract meant that the whole house was going to be rebuilt in concrete

block. This testimony was corroborated by the Defendant when he admitted in Court that a "bond beam" would be used in a concrete clock structure while a wooden structure does not need a "bond beam" but rather a "main beam." Additionally, the Court notes that Defendant previously included a 90-day completion period provision in an unrelated contract to repair and reconstruct a concrete block house.¹⁵ Finally, Defendant was unable to state for certain at trial when the Plaintiffs requested to change the house to concrete block. Considering these facts, this Court concludes that the Plot 37 contract contemplated a concrete block structure.

However, regardless whether the parties originally contemplated the structure being rebuilt as a concrete structure, it is clear from the trial testimony that Plaintiffs requested additional changes to the house on Plot 37 during the reconstruction process.¹⁶ There is no question that these requested changes required more time for completion. Furthermore, the Plaintiffs continued to pay the Defendant after the expiration of the 90-day time period. Thus, in the absence of a "time is of the essence" provision in the Plot 37 contract, this Court must find that the Plaintiffs, by requesting alterations to the original plans and continuing to make payments to the Defendant, extended or excused the 90-day completion period. Thus, Defendant, after the expiration of 90 days, was entitled to a reasonable time to complete the work at Plot 37.

¹⁵ See Plaintiffs' Exhibit No.30, contract for the repair and reconstruction of Albertha Akins' house at Plot No. 20 Estate Rattan. Defendant testified that he prepared the document himself.

¹⁶ Abraham Hewitt testified that during Defendant's reconstruction of the house on Plot 37, he did authorize Defendant to (1) enclose the porch (2) build an addition or extension in the back and (3) combine the two bathrooms into one and build a small bathroom and pantry.

The question then becomes what would have been a reasonable time period for Defendant to complete the work at Plot 37. Larry French, Plaintiffs' expert, and Taylor Babb, Defendant's expert, both testified that the Plot 37 job should have been reasonably completed within nine to twelve months. Furthermore, two of the workers employed by the Defendant for the Hewitts' job, Antonio Ayala and Roger Hector, corroborated Abraham Hewitt's testimony that Defendant was frequently absent from the jobsite and that Defendant had them working on at least three other construction jobs while they were working at the Hewitts' property. Thus, although Plaintiffs requested and authorized all the numerous changes alleged by the Defendant, he still exceeded the reasonable time for completion by five months. Accordingly, Plaintiffs are entitled to damages, if any, as a result of Defendant's unreasonable delay.

2. Failure to Perform Work in Accordance with the Contracts

The Plaintiffs also allege that the Defendant failed to perform the work at Plot 37 according to the contract. Specifically, Plaintiffs claim that Defendant placed the rafters on the roof unevenly in that some are 20 to 30 inches apart instead of 32 inches.¹⁷ Plaintiffs further claim that Defendant made numerous changes to the house without authorization. The only authorizations Plaintiffs claim they authorized were a change in the style of the roof, to enclose the back porch, and to build an

¹⁷ Defendant claims that one of his workers made a mistake with respect to the placing of the rafters but that when he told Plaintiffs about the mistake, Mr. Hewitt responded that he did not want Defendant to change the roof.

addition to the back of the house (a small bathroom and a pantry).¹⁸ Plaintiffs finally claim that they did not authorize Defendant to raise the height of the house by two feet.

In response, Defendant argues that the Plaintiffs made numerous changes to the design of the house on Plot 37 once he began work. These changes include: (1) a change in the roof structure; (2) an addition or extension to the back of the house; (3) enclosing of the back porch; (4) combining two bathrooms into one and building an additional small bathroom; (5) digging a foundation for the outside pump; and (6) building a six-inch concrete block wall on the inside of a four-inch concrete block wall previously built by Abraham Hewitt.¹⁹ Furthermore, Defendant claims that he had to raise the height of the house as a result of building the new addition in the back of the house, which in essence, widened the house. Thus, the walls had to be higher in order to maintain the pitch of the roof. Defendant alleges he informed Plaintiffs about this change and they agreed.

In interpreting a contract, effect must be given to the intention of the parties as gathered from a consideration of the entire contract. 13 Am. Jur. 2d Building and Construction Contracts § 8. Words and other conduct [of the parties] are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight. Restatement (Second) of Contracts § 202(1)(1981). In interpreting the words and conduct of the parties to a contract, a court must put itself in the position they occupied at the time the contract was made. *Id.*, cmt.b.

¹⁸ Although Plaintiffs authorized the addition to the back of the house, they argue that they never authorized Defendant to extend the addition as far as he did.

¹⁹ A space ended up between the four- and six-inch concrete blocks and Defendant eventually had to fill in the space with concrete. Defendant claims that this was done pursuant to Mrs. Hewitt's request.

The contractor and owner, may, by subsequent agreement, modify the original contract and authorize or require deviations and departures therefrom. 17A C.J.S. Contracts § 373; *See also* Freeman v. Stanbern Constr.Co., 106 A.2d 50, 54 (Md. 1954). However, the contractor is not justified without the consent of the owner, express or implied, in departing from the requirements of the contract. 17A C.J.S. Contracts § 373. Once a building is being constructed, and additions or alterations are made, the original contract, unless it is so entirely abandoned that it is impossible to trace to the part of the work it applies, is held to exist and to be binding on the parties so far as it can be followed. 13 Am Jur 2d Building & Construction Contracts § 4; *See also* 17A C.J.S. Contracts § 373 and Hoffman v. Cook, 315 A.2d 551 (Md.Ct.Spec.App. 1974). The additions or alterations, if the expense of the work is thereby increased, may be the subject of a new contract, either express or implied, but they do not affect the original contract, which still remains in force. 13 Am. Jur. 2d Building & Construction Contracts § 4.

In the case *sub judice*, trial testimony established that the scope of the Plot 37 contract is somewhat general in nature.²⁰ Although the contract does not provide specific details as to what was to be done and who was to provide what, the circumstances of this case, as well as the contract, clearly reveal that the Defendant was to perform various repair and reconstruction work on the house at Plot 37 and that the Plaintiffs would provide specific payments upon the occurrence of certain events. Furthermore, the trial testimony established that before Defendant began working at Plot 37, the parties contemplated the reconstruction of Plaintiffs' home as it was originally built with the

²⁰ Plaintiffs' expert, Taylor Babb, as well as Abraham Hewitt and the Defendant testified that Plaintiffs' Exhibits No.1 and 2 are general in nature.

exceptions of a change in the roof structure and the use of concrete block instead of wood for the walls.

A review of the casefile reveals that the Defendant breached the Plot 37 contract when he improperly laid out the roof.²¹ Although Defendant claims that he informed Plaintiffs about the mistake and that they told him not to worry about it, it is clear to this Court that such was not the case.²² Furthermore, Defendant impliedly warranted that the work would be done in a workmanlike manner and it was incumbent upon him to take any necessary steps to remedy the defects that he created. Accordingly, Plaintiffs are entitled to recover damages, if any, resulting from the improperly laid out roof.

Regarding alleged changes either requested or authorized by the Plaintiffs, this Court finds that the Plaintiffs solely requested or authorized the porch enclosure and the back addition up to a certain length. Although the Court sees the logic of Defendant's explanation that the 60-feet long by 10 foot wide addition would essentially widen the house necessitating the walls being raised in order to maintain the pitch of the roof, the Court finds that Plaintiffs never authorized Defendant to extend the addition as far as he did. Defendant, by his own admission, testified that the wall was not supposed to go as far east as it did. Furthermore, the Court credits the testimony of Abraham Hewitt

²¹ Plaintiffs' expert, Taylor Babb, testified that during his inspection of the house on Plot 37, he found that the roof was improperly laid out. Specifically, the rafters on the roof were unevenly placed. Mr. Babb further testified that he did not do an estimate to correct the defect since it would be impractical as the whole roof would have to be taken off.

²² Abraham Hewitt testified that his wife informed Defendant about the problems with the rafters.

where he testified that he complained to the Defendant about the wall being raised too high and that Defendant assured him the wall would not be too high. Finally, it was incumbent upon Defendant to notify and get authorization from the Plaintiffs regarding these changes. The Court finds that Defendant did not do so since he testified at his April 1994 deposition that he never got authorization from the Plaintiffs to raise the height of the wall.²³ Defendant also testified at his 1994 deposition that he never wrote down what changes were made to the house and how much these changes cost. For the foregoing reasons, the Court finds that Defendant also breached the Plot 37 contract when he made unauthorized changes to the house. Accordingly, Plaintiffs are entitled to damages, if any, as a consequence of Defendant's breach. However, Defendant is entitled to compensation for any extra work requested by the Plaintiffs during the reconstruction process, specifically, the back addition and the porch enclosure.

B. Defendant Breached the Plot 22-B Contract

With regard to the reconstruction work on the house at Plot 22-B, Plaintiffs claim in their complaint that Defendant breached the contract by: (1) intermittently abandoning the job, (2) delaying the job, and (3) failing to perform the work in accordance with the written contract entered into by and between the parties. Defendant began work at Plot 22-B Rattan in October 1990 and left in February 1992. Defendant admits that the job was not completed when he left or quit. Defendant allegedly left the job as a result of a dispute with the Plaintiffs regarding the installation of certain tiles and windows. However, before quitting the job, Defendant nailed boards to the garage and other

²³ At trial, Defendant retracted his earlier deposition testimony and testified that he informed Plaintiffs about raising the height of the interior wall.

areas and padlocked the door, thus preventing the Plaintiffs from entering the house. Despite several requests from Plaintiffs to remove the barricades, Plaintiffs were unable to gain access into the house until April 1993 when the Court ordered Defendant to return the keys to Plaintiffs. Defendant claims he locked the house to secure the materials he bought which were still inside. Once the Plaintiffs gained access to the house at Plot 22-B, they allegedly spent \$36,585.13 to complete the remaining reconstruction work.

There is no question that Defendant breached the contract for the reconstruction job at Plot 22-B. Defendant, by his own admission, agrees that the job at Plot 22-B was not completed when he quit the job in February of 1992. Furthermore, Defendant provided no justifiable explanation for his abandonment of the Plot 22-B job. The fact that he was involved in a disagreement or dispute with the Plaintiffs over the purchase and installation of certain windows and tiles cannot justify his outright abandonment of any further work at Plot 22-B.

Finally, the Court also finds that the Defendant was responsible for several structural problems to the house at Plot 22-B. First, Plaintiffs' expert, Larry French, testified that the tiles in the living room, dining room and kitchen were improperly laid out. Mr. French testified that normally all construction is out-of-square by either a one-half inch or one inch, but he found that the tiles were out of square by nearly nine inches and the improper layout is clearly visible. Second, Abraham Hewitt testified that the Defendant built a wall against the front steps of the house without Plaintiffs' authorization. Although Defendant testified that he had authorization to build the wall from the Plaintiffs, this testimony is inconsistent with Defendant's prior deposition testimony where Defendant first testified that he chose to build the wall against the steps since there was no plan. Finally,

Abraham Hewitt testified that when the Plaintiffs finally obtained access to the house at Plot 22-B after receiving the keys from Defendant, they discovered that Defendant had applied only one layer of roof coating. Mr. Hewitt testified that the roof required at least three coatings. Based upon the foregoing evidence, the Court finds that Defendant breached the Plot 22-B contract and that Plaintiffs are therefore entitled damages, if any, for the structural defects created by the Defendant with regard to the house at Plot 22-B.

III. Defendant's Breaches Were Material

Having determined that Defendant breached both the Plot 22-B and Plot 37 contracts, the Court must now decide whether the breaches were material. The standard of materiality applies to contracts of all types. Restatement (Second) of Contracts §241 cmt. a. A condition to rendering performance under a contract is that there be no uncured material breach by the other party to the contract. Restatement (Second) of Contracts §237. A material breach of contract, whether for defective performance or for the failure to perform, operates to either prevent the nonbreaching party's duty to perform from arising, at least temporarily, or to discharge that duty if the breach has not been cured during the time in which performance can occur. Restatement (Second) of Contracts §237 cmt. a. In construction contracts, it is common to state the issue of "uncured material breach" as whether there has been "substantial performance." Restatement (Second) of Contracts § 237 cmt. d. Substantial performance of a contract occurs where there is performance of all the essentials necessary to accomplish the purpose of the contract. 13 Am. Jur. 2d Building and Construction Contracts §43. If there has been substantial performance, there is no material breach. Restatement (Second) of Contracts §237 cmt. d. The contractor may claim any unpaid balance due him under the

contract, and the property owner may counterclaim for damages for any defects. *Id.* On the other hand, if there has *not* been substantial performance, a material breach has occurred, and the consequences are more severe. *Id.* First, the nonbreaching party may treat the contract as at an end, discharging any duty of counterperformance. *Id.* Second, the nonbreaching party has an immediate right to all remedies for breach of contract, including total damages. *Id.* Third, the contractor has no claim under the contract. Restatement (Second) of Contracts §237 cmt. d. However, he may claim restitution for his services. *Id.*

The considerations in determining whether performance is substantial are the same as those for determining whether a breach is material. *Id.* These considerations are:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241.

There is no question that the work at Plot 37 was *not* substantially performed by Defendant and that he materially breached the contract. Both parties presented expert testimony that the Plot 37 job reasonably should have taken 9 to 12 months to complete. However, Defendant delayed

performance under the contract by five months when the contract called for completion within 90 days of its execution. Defendant also unevenly placed the roof rafters 20 to 30 inches apart when the industry standard placement is 32 inches. Moreover, Defendant admitted that he overextended the addition to the back of the house which, in turn, required him to raise the height of the walls by two feet to maintain the pitch of the roof. Further, Defendant never kept track of the changes made to the house or how much the changes cost.

Similarly, the Court finds there was no substantial performance of the work at Plot 22-B and Defendant materially breached this contract as well. As discussed in the previous section, Defendant himself was responsible for numerous structural or design defects in the house. There is clear evidence that floor tiles throughout the living room, dining room, and kitchen were visibly out of square by nine inches when the acceptable standard of deviation within the construction industry is only one-half to one inch. Additionally, Defendant built a wall against the front steps of the home without the Plaintiffs' authorization. Moreover, the Defendant only applied one layer of roof coating instead of at least three coatings as required. Finally, Defendant abandoned the job at Plot 22-B without adequate justification after almost one and a half years when the structure was only 75 to 85 percent complete.

Substantial performance of a contract occurs where there is performance of all the essentials necessary to accomplish the purpose of the contract. 13 Am. Jur. Building and Construction Contracts §43. Clearly there was no substantial performance of any of the contracts. Plaintiffs had a reasonable expectation that the repair and reconstruction of the structures on Plots 22-B and 37 would be timely performed in good faith and in a workmanlike manner. For the reasons discussed

above, the Court finds that the Plaintiffs did not receive substantial performance from Defendant and that Defendant materially breached the contracts for construction services at Plots 22-B and 37. Accordingly, Plaintiffs are therefore entitled to total damages under the contract.

IV. Damages

Having found the Defendant materially breached both the Plot 22-B and Plot 37 contracts, the Court now turns to Plaintiffs' claims for damages. Every injured party has a right to damages for any breach by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged. Restatement (Second) of Contracts § 346(1)(1981). One suing for breach of contract must establish his losses with some degree of reasonable certainty to be entitled to recovery. Raimer v. Stout, 14 V.I. 568, 590 (Terr.Ct. 1978)(citing Restatement (Second) of Contracts § 331). "If the breach caused no loss or if the amount of the loss is not proved . . . , a small sum fixed without regard to the amount of loss will be awarded as nominal damages." Restatement (Second) of Contracts § 346(2); *See also* Cover v. Island Cars of St. Croix, 18 V.I. 156 (Terr.Ct. 1982).

Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed. Restatement (Second) of Contracts §347, cmt.a; *See also* Christmas v. Virgin Islands Water & Power Auth., 18 V.I. 624 (D.V.I 1981). For breach due to defective performance or due to abandonment of the contract, an injured party can get a judgment for damages measured by the reasonable cost of reconstruction and completion in accordance with the contract, so long as this is

possible and does not involve unreasonable economic waste. See 13 Am Jur 2d Building & Construction Contracts §80 and 5 Corbin on Contracts § 1089 (1964)(emphasis supplied); See also Sheldon v. Northeast Developers, Inc., 238 A.2d 775 (Vt. 1968) and Cooper Concrete Co. v. Hendricks, 386 S.W.2d 221 (Tex. Civ.App. 1965).²⁴ The amount actually paid by the owner to another contractor for correction and completion in accordance with the contract is a measure of damages for the Defendant's breach. 5 Corbin on Contracts § 1089; See also Dierickx v. Vulcan Industries, 158 N.W.2d 778 (Mich.Ct.App. 1968). If it is made to appear that physical reconstruction and completion in accordance with the contract will involve unreasonable economic waste by destruction of *usable* property or otherwise, the damages awarded for the contractor's breach of contract will be measured by the difference between the market value that the structure contracted for would have had and that of the imperfect structure received by the Plaintiffs. 5 Corbin on Contracts §1090; See also Restatement (Second) of Contracts § 348(2); Vezina v. Nautilus Pools, Inc., 610 A.2d 1312 (Conn.App.Ct. 1997);²⁵ Oelschlegel v. Mutual Real Est.Inv.Trust, 633 A.2d 181 (Pa.Super. 1993), *appeal denied* 651 A.2d 540; Bayuk v. Edson, 46 Cal Rptr 49, 54

²⁴ The court in Cooper held that as a general rule, "the correct measure of damages resulting from the breach of a building contract is ordinarily the reasonable cost of remedying the defects which constitute a breach of contract, provided such contract has been 'substantially performed' and the defects in its performance can be remedied without impairing the building as whole; but if such defects cannot be remedied without impairing the structural efficiency of the building, the measure of the damages is the difference between the value of the building as constructed and its value had it been constructed according to plans and specifications." Cooper, 386 S.W. 2d at 223.

²⁵ The court in Vezina held that "[W]here expectation damages for breach of contract greatly exceed diminished value of property, award of damages is limited to diminished value of property."

(Cal.Dist.Ct.App. 1965);²⁶ and Worthen Bank & Trust v. Silvercool Serv., 687 P.2d 464, 467 (Colo.Ct.App. 1984).²⁷

Finally, where there is an express stipulation as to the amount of compensation and there has been full performance by the contractor, such stipulation is conclusive on the parties, and measures the amount of recovery for performance, irrespective of whether the cost of performance exceeded the amount stipulated. 17 C.J.S. Contracts §§.361 and 367(1); *See also* 13 Am Jur 2d Building and Construction Contracts § 18²⁸ and Gutmacher v. H & J Constr. Co., 419 P.2d 525 (Ariz. 1966). Furthermore, if a building and construction contract is fairly entered into by an experienced builder, the fact that a portion of the work proves to be more expensive than was estimated does not entitle the builder, in the absence of fraud or mistake, to any allowance beyond the contract price. 17 C.J.S. Contracts § 367(1)(*cited in* Knight Bros., Inc. v. State, 199 N.W.2d 720, 727 (Neb. 1972)).

²⁶ The court in Bayuk held:

[W]here there was testimony to the effect that tearing and repairing defects in design and building of house would cost more than rebuilding of house in its entirety, it was proper to compute house owner's damage due to faulty design and supervision by architect based on diminution of market value due to defects.

²⁷ The Court in Worthen held:

In breach of contract for faulty installment of roof in which evidence established that roof installed by builder was unusable and had to be removed and replaced, proper measure of damages was cost of replacement of roof rather than difference in value between building with roof installed by builder and with the replacement roof.

²⁸ Ordinarily, the right to compensation under a building or construction contract is determined from the terms of the contract, and when the amount of compensation is specified therein it is controlling.

A. Plot 37

Turning to the case at hand, the contract price for the work at Plot 37 was \$80,000. However, the Plaintiffs have provided checks totaling \$126,500 which they allege were paid to Defendant for the reconstruction of the house at Plot 37. Plaintiffs also claim that they purchased \$15,701.59²⁹ worth of materials with the understanding that Defendant would pay 50% of the costs of those items included in his estimate. According to Plaintiffs, Defendant determined only \$11,000 of these material costs were included in his estimate and agreed to reimburse them for 50% of those costs, or \$5,500. Thus, Plaintiffs allege that Defendant has received the total amount of \$126,500 for his performance on the Plot 37 contract and owes them \$5,500 as reimbursement for materials they purchased. However, despite the alleged agreement between the parties to split the costs of materials, the Plaintiffs are seeking to recover as compensatory damages the entire amount of \$15,701.59 they claimed they spent on materials for the work at Plot 37 and as well as the amount of \$8,757.92 incurred for materials used in the unauthorized construction of an additional two feet of interior wall.

1. The Original Contract

There is little dispute that the contract for Plot 37 was not substantially performed by the Defendant. Defendant committed several material breaches to the original contract. Specifically, Defendant unreasonably delayed performance of the contract, and he defectively laid out of the roof.

²⁹ Although Plaintiffs claim that they paid \$15,701.59 for the materials, the receipts they provided only total \$14,089.04.

Regarding the delay, the proper measure of damages for a Defendant's wrongful delay in the performance of a contract is the loss resulting from the delay. 25 C.J.S. Damages §77 (1966). Ordinarily, under a building construction contract, in the absence of a stipulation in the contract, the rental value or value of the use of the property, less the expenses of maintaining the building, will be the measure of damages unless it clearly appears that the owner could not, during the delay, have rented the building, or the building was constructed for sale only and was sold for the price originally fixed although at a later date. *Id.* In the case *sub judice*, the Plaintiffs have presented no evidence as to any loss that they sustained as a result of Defendant's unreasonable delay in the performance of the Plot 37 contract. Specifically, Plaintiffs have presented no testimony as to the rental value or value of use of the house at Plot 37 or that it was their intention to sell the house. To the contrary, Plaintiffs continued to reside at Plot 37. If the breach caused no loss, or if the amount of the loss is not proved, a small sum fixed without regard to the amount of loss will be awarded as nominal damages. Restatement (Second) of Contracts § 346(2). Because Plaintiffs have not proven actual loss of rental value or the value of the loss of use, the Court will award nominal damages in the sum of \$1.00.

With regard to Defendant's improper layout of the roof, the proper measure of damages is ordinarily the reasonable cost of reconstruction and completion in accordance with the contract. However, Plaintiffs' expert, Larry French, testified that he did not prepare an estimate to correct the roof since it would be impractical to do so. Specifically, Mr. French testified that the whole roof would have to be taken off in order to correct the defective design and that the resulting cost would be too exorbitant and not economically feasible. Thus, the proper measure of damages in the instant

matter becomes the diminution of market value due to the defects.

This Court, however, cannot determine loss of market value because the Plaintiffs failed to present the requisite evidence. Specifically, Plaintiffs presented no evidence of the present market value of the house with the improper layout design. Similarly, Plaintiffs presented no evidence of what the market value of the house would have been had the roof been constructed in a workmanlike manner. Again, since Plaintiffs have failed to prove actual loss of market value, this Court will award nominal damages for Defendant's defective performance in the sum of \$ 1.00.

2. *Extra Work or Modifications/Materials*

A builder's right to compensation for additional, changed, or extra work depends on the existence of a valid contract, express or implied, as well as evidence that the contractor performed services, or furnished material, and did work outside of and in addition to the specifications agreed on, at an expense in excess of the contract price. 17A C.J.S. Contracts § 371(2). Furthermore, a contractor may recover the reasonable value of additional work necessitated by a material change of specifications. 13 Am Jur 2d Building and Construction Contracts § 19. However, there can be no recovery for extra work performed or materials supplied without the knowledge and consent of the adverse party. 17A C.J.S. Contracts § 364.

In the case *sub judice*, there is no dispute among the parties that Defendant was authorized, outside of the original contract, to extend the back of the house as well as to add a small bathroom at Plot 37. However, Plaintiffs never authorized Defendant to extend the building as far back east as he did nor to increase the height of the walls by two feet. Furthermore, Plaintiffs allege that despite several requests made to the Defendant to provide them with estimates for the additions,

Defendant finally handed them a bill for \$42,000 for the extra work performed only after the additions were about 90% complete. In response, Defendant admits that Plaintiffs made several requests for the estimates but that he did eventually provide them with a \$20,000 to \$30,000 estimate for both the extension and a \$1,700 estimate for the small bathroom. However, Defendant also admitted at trial that he built the houses without explaining to the Plaintiffs what they owed him or why they owed him.

Although the Defendant was entitled to compensation for work performed pursuant to Plaintiffs' request and knowledge, it appears to the Court that the Defendant received additional money for a portion of work performed *without* the express authorization from the Plaintiffs. However, one suing for breach of contract must establish his losses with some degree of reasonable certainty to be entitled to recovery. Raimer v. Stout, 14 V.I. 568, 590 (Terr.Ct. 1978)(*citing* Restatement (Second) of Contracts § 331). Furthermore, if the amount of the loss is not proved, a small sum fixed without regard to the amount of loss will be awarded as nominal damages. Restatement (Second) of Contracts § 346(2); *See also Cover v. Island Cars of St. Croix*, 18 V.I. 156 (Terr.Ct. 1982). The Court finds the Plaintiffs have failed to provide sufficient evidence that would allow the Court to determine the value of Defendant's extra work or to what amount Defendant was not entitled. Because Plaintiffs have failed to prove their actual losses on the unauthorized work, the Court will award nominal damages of \$1.00.

Thus, the only remaining damages issue with regard to Plot 37 is whether the Plaintiffs are entitled to compensation of \$15,701.59 for materials that they purchased out-of-pocket for the job at Plot 37 and as well as the amount of \$8,757.92 for the additional materials used when Defendant

raised the height of the building by two feet without authorization. The record reveals that Plaintiffs are entitled to recover the amount of \$8,757.92 representing the cost for the additional two feet of interior wall. It is clear that Plaintiffs never authorized Defendant to raise the height of the roof by two feet. To the contrary, Plaintiffs informed Defendant that the roof was going to be too high but Defendant assured them that such would not be the case. Since Plaintiffs actually incurred the cost of materials for the additional two feet of wall which was not contemplated by the parties, the Court will award the sum of \$8,757.92 as damages.

Finally, regarding Plaintiffs' claim for their entire out-of-pocket costs of \$15,701.59 for materials, the Court finds there is no basis for recovery of this amount. However, Plaintiffs did testify to an agreement between the parties in which Plaintiffs would purchase certain items so that they could get exactly what they wanted and Defendant would reimburse them for their purchases. According to Plaintiffs, Defendant agreed to reimburse 50 percent of the costs of those items already included in his estimate. Plaintiffs testified that under this agreement, Defendant determined only \$11,000 in materials out of their total purchases of \$15,701.59 were included in the contract. Thus, Plaintiffs alleged Defendant owes them \$5,500, or 50 percent of \$11,000. Although Plaintiffs admitted the agreement was never reduced to writing, the Court finds the evidence is unequivocal on the terms of the agreement. Accordingly, Plaintiffs shall recover \$5,500 in compensatory damages for the cost of the materials they purchased.

B. Plot 22-B

The contract price for the work at Plot 22-B was \$75,000. Plaintiffs have provided checks totaling \$92,454.20 which they allege were paid to the Defendant for his work at Plot 22-B.³⁰ Plaintiffs further allege that after Defendant abandoned the job at Plot 22-B, they spent an additional \$36,585.13 to complete the job.

In the case *sub judice*, Defendant, without justification, abandoned his job at Plot 22-B. The house at Plot 22-B was about 75-85% complete when Defendant quit, but Defendant received \$92,454.20 for his services--nearly \$17,454.20 more than the original contract price. Furthermore, the testimony at trial once again established that the Defendant made numerous changes to the house at Plot 22-B without any authorization from the Plaintiffs. However, the only damages Plaintiffs seek to recover is the sum of \$36,585.13 representing the costs they incurred to complete the house at Plot 22-B plus lost rent for the period that Plaintiffs were unable to rent the house at Plot 22-B.

With regard to the Plaintiffs' claim for lost rent, the Court cannot award any such damages. Plaintiffs have provided no testimony whatsoever as to the rental value of the house at Plot 22-B.³¹ It was only during the closing argument that Plaintiffs' counsel stated that the Plaintiffs seek lost rent

³⁰ See Plaintiffs' Exhibit No. 15.

³¹ The only evidence found with regards to loss of rental income for the house at Plot 22-B is a letter dated June 15, 1992 from Mr. Abraham Hewitt to Defendant regarding Defendant's failure to complete his work at Plot 22-B. See Plaintiffs' Exhibit No.9. In the letter, Mr. Hewitt states "I am further demanding that an additional \$15,000.00 be paid to me which represents loss of rental income for the mentioned property between the period of April 1991 and June 1992," However, at trial, Plaintiffs only submitted this document in support of their testimony regarding their attempts to have Defendant return the keys to Plot 22-B to them. Mr. Hewitt provided no additional testimony concerning lost rent for the house at Plot 22-B.

in the amount of \$1,000 a month for the period running from July 1991 to March 1993, or a total of \$21,000. However, unsworn statements from counsel are not evidence and this Court cannot determine damages based solely on the closing statements of an attorney.

With regard to Plaintiffs' claim for the recovery of \$36,585.13 in costs to complete the house at Plot 22-B after Defendant abandoned the job, Plaintiffs have provided numerous receipts for materials and labor which total only \$20,469.18.³² In light of the rule that an injured property owner is entitled to recover reasonable actual costs for correction and completion of a construction contract, *See 13 Am Jur 2d Building & Construction Contracts* § 80 and 5 Corbin on Contracts § 1089 (1964), the Court will award Plaintiffs compensatory damages in the amount of \$20,469.18.

The Plaintiffs also testified that they should be credited with the amount of \$13,848³³ for the value of their own labor at Plot 22-B. Plaintiffs placed the same value on their labor as Defendant placed upon his laborers. Since Plaintiffs provided sufficient evidence that their labor was used to complete the work at Plot 22-B, they shall be awarded compensatory damages of \$13,848 for the value of their labor.

The Plaintiffs further seek to recover the sum of \$4,506.47 representing out-of-pocket expenses for materials used during the reconstruction of Plot 22-B. However, Plaintiffs provided no evidence that they are entitled to recover this amount. Plaintiffs bear the burden of establishing their

³² See Plaintiffs' Exhibit Nos. 17-1 through 17-4 and 17-7 through 17-12.

³³ Plaintiffs provided records representing their labor as follows:

Abraham Hewitt -	\$10,900.00 (910½ hrs * \$12.00)
Doreen Hewitt -	\$2,948.00 (536 hrs * \$5.50)

losses with some degree of reasonable certainty to be entitled to recovery. Raimer v. Stout, 14 V.I. 568, 590 (Terr.Ct. 1978)(citing Restatement (Second) of Contracts § 331). If Plaintiffs fail to meet the burden of proving such losses, a small sum fixed without regard to the amount of loss will be awarded as nominal damages. Restatement (Second) of Contracts § 346(2); *See also* Cover v. Island Cars of St. Croix, 18 V.I. 156 (Terr.Ct. 1982). The Court finds the Plaintiffs have failed to provide sufficient evidence that would allow the Court to what amount Defendant was not entitled. Because Plaintiffs have failed to provide an adequate basis for the recovery of their material costs incurred for the work at Plot 22-B, the Court will award nominal damages of \$1.00.

V. Defendant's Counterclaim/Restitution

Although Defendant materially breached the construction contracts and is therefore precluded from seeking damages under the contract, Defendant may still recover for the value of his services under an equitable remedy. Restatement (Second) of Contracts § 237 cmt. d. In the absence of waiver or excuse, compensation payable on the completion of a contract is not recoverable where there has not been at least substantial performance of the contract. 17A C.J.S. Contracts § 367(6); *See also* Restatement (Second) of Contracts § 237, cmt. d. The contractor, however, may recover on a quantum meruit theory the reasonable value of the labor and materials furnished, if he has acted in good faith and the owner has retained the benefit of the partial performance. 17A C.J.S. Contracts § 367(6); *See also* Restatement (Second) of Contracts §§ 237, cmt. d and 370. This rule cannot be invoked where the failure to perform is wilful or intentional, or is due to carelessness, or unless the omission, though intentional, is due to a belief that performance in that respect is not required. 13

Am Jur 2d Building and Construction Contracts § 42; *See also* 17A C.J.S. Contracts § 367(6)³⁴ and Restatement (Second) of Contracts § 374. The measure of the builder's recovery for a partial performance, when entitled so to recover, is the reasonable value of the labor and materials having reference to the contract price, not to exceed the benefit received by the owner, and subject to a deduction of the amount of damages sustained by the owner by reason of the builder's failure fully to perform the contract. 17A C.J.S. Contracts § 367(6); *See also* Restatement (Second) of Contracts § 371³⁵ and Ventura v. Pearson, 19 V.I. 107 (Terr.Ct. 1980).³⁶

³⁴ Where the failure of the builder substantially to perform is willful and without justification, and the owner cannot avoid availing himself of the benefits of a partial performance, by reason of the labor and materials being attached to the owner's freehold, the builder is not entitled to any compensation for his partial performance, either on express contract or on quantum meruit, unless the contract is a divisible one.

17A C.J.S. Contracts §367(6).

³⁵ Section 371 states in pertinent part:

If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either

(a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or

(b) the extent to which the other party's property has been increased in value or his other interests advanced.

³⁶ The court in Ventura held

The measure of recovery in cases where there has been no tortious conduct on the part of the recipient of the services and where both parties are equally at fault is the value of the actual benefit realized. (*citing* Restatement of Restitution § 155(1)(1937).

At trial, Defendant's expert, Taylor Babb, testified that the fair market value for the work done by Defendant was \$247,388 for the house at Plot 37 and \$143,569 for the house at Plot 22-B. Accordingly, the Defendant seeks further payment from the Plaintiffs under the legal principles of quantum meruit, unjust enrichment, and restitution. However, the Court cannot accord much weight to Mr. Babb's testimony for several reasons. First, Mr. Babb is an engineer draftsman. He does not build houses nor has he ever submitted a bid for the cost of building any particular type of building. Second, Mr. Babb testified that in determining the fair market value of Defendant's work, one would have to know what work was done, what building materials were purchased, and what labor was provided. Despite this testimony, Mr. Babb did not consider the materials and labor costs for which Plaintiffs paid, the time it took Defendant to build the houses, and the value of work done by the Plaintiffs themselves at both plots in making his determination of fair market value. Third, Mr. Babb's figures include the extra work Defendant performed on both properties without Plaintiffs' authorizations. Finally, with regard to Plot 22-B, Mr. Babb inspected the house in January 1996 after the Hewitts had put in numerous hours of labor along with thousands of dollars for out of pocket costs.

Except for Taylor Babb's testimony, Defendant provided no other credible evidence in support of his claim for restitution. Although Defendant has provided a spreadsheet of all of his original invoices, receipts, and canceled checks, there is no formal attestation to the document and the spreadsheet just contains numbers without any references to a corresponding invoice, receipt or

check.³⁷ Furthermore, Defendant has testified that he cannot recall exactly how much money he received from the Plaintiffs for his work on both plots. Additionally, Defendant has provided no itemization of his material and labor costs nor did he keep timesheets of all of his employees. This Court therefore is without basis for awarding restitution damages for the value of Defendant's work at Plot 37 and Plot 22-B. Furthermore, even if Defendant had provided an adequate basis to recover the value of his services under the Plot 22-B contract, there can be no question that Defendant's abandonment of that job was intentional and without justification. Where the failure of the builder substantially to perform is willful and without justification, and the owner cannot avoid availing himself of the benefits of a partial performance, the builder is not entitled to any compensation for his partial performance on an equitable theory unless the contract is a divisible one. 17A C.J.S. Contracts § 367(6). Based upon the foregoing reasons, Defendant's counterclaim for restitution damages for the work at Plots 22-B and 37 is denied.

CONCLUSION

Construction contracts existed between the parties for renovations and repair work at Plot Nos. 22-B and 37 Estate Rattan. The Defendant materially breached the contracts through his delayed performance and failure to perform the work in accordance with the terms of the contracts.

Because Plaintiffs sufficiently proved their actual losses with regard to the Plot 37 contract, Plaintiffs shall recover damages of \$8,757.92 for the cost of the additional two feet of interior wall and \$5,500.00 for out-of-pocket material expenses. However, Plaintiffs shall only be awarded nominal damages of \$1.00 for Defendant's delayed performance, \$1.00 for the improper layout of the roof, and \$1.00 for Defendant's unauthorized work because they did not prove actual damages with regard to these claims.

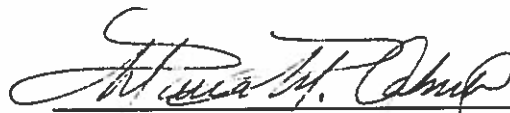
With regard to the Plot 22-B contract, Plaintiffs shall recover damages of \$20,469.18 for the costs of completion and \$13,848.00 for the value of their labor. However, because they failed to provide an adequate basis for the recovery of their out-of-pocket expenses for materials, Plaintiffs shall be awarded nominal damages of \$1.00. Furthermore, Plaintiffs shall recover nothing on their claim for lost rent since they failed to provide any evidence in support of this claim.

Finally, Defendant is precluded from recovering any unpaid balance under any of the contracts for renovations at Plot Nos. 22-B and 37 because he materially breached the contracts. Defendant is also precluded from recovering the value of his services at Plots 22-B and 37 under a restitution theory because he failed to provide an adequate basis for awarding such damages and because he intentionally and unjustifiably abandoned the job at Plot 22-B. Therefore, Defendant shall recover

Hewitt vs. Morton
Civil No. 771/1992
Memorandum Opinion
Page 42

nothing for the value of his services.

DONE AND SO ORDERED this 14th day of April, 1999.



MARIA M. CABRET
Territorial Court Judge

A T T E S T:
YVONNE V. WESSELHOFT
Clerk of the Court

By: Yvonne V. Wesselhoft
Deputy Clerk

Dated: April 14, 1999