DOCKET NO.: LLI-CV-16-6014252-S	:	SUPERIOR COURT
BRETT STONE PAINTING &	:	JUDICIAL DISTRICT
MAINTENANCE, LLC	:	OF LITCHFIELD
V.	:	AT TORRINGTON
RACHEL M. BAIRD, ET AL	:	MARCH 29, 2019

MEMORANDUM OF DECISION

I
STATEMENT OF THE CASE

This is a dispute regarding a build-out of a leased commercial building. The parties are: Brett Stone Painting and Maintenance, LLC ("BSPM"); Northwest Investments, LLC ("Northwest"); and Rachel Baird ("Baird"). While not technically a party, Brett Stone ("Stone") is key to the resolution of this case. The real property in question is located at 15 Burlington Road, Harwinton ("subject building").

The operative pleadings are: BSPM's revised complaint (#104), dated November 15, 2016; Baird's answer, claim for set off and counterclaim to BSPM's revised complaint (#106), dated December 28, 2016; BSPM's reply to set off and answer to counterclaim (#108), dated January 3, 2017; Baird's third party complaint (#112), dated January 26, 2017; Northwest's answer (#114) to Baird's third party complaint, dated February 10, 2017; and Baird's request for leave to amend and amended answer to BSPM's revised complaint (#134), dated November 9, 2018.

BSPM alleges claims of breach of contract in Count One and unjust enrichment in Count Two against Baird. Baird claims a set-off against Stone based on legal services provided to Stone and asserts counterclaims against BSPM based on breach of contract in Count One, fraud in Count Two, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes §

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42-110a et seq., in Count Three. Baird's third party complaint alleges against Northwest fraud in Count One and a violation of CUTPA in Count Two.

The matter was tried to the Court on November 27, 28, 29, 2018, and January 16, 2019. In lieu of closing arguments, the parties filed the following post-trial briefs: BSPM and Northwest's post trial memorandum (#141); Baird's post evidence brief (#142); Baird's reply brief (#143); and the reply brief of the BSPM and Northwest (#144).

In considering the evidence, in addition to evaluating the testimony, the court also drew reasonable inferences from the facts established in this case. The court took into consideration, as well, all direct and circumstantial evidence presented. The court evaluated the witnesses who came before it, taking into account not only their spoken testimony, but also their ability to perceive the things about which they testified; their ability to recall relevant facts and events; any interest that they may have had in the outcome; the reasonableness of their testimony; and any contradictions that arose between their testimony and other evidence introduced at the hearing. The court's conclusions are based upon all of the foregoing factors.

II
FACTS

BSPM is a Connecticut limited liability company (LLC) located in Harwinton, Connecticut. Stone is the controlling member and manager of BSPM and is in the business of residential and commercial construction. Northwest is a sole member Connecticut LLC and the owner of the subject building as well as some of the surrounding buildings (complex), which included a package store, craft store and house. Stone is the sole member and has complete control of Northwest.

Baird is a tenant pursuant to a commercial lease with Northwest. Edward Peruta (Peruta), President of American News & Information Services, Inc., shares office space and operates a broadcasting studio ("studio") at the subject building.

Prior to August 2015, Northwest purchased the whole complex, which included the subject building as well as the other buildings. The former tenants, an insurance agency and T-shirt shop, moved out before August 2015. The subject building is approximately 2000 square feet. Before the build-out began, Stone had time to inspect the building and determine any issues relating to renovating the subject building. The interior was in need of work to accommodate a new tenant.

Prior to August 2015, Baird was renting office space in Torrington for her law practice. She was paying $803 per month. She needed more room and was also looking for space for a studio. Baird and Peruta were taping a show at a public access studio in Wethersfield but wanted their own studio nearby. Her Torrington lease was set to expire in December 2015. She contacted a real estate broker to discuss potential rental properties and the cost of a build-out. She also searched for properties on the internet.

Prior to August 2015, Stone's daughter put an ad on Craig's List advertising the subject building for rent of $1600 per month. Baird emailed Stone's daughter in response to the listing and made arrangements to view the property. Stone had a pre-existing relationship with Baird and Peruta. Baird represented Stone in some legal matters. Stone also knew Baird from doing construction work for Baird's mother and for Baird. Stone knew Peruta as well.

On August 2, 2015, Baird and Peruta came to visit the subject building and met with Stone. They told Stone that they were looking for office space, a conference room and a television studio. The parties understood that the build-out would be an additional cost. Both parties had a sense of urgency. Baird was looking for more space and room for a studio and wanted to leave the

Torrington space; Stone needed a signed lease to help get financing for the renovation of the complex.

Baird and Peruta first discussed the rent with Stone. After some discussion, Stone and Baird agreed on a five-year lease with rent of $1200 each month for the first two years and $1300 each month for the final three years. The lease covered the entire subject building. The lease agreement was later reduced to writing. The parties have no dispute regarding the lease agreement.

Baird, Peruta and Stone then discussed the build-out. Stone's understanding of the agreement was hard to determine based on his conflicting testimony. First, he testified that the parties met at the property and entered into an agreement sometime in June 2015. Later, he testified that two meetings at the property actually occurred the last week or so of July 2015, and the parties entered into an agreement on July 27, 2015. Although the revised complaint alleges that "[o]n or about August 2, 2015, Stone and Baird agreed that Stone would provide materials and services to Baird in connection with the build-out" he contested being at the subject building on that date. See Rev. Compl. ¶ 3. In addition, Stone denied that there was ever an agreement to build anything for $25,000 even though the revised complaint alleges that "[t]he build-out was to be consistent with a floor plan agreed upon by the parties and for a fixed fee of $25,000." See Rev. Compl. ¶ 3. Stone testified that he needed to know what materials, i.e., carpeting, paint, etc., Baird and Peruta wanted. He claimed that the price never got finalized and that the cost of the build-out increased because of the additional work requested and the materials chosen.

Baird's understanding of the agreement diverged significantly from Stone's. She had previously discussed with a real estate agent the cost of a potential build-out of leased space and had a price in mind. Baird denied visiting the subject building before August 2, 2015. On that day, she went there with Peruta to view the property. After discussions with Stone, she offered

him $15,000 for the build-out. Stone rejected her offer. She then came back with an offer of $25,000. Stone said he could do it for $25,000. At some point, Peruta used paint to mark off the build-out that Baird and Peruta were requesting, including the location of the offices, conference room and studio. Peruta also did written sketches of the build-out. The agreement regarding the build-out was never reduced to writing. Baird testified that even though Stone asked her for input regarding certain items after that day, such as flooring, color and paint, she never thought she was agreeing to pay more than the fixed price. She would never have agreed to pay more than $25,000 for a five year lease. In addition, she thought $25,000 was expensive and could not afford to pay more. According to Peruta, the original plan discussed on August 2, 2015, included the following: installation of additional electrical plugs, studio with fiber optic and internet wiring, conference room and offices. A second bathroom was not included. There was already a bathroom in the back. It was Stone who suggested adding a bathroom.

Although the billing records for the build-out showed labor charges as early as May 15, 2015, the evidence demonstrates that Stone commenced work on the project soon after August 2, 2015, working off a sketch prepared by Peruta. See Ex. MM. Stone failed to provide an adequate explanation for the early charges. The billing records reflect that most of the charges were incurred from August 4, 2015, to October 9, 2015.

On August 11, 2015, Stone submitted a building permit application, dated August 10, 2015, to the town. The application included new heating installation, air conditioning and a water heater. The scope of work listed was: frame for three new offices, movement of electrical plugs and outlets, installation of a new drop ceiling, renovation of two bathrooms, carpet installation and painting. The estimated cost was listed as $25,000. The building permit was approved on August 11, 2015.

On August 23, 2015, Baird signed a written, five-year commercial lease agreement with Northwest. See Ex. Y. The lease did not include any provision regarding the build-out. The term runs from September 1, 2015, to August 31, 2020. The monthly rent is $1200 for the first two years and $1300 for the final three years. The lease provides for the use of the property for office work by Baird and America Media, and no more than two businesses are to operate there without notifying Northwest. Under the lease, Baird is not permitted to take any of the renovations with her when she vacates.

Baird testified that she did not have any substantive discussions with Stone regarding the build-out after August 2, 2015. She admitted that she delegated to Peruta the day-to day oversight of the project. Baird admitted that the final build-out is different than the sketch.

Peruta testified regarding his involvement in the case. During the build-out, Peruta requested several changes to the original plan. He admitted that the dimensions of the conference room had to be increased to fit their office furniture but claimed that Stone was informed before any significant work was done. Peruta requested that Baird's office be flipped to the other side of the building before the walls were installed. He also requested the installation of glass in the reception area and the studio control room. He expected to pay for the two pieces of glass and the cost of installation. Peruta paid $5000 towards the build-out.

The renovations to the subject building ended up including a kitchenette and second bathroom. The parties disagree regarding whether this additional work was requested. Both Baird and Peruta denied requesting a kitchenette and second bathroom. They were the only tenants and did not need a second bathroom. Peruta did not request that Stone include the kitchenette but had no objection to him doing so. They merely acquiesced in Stone's decision, as the landlord, to make these improvements while he was renovating the lease space for them.

Stone also asked for Baird and Peruta's input regarding flooring and paint. Baird and Peruta insisted that they believed that they were not making demands regarding flooring or painting above and beyond the original agreement. When Stone suggested putting wood flooring in the conference room floor, Peruta purportedly told Stone to "go ahead." Peruta denies requesting the wood flooring. Peruta also did not request special carpet for the studio. From Peruta's perspective, the studio did not need a drop ceiling.

During this period, Baird provided legal services to Stone, which included criminal (drunk driving charge), civil (evictions) and administrative (handgun permit) matters. While representing Stone, Baird did not discuss the build-out. Baird testified that Stone still owes her $11,000 for legal services.

Baird received an inheritance of $50,000, which she decided to use towards the rent and build-out. From August 4, 2015, to October 1, 2015, Baird issued several checks to Stone with payment directions. Ex. LL. On August 14, 2015, Baird issued a check to Stone for $16,800 to cover the rent from November 2015, to December 2016. Baird signed the lease on August 23, 2015. On September 9, 2015, Baird issued checks to BSPM for $14,400 to cover the rent for 2017 and for $10,000 towards the build-out. On October 1, 2015, Baird issued a check for $5000 towards the build-out.

In early-to-middle September 2015, Jeff Neuman (Neuman), the new local building official, stopped by the subject building to see how the project was progressing. The former building official, Frank Rybak, had issued the building permit on August 11, 2015. See Ex. Z. The estimated cost listed on the application, $25,000, was supposed to be related to the actual scope of the work in order to determine the building permit fee. The electric permit application

was not submitted until on or about October 19, 2015, and indicated the total value of the electrical work as $9000. Stone never submitted a revised building or electrical permit to the town.

Between August 2, 2015, and September 25, 2015, Peruta and Baird did not receive any documents from Stone indicating that the cost of the project had exceeded $25,000. On September 25, 2015, Stone's office sent an email to Baird, which included the following: "Attached please find a copy of the new estimate for your new at Burlington Rd. There is still an outstanding balance for work and materials. We are requesting another partial payment this time." The attached estimate, dated September 10, 2015, listed the following description: "New carpeting throughout building approx. 2000 sq ft. . . . Conference room flooring approx. 324 sq ft - #865686 cherry . . . Bathrooms (3) approx. 136 sq ft. . . . Reception area window – custom pass through cut and talk through cut – materials only. . . . Custom electrical placement of electrical plugs, lighting – materials only as of 8/20/2015. . . . Construction of office walls – separations and studio area – materials only as of 9/9/2015." Ex. KK. The estimate indicated material cost of $27,534.15 as of September 22, 2015, and labor charges of $36,445 as of September 18, 2015. Id.

Baird was shocked to find that the invoice now reflected a total cost of at least $63,979.15. She was also upset to find that the check for $14,400 was being credited to the build-out instead of the 2017 rent. Baird had concerns that she was being charged for work that was being done on the other buildings and the whole complex. After receiving the email, Baird asked Peruta to talk to Stone. Peruta confronted Stone regarding the estimate and told him that they had a deal for a $25,000 build out. Stone told Peruta he had to check on it.

By the first week of October 2015, most of the renovations had been completed. See Exs. K, L, N, O, P. There were only a few additional labor and material charges after early October 2015.

On or about October 7, 2015, Stone starting serving a jail sentence on his drunk driving case and was subsequently released on or about December 15, 2015.

Baird moved her office to the subject building on or about October 10, 2015. She had previously made arrangements with Stone to do so because she needed to hire a moving company to move her office furniture from Torrington. She also made arrangements to put the utilities in her name and pay for propane.

In mid-October 2015, Neuman returned to the property to conduct the certificate of occupancy (CO) inspection. During the inspection, he found several building code violations that required additional work. Door handles needed to be replaced and some doorways needed to be widened because they were noncompliant. There were also several code violations related to the studio requiring additional ceiling and electrical work. Some flooring changes were required. Neuman did not issue a CO based on the code violations. As a result, Baird and Peruta were unable to use the property fully for several weeks until the CO was finally issued.

On or about October 19, 2015, an electrical permit was submitted with the following description of the project: "add wiring and new light fixtures for remodeled offices and t.v. studio." Exs. DD, EE. The total value of the project was listed as $9000.

An invoice, dated October 30, 2015, listed a description of the work done, which included the following: "custom office installation; installation of walls and partitions according to plans; installation of new carpeting – remove old flooring, level out flooring and prep to except padding and carpeting, install carpeting pad, install carpeting; prep, tape, sand and paint all walls according to color scheme; install hung ceiling throughout building – paint tracks black in designated areas; install mini kitchenette: water supply lines, sink and electrical outlets; install custom glass window studio area and glass partition in reception area, install custom electrical wiring through-out

offices, reception area, conference room, studio area; install custom data wiring, audio and HDMI wiring, CATV wiring, telephone wiring and fax line; install custom phone wiring through-out offices and studio area; install custom wiring for studio lights – rewire move lighting per request; and install wiring for TV control room including data wiring." Ex. HH. The invoice indicated material costs of $36,270and labor charges of $63,751. According to the invoice, the total cost at that point was $100,021. The invoice, also listed reimbursement for work performed by Baird in the amount of $16,563.93. Id., p. 5.

After the code violations were addressed, Neuman conducted another inspection and issued a CO for the property as a single use business on November 4, 2015. Baird and Peruta were satisfied with the end product. They had no complaints regarding the quality of the work done. There was no punch list.

On November 24, 2015, Baird sent an email to Christine, Stone's daughter, contesting the additional cost of the build-out, indicating that the build-out that Stone said would cost $25,000 now costs $100,021. Ex. XX. On or about November 11, 2015, efforts were made to have Baird's accountant review the billing records. On or about February 15, 2016, Stone sent an invoice to Baird, which indicated that the total cost of the project was now $97,034.80. Although the parties never entered into a written construction contract, Stone listed finance charges for invoices unpaid after ten days that interest will be charged at a rate of one and one-half percent per month, which amounts to eighteen percent annually.

When asked about the billing records, Stone testified that his general practice would be to review the receipts for materials put in the job file with his daughter or his office assistant and bookkeeper to determine whether charges needed to be deducted, adjusted or applied to another job.

The evidence reveals that there were several inaccuracies in the billing records. The records show overbilling for labor charges by several thousand dollars, including charges before August 2, 2015. A number of receipts for material costs that were included in this job file should not have been billed to Baird. For example, there were invoices for mailboxes, tools, and building code violations, which should have not been included as costs of the build-out. Stone claimed that deductions, adjustments and reallocations were made, but the billing records are lacking in this regard. Stone calculated a blended average labor rate for carpenters, plumbers and other laborers of $45 per hour.

Based on the evidence, a reasonable inference can be drawn that, although Stone has years of experience in construction and remodeling, he engaged in poor business practices, which included maintaining inaccurate billings records and failing to engage in proper financial management of his business affairs. The invoices reflect costs for the build-out far in excess of the estimates included in the building and electrical permits.

In February 2016, and March 2016, the parties had discussions regarding the dispute. No other payments were made by Baird and Peruta. Stone made repeated demands to Baird for payment. After the invoice was sent out, no additional payments were made. As of the last day of the trial, Stone had received payments for the build-out of $15,000 from Baird and $5000 from Peruta, for a total of $20,000. As to the build-out, Stone testified that all of the subcontractors have been paid, but he is still paying his suppliers.

Stone has put the complex up for sale. All of the buildings, including the subject building, are listed as being updated. When the current lease expires in the fall of 2020, if a new tenant moves into the premises, Stone expects that he would need to do some remodeling or a build-out for a new tenant. He is not expecting to be able to find a tenant for the studio.

III
DISCUSSION

A
BSPM's Case against Baird

1
Breach of Contract Claim

BSPM claims that Baird breached her contract with BSPM in Count One of the revised complaint. "The elements of a breach of contract action are the formation of an agreement, performance by one party, breach of the agreement by the other party and damages. . . . The existence of a contract is a question of fact to be determined by the trier on the basis of all of the evidence." (Citation omitted; internal quotation marks omitted.) *Summerhill, LLC* v. *Meriden*, 162 Conn. App. 469, 474, 131 A.3d 1225 (2016). To prove the claim, BSPM must prove the elements by the fair preponderance of the evidence standard, which is "properly defined as the better evidence, the evidence having the greater weight, the more convincing force in your mind." (Internal quotation marks omitted.) *Cross* v. *Huttenlocher*, 185 Conn. 390, 394, 440 A.2d 952 (1981).

Stone testified that there was not a fixed price contract but rather a "day to day" or "time and materials" contract for the build-out. BSPM claims that "Mr. Peruta and Mr. Stone testified extensively about their near daily interactions, material choices, movement of walls, configuration of rooms, the addition of a bathroom and a kitchenette, etc." See BSPM/Northwest Post-Tr. Mem. (#141), pp. 4-5. Baird contests the breach of contract claim, pointing out that BSPM's pleadings contradict Stone's conflicting testimony regarding whether there was an agreement and/or whether any agreement was a fixed price agreement or a time and materials agreement. Specifically, Baird contends that: "As plaintiff has alleged, and defendant has admitted, that there was a $25,000 agreement for the build-out based on the plans presented on August 2, 2015, the only issue that

remains regarding plaintiff's contract issue is whether there was a subsequent agreement expanding the scope. Plaintiff presented *no* testimony that any agreement formed on August 2, 2015 ever changed after August 2, 2015 especially as he steadfastly claims that there was no such initial $25,000 agreement to form the initial contract. If there was no original agreement, it is only logical that it cannot be amended." (Emphasis in original.) Baird Post-Evid. Br. (#142), p. 3.

a

Formation of the Original Oral Agreement

The first element is the formation of an agreement. "To form a valid and binding contract in Connecticut, there must be a mutual understanding of the terms that are definite and certain between the parties. . . . To constitute an offer and acceptance sufficient to create an enforceable contract, each must be found to have been based on an identical understanding by the parties." (Internal quotation marks omitted.) *Geary* v. *Wentworth Laboratories, Inc.*, 60 Conn. App. 622, 627, 760 A.2d 969 (2000). "In order for an enforceable contract to exist, the court must find that the parties' minds have truly met. . . . If there has been a misunderstanding between the parties, or a misapprehension by one or both so that their minds have never met, co contract has been entered into by them and the court will not make for them a contract which they themselves did not make." (Internal quotation marks omitted.) *Summerhill, LLC* v. *Meriden*, supra, 162 Conn. App., 474-75. "It almost goes without saying that consideration is [t]hat which is bargained for by the promisor and given in exchange for the promise by the promise. . . . [T]he doctrine of consideration does not require or imply an equal exchange between the contracting parties. . . . Consideration consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." (Internal quotation marks omitted.) Id., 475.

"A contract is express if its terms are stated by the parties, either orally or in writing, and it is implied if its terms are not so stated. In other words, an implied contract is one in which some

or all of the terms are inferred from the conduct of the parties and the circumstances of the case, though not expressed in words, while an express contract is one in which the parties arrive at their agreement and express it in words, either oral or written . . . . An express contract is a contract whose terms are stated by the parties; an implied contract is a contract whose terms are not so stated." (Internal quotation marks omitted.) *Schreiber* v. *Connecticut Surgical Group, P.C.*, 96 Conn. App. 731, 738, 901 A.2d 1277 (2006). "In the traditional terms of offer and acceptance, when a request is made under such circumstances that a reasonable person would infer an intent to pay for them . . . the request amounts to an offer, and a contract is created by the performance of the work . . . . [C]onsistent with that principle . . . [a]n implied [in fact] contract would arise if the plaintiff rendered services, at the request of the defendant, under an expectation that they were to be paid for and if the defendant either intended to pay for them or the services were rendered under such circumstances that the defendant knew, or, as a reasonable person, should have known, that the plaintiff did expect payment . . . . The question . . . is not whether the defendant in fact expected to pay for the services but whether they were rendered under such circumstances that the defendant either knew, or as a reasonable man, should have known, that the plaintiff expected compensation." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Proctor*, 324 Conn. 245, 259-61, 152 A.3d 470 (2016). "A true implied [in fact] contract can only exist where there is no express one." (Internal quotation marks omitted.) *Janusauskas* v. *Fichman*, 264 Conn. 796, 804, 826 A.2d 1066 (2003).

Stone's testimony regarding when the parties met to discuss the build-out and what was discussed was lacking in many respects. See *Raia* v. *Topehius*, 165 Conn. 231, 235, 332 A.2d 93 (1973) ("It has long been an established legal principle in this state that the trier of fact has the right to accept part and disregard part of the testimony of a witness.") Most importantly, his

testimony that they agreed to a "day-to-day" or "time and materials" contract rather than the fixed price contract for $25,000, as alleged in the revised complaint, has little, if any, credibility. See Rev. Compl. ¶ 3 ("The build-out was to be consistent with a floor plan agreed upon by the parties and for a fixed fee of $25,000.").

The evidence demonstrates that on August 2, 2015, the parties met at the premises and discussed a lease agreement and a build-out of the leased premises. After agreeing to lease terms, they entered into an express oral agreement for the build-out of the subject building for a fixed cost of $25,000. The evidence established that there was a mutual understanding between the parties. Stone, on behalf of BSPM, negotiated various conditions and terms with Baird pertaining to the leasehold such that Baird would agree to occupy the premises, and Stone would make repairs and renovations suitable for her tenancy. There was a meeting of the minds for a fixed price contract for the build-out. The build-out contract and lease agreement, which was signed a few weeks later, were necessarily connected. BSPM reasonably expected that Baird would lease the subject building per the lease terms after the build-out. While Baird reasonably expected that she would occupy the subject building pursuant to the lease after the agreed build-out was completed.

b

Terms of the Original Agreement

The parties are in dispute regarding the terms of the original build-out agreement. "It is a fundamental principle of contract law that the existence and terms of a contract are to be determined from the intent of the parties. . . . The parties' intentions manifested by their acts and words are essential to the court's determination of whether a contract was entered into and what its terms were." (Internal quotation marks omitted.) *Auto Glass Express, Inc.* v. *Hanover Ins. Co.*, 293 Conn. 218, 225, 975 A.2d 1266 (2009).

In determining the terms of the original agreement, the court has considered the conflicting testimony of the parties as well as the documentary evidence. The photographs, taken on August 2, 2015, show that the parties met and marked out the location for the conference room, offices and studio. See Ex. A. The sketches, made by Peruta contemporaneously with this meeting, confirm these discussions. See Exs. 22, QQ, RR, WW. The scope of work listed on the building permit application dated August 10, 2015, includes the installation of a new heating unit, air conditioning unit, and a water heater, as well as framing for three new offices, movement of electrical plugs and outlets, the installation of a drop ceiling, the renovation of two bathrooms, and carpet installation and painting. See Ex. Z. The estimated cost was listed as $25,000.

The evidence establishes that the parties entered into a fixed price contract for $25,000. The terms of the agreement provided for a build-out for a conference room, three offices, and a studio. It also included necessary electrical and mechanical work as well as carpet and paint.

c

Modification of the Original Agreement

The photographs show that the build-out began soon after August 2, 2015. See Exs. B, C. It was not long before modifications to the original agreement were discussed and made. "For a valid modification to exist, there must be mutual assent to the meaning and conditions of the modification and the parties must assent to the same thing in the same sense. . . . The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act. . . . Moreover, [m]odification of a contract may be inferred from the attendant circumstances and conduct of the parties." (Citations omitted; internal quotation marks omitted.) *Precision Mechanical Services, Inc.* v. *Shelton Yacht & Cabana Club, Inc.*, 97 Conn. App. 258, 263, 903 A.2d 692, cert. denied, 280 Conn. 928, 909 A.2d 524 (2006). "[F]or modifications of a contract to be enforceable there must be new consideration . . . . Mutual promises qualify as sufficient

consideration for a binding contract . . . . [A] modification under a contract not fully performed on either side is binding . . . if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made . . . ." (Citations omitted; internal quotation marks omitted.) *Southern New England Telephone Co.* v. *Coho*, Superior Court, judicial district of New Haven, Docket No. CV-03-0476159-S (September 27, 2006, *Corradino, J.*).

There is no question that Peruta's sketches do not fully reflect all the work done on the subject building. Baird admitted that the final build-out is different than the original agreement. The evidence proves that the parties agreed to modifications of the original agreement. These modifications resulted primarily from discussions between Stone and Peruta. Baird authorized Peruta to oversee the project. While nothing was reduced to writing, Baird and Peruta agreed to pay for certain modifications while Stone agreed to make them during the build-out. These modification are fair and equitable in view of circumstances not anticipated by the parties when the contract was made.

Baird and Peruta agreed to pay for the modifications relating to the foyer, installation of glass for the reception area and studio, and the larger conference room. In addition, Peruta requested that Baird's office be flipped to the other side of the building. However, the evidence supports Baird and Peruta's contention that they did not request the installation of a second bathroom or a kitchenette but had no objection to Stone doing so. These changes were made by Stone and were improvements to his property. Although Stone asked for Baird and Peruta's input regarding carpet and paint, that was part of the original agreement. Peruta did not request special carpet for the studio. When Stone suggested putting wood floors in the conference room floor, Peruta told him to "go ahead." Peruta denies requesting the wood floors. From Peruta's perspective, the studio did not need a drop ceiling.

d

Breach of the Modified Agreement

As previously noted, the essential elements for a cause of action based on breach of contract are (1) agreement formation, (2) performance by one party, (3) breach of the agreement by the other party, (4) direct and proximate cause, and (5) damages. See *McCann Real Equities Series XXII, LLC* v. *David McDermott Chevrolet, Inc.*, 93 Conn. App. 486, 503-504, 890 A.2d 140, cert. denied, 277 Conn. 928, 895 A.2d 798 (2006).

The preponderance of the evidence proves that BSPM prevails under a theory of breach of contract. First, the parties entered into an oral agreement for a build-out of the subject building. The agreement was subsequently modified but was still an enforceable express contact. Second, BSPM performed under the agreement. The build-out was completed and a CO was issued on November 4, 2015. Baird was satisfied with the work done and has been occupying the premises since October or November 2015. Third, although Baird initially agreed to pay $25,000 for the build-out, she failed to pay that full amount and also did not make any payments towards the modifications that were agreed upon. BSPM made several demands for payment to Baird without success. Baird has paid a total of $20,000 towards the build-out. Baird has breached the agreement based on her failure to pay. Fourth, Baird's breach is the direct and proximate cause of the damages suffered by BSPM. BSPM has not been paid in full and has been unable to pay all the suppliers relating to the build-out.

"Damages are an essential element of the plaintiff's proof and must be proved with reasonable certainty." *Simone Corp.* v. *Connecticut Light & Power Co.*, 187 Conn. 487, 495, 446 A.2d 1071 (1982). "[T]he trial court has broad discretion in determining whether damages are appropriate." *Amwax Corp.* v. *Chadwick*, 28 Conn. App. 739, 745, 612 A.2d 127 (1992). A

property owner is competent to testify to the value of his or her property. *Shane* v. *Tabor*, 5 Conn. App. 363, 364, 497 A.2d 1047 (1985).

Contrary to Baird's argument that BSPM failed to introduce evidence regarding damages, the evidence is sufficient to assess a value for the modifications. These are modifications not cost overruns. The evidence supports Stone's claim that he is entitled to damages for the foyer, installation of glass for the reception area and studio, the larger conference room, and some additional expenses relating to the studio. Accordingly, the court awards damages in the amount of $11,000. BSPM is not entitled to an award of damages for the kitchenette, second bathroom, building code violations, and any other work done. The studio was always part of the original agreement. The evidence strongly suggests that Stone significantly underestimated the costs of the build-out to his detriment.

In sum, the evidence shows that BSPM has damages in the amount of $5000 for the balance of the original agreement plus $11,000 for the modifications, for a total of $16,000.

2
Unjust Enrichment Claim

In Count Two of the revised complaint, BSPM alleges a claim of unjust enrichment against Baird. "Plaintiffs seeking recovery for unjust enrichment must prove [by the fair preponderance of the evidence standard] (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." (Internal quotation marks omitted.) *Vertex* v. *Waterbury*, 278 Conn. 557, 573, 898 A.2d 178 (2006). "Unjust" is defined as "contrary to justice; not just." Black's Law Dictionary (8th ed. 2004).

"Unjust enrichment applies wherever justice requires compensation to be given for property or services rendered under a contract, and no remedy is available by an action on the

contract. . . . A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another. . . . With no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable, it becomes necessary in any case where the benefit of the doctrine is claimed, to examine the circumstances and the conduct of the parties and apply this standard. . . . [T]he determinations of whether a particular failure to pay was unjust and whether the defendant was benefited are essentially factual findings for the trial court that are subject only to a limited scope of review on appeal." (Citations omitted; internal quotation marks omitted.) *Hartford Whalers Hockey Club* v. *Uniroyal Goodrich Tire Co.*, 231 Conn. 276, 282-83, 649 A.2d 518 (1994).

BSPM argues that Baird was unjustly enriched in the amount of $77,034.80. BSPM/Northwest Post-Tr. Mem. (#141), p. 7. Specifically, it contends that "There is no dispute that Baird got the fit-up she wanted. Mr. Peruta and Mr. Stone testified extensively about their near daily interactions, materials choices, movement of walls, configuration of rooms, the addition of a bathroom and a kitchenette, etc. Baird, in her own words, was very pleased with the build-out. That is to say up to and including the rendering of the bill. There can be no serious dispute that Baird was unjustly enriched at BSP's expense. She accepted the benefit of the construction of a custom office over and above the $25,000 agreed upon price. . . . Baird unjustly retained the benefits of the custom fit-up. She got a $95,000 build-out for $20,000." Id., pp. 4-5.

Baird counters that the unjust enrichment claim fails because: "First, there is no evidence that the defendant was enriched, unjustly or otherwise . . . . [And,] [s]econd, an unjust enrichment claim cannot stand alongside a breach of contract claim as they are legally inconsistent. An unjust

enrichment claim can only lie when there is no adequate remedy at law." Baird Post-Evid. Br. (#142), pp. 3-4.

In reply, BSPM and Northwest argues that: "there can be no doubt that Baird breached the $25,000 contract by paying only $20,000. Thereafter, the 'agreement' is much less definite, hence the unjust enrichment claim. BSPM is not claiming [it] had a definite agreement (to wit, a 'contract') for the excess work. [It] is, however, claiming that, in equity, Baird was unjustly enriched by it." BSPM/Northwest Reply Br. (#144), p. 2.

BSPM's unjust enrichment claim arguably presents several legal obstacles. First, as previously noted, "[u]njust enrichment is a legal doctrine to be applied when no remedy is available pursuant to a contract. . . . The lack of a remedy under a contract is a precondition to recovery based on unjust enrichment or quantum meruit." (Citations omitted.) *United Coastal Industries, Inc.* v. *Clearheart Construction Co.*, 71 Conn. App. 506, 512-13, 802 A.2d 901 (2002). In this case, BSPM has a remedy under law having prevailed on the breach of contract claim. Second, this is not a case of partial performance. See id., 512-15. BSPM fully performed under the agreement. The build-out was completed after a few week delay to address building code violations. Baird moved into the premises and was satisfied with the work done. Third, "a claim for restitution based on an alleged implied in law contract is barred by an express contract that fully addresses the same subject matter." See *Kelley* v. *Five S Group, LLC*, 136 Conn. App. 57, 66, 45 A.3d 647, cert. denied, 306 Conn. 904, 52 A.3d 731 (2012). In this case, the express oral contract between the parties addressed the subject matter of the build-out of the leased premises. Finally, BSPM is not entitled to prevail on both breach of contract and unjust enrichment claims. See *Stein* v. *Horton*, 99 Conn. App. 477, 485, 914 A.2d 606 (2007) ("Parties routinely plead

alternative counts alleging breach of contract and unjust enrichment, although in doing so, they are entitled only to a single measure of damages arising out of these alternative claims.").

Assuming arguendo that BSPM is able to overcome any legal obstacles, its case for unjust enrichment has serious proof problems. First, Stone's testimony was not sufficiently credible to prevail on the unjust enrichment claim. See *Raia* v. *Topehius*, supra, 165 Conn. 235 ("It has long been an established legal principle in this state that the trier of fact has the right to accept part and disregard part of the testimony of a witness."). Second, BSPM's record keeping system does not provide a reliable basis to make a restitution determination. For example, the records reflected numerous charges before August 2, 2015, as well as subsequent charges, that should not have been billed to Baird. Finally, it is too difficult to determine the benefit to Baird given that she is a tenant with only a five-year lease and is not able to take any of the improvements with her when she leaves the premises. The improvements run with the premises not the tenant.

For the above reasons, BSPM's claim of unjust enrichment must fail.

B
Baird's Case against BSPM& Northwest

1
Baird's Set-Off Claim

Baird has asserted a set-off against Stone, as an individual, based on legal services she provided to Stone. "A right of setoff may . . . be asserted in response to a complaint just as a counterclaim may be so pleaded. Practice Book § 10-54." *Gattoni* v. *Zaccaro*, 52 Conn. App. 274, 280 n.4, 727 A.2d 706 (1999). "As to setoff. . . . [i]t is available only when the plaintiff sues for recovery of a debt." 1 E. Stephenson, Connecticut Civil Procedure (3rd Ed. 1997) § 85, p. 258.

"In Connecticut, a setoff may be legal or equitable in nature. . . . Legal setoff is governed by General Statutes § 52-139 et seq. and involves mutual debts between parties in any action: (1)

to recover on a debt pursuant to § 52-139;[1] (2) by an assignee of a nonnegotiable chose in action pursuant to General Statutes § 52-140; (3) for trespass to real or personal property or other tort committed without force pursuant to General Statutes § 52-141; or (4) involving joint debtors pursuant to General Statutes § 52-142. . . . When the statutes governing legal setoff do not apply, a party may be entitled to equitable setoff, nonetheless, only to enforce the simple but clear natural equity in a given case. . . . The right to setoff, although it may arise out of a written instrument, is a common law equitable right that is not itself a written instrument. . . . Although we have discerned no meaningful distinction between setoff rights that may derive from common-law principles and contract versus those that are moored in statute . . . [i]t is clear that a setoff does not occur automatically but, rather, it must be exercised affirmatively. . . . In the usual case, setoff is the equitable right to cancel or offset mutual debts or cross demands . . . ." (Citations omitted; footnote added; internal quotation marks omitted.) *OCI Mortgage Corp.* v. *Marchese*, 255 Conn. 448, 463-65, 774 A.2d 940 (2001).

Baird argues that "[w]hile Stone denies the agreement to set-off the debt in the Answer, the bills submitted as Exhibit HH specifically reflect that [BSPM] agreed to credit Baird $16,563.93 for legal fees to Stone individually. . . . Stone never disputed the bill, and . . . was willing to set-off the amount." Baird Post-Evid. Br. (#142), p. 19; see also Ex. HH, p. 5. Baird also argues that the set off should be allowed under the theory of corporate veil piercing. Baird Post-Evid. Br. (#142), pp. 20-22. Baird specifically argues that BSPM "is commingling not only the actual funds but crediting funds rightfully to different entities both controlled by Stone. Such

[1] "The relevant portion of [§ 52-139] . . . provides: (a) In any action brought for the recovery of a debt, if there are mutual debts between the plaintiff or plaintiffs, or any of them, and the defendant or defendants, or any of them, one debt may be set off against the other." (Emphasis omitted; internal quotation marks omitted.) *Petti* v. *Balance Rock Associates*, 12 Conn. App. 353, 362, 530 A.2d 1083 (1987).

conduct reflects dominion and control over entities and a clear lack of regard for the company structures. Therefore, the Court should set-off the bills against the balance of the $5000 owed or the $25,000 contract." Id., p. 22. Baird further argues that "[r]egarding the set-off, defendant does not seek damages, but merely what the legal term states, a set-off." Baird Reply Br. (#143), p. 4. Baird testified that Stone still owes her $11,000 for legal services.

BSPM contests the set-off and makes the following argument: "Baird asserts a set off as between herself and Brett Stone, the person. Baird indisputably was Mr. Stone's lawyer, and she claims that he owes her money for fees. He, as an individual, is not a party to this case. Thus, anything he might owe her is of no moment. A set off is a debt independent of the action sued on. . . . A condition precedent to the application of the set off statute . . . is that the Defendant's claim arises from debt due from the Plaintiff. . . . Here, Baird has not alleged and has not claimed any debt due to herself from BSP[M], only from Mr. Stone individually." BSPM/Northwest Post-Tr. Mem. (#141), p. 3.

Assuming arguendo that Baird is not entitled to a set-off based on § 52-139, she is entitled to an equitable set-off. "When the statutes governing legal setoff do not apply, a party may be entitled to equitable setoff, nonetheless, only to enforce the simple but clear natural equity. . . . The right to setoff, although it may arise out of a written instrument, is a common law equitable right that is not itself a written instrument. . . . Although we have discerned no meaningful distinction between setoff rights that may derive from common-law principles and contract versus those that are moored in statute . . . [i]t is clear that a setoff does not occur automatically but, rather, it must be exercised affirmatively." (Citations omitted; internal quotation marks omitted.) *OCI Mortgage Corp.* v. *Marchese*, supra, 255 Conn. 464.

"Pursuant to Connecticut case law . . . a court may properly disregard a corporate entity if the elements of *either* the instrumentality rule or identity rule are satisfied." (Emphasis in original.) *Litchfield Asset Management Corp.* v. *Howell*, 70 Conn. App. 133, 148 n.11, 799 A.2d 298, cert. denied, 261 Conn. 911, 806 A.2d 49 (2002). "In the usual veil piercing case, a court is asked to disregard a corporate entity so as to make available the personal assets of its owners to satisfy a liability of the entity. . . . [A]n instance of what is known as 'reverse piercing,' [is] . . . [where] the assets of the corporate entities should be made available to pay the personal debts of an owner." Id., 149.

"The instrumentality rule requires, in any case but an express agency, proof of three elements: (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice *in respect to the transaction attacked* so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of plaintiff's legal rights; *and* (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of." (Emphasis in original; internal quotation marks omitted.) *Davenport* v. *Quinn,* 53 Conn. App. 282, 300, 730 A.2d 1184 (1999), quoting *Angelo Tomasso, Inc.* v. *Armor Construction & Paving, Inc.*, 187 Conn. 544, 553-54, 447 A.2d 406 (1982).

"The identity rule has been stated as follows: [i]f a plaintiff can show that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation

conducted by one corporation for the benefit of the whole enterprise." (Internal quotation marks omitted.) *Davenport v. Quinn,* supra, 53 Conn. App. 300-301, quoting *Angelo Tomasso, Inc. v. Armor Construction & Paving, Inc.,* supra, 187 Conn. 554.

In applying the identity rule, the court makes the following findings. Baird represented Stone, personally, in several criminal, civil and administrative matters. Her records reflect that she did substantial legal work on his behalf beginning in January 2014. See Ex. TT. Stone did not contest that Baird represented him in these matters. The evidence demonstrates that Stone commingled not only the actual funds but credited funds to the different entities, which are solely controlled by Stone, including a reimbursement credit for legal work performed for Stone by Baird on BSPM Invoice #333. See Ex. HH. Stone's conduct reflected dominion and control over these entities and a clear lack of regard for the company structures. As a result, the asset of the corporate entity, the money owed to BSPM by Baird, should be made available to pay the personal debts of an owner, his outstanding legal bill to Baird. Having weighed the equities, the court finds that Baird is entitled to an equitable set-off against in the amount of $11,000.

2

Baird's Counterclaim/Third Party Complaint against BSPM and Northwest

In her counterclaim/third-party claims, Baird alleges that: "Brett Stone Painting/Northwest Investments LLC 'collectively Stone': breached the $25,000 contract;[2] committed fraud;[3] and

[2] As previously noted, the essential elements for a cause of action based on breach of contract are (1) agreement formation, (2) performance by one party, (3) breach of the agreement by the other party, (4) direct and proximate cause, and (5) damages. See *McCann Real Equities Series XXII, LLC* v. *David McDermott Chevrolet, Inc.*, supra, 93 Conn. App. 503-504.

[3] "The essential elements of an action in common law fraud . . . are that: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury. . . . Under a fraud claim of this type, the party to whom the false representation was made claims to have relied on that representation and to have suffered harm as a result of the reliance." (Internal quotation marks omitted) *Simms* v. *Seaman*, 129 Conn. App. 651, 671, 23 A.3d 1 (2011), aff'd, 308 Conn. 523, 69 A.3d 880 (2013).

engaged in unfair trade practices[4] by basically setting up a 'bait and switch' claim regarding the $25,000 agreement. It is a classic maneuver to agree to a $25,000 build-out to get the customer 'in the door' and then bill her for $100,000 with no confirmation, email, letter etc. . . . Reaching a $25,000 agreement and then billing for $64,000 then $100,000 and placing the matter in suit is clearly a breach of a $25,000 contract. It also meets the elements of fraud. . . . The conduct certainly meets the standard for an unfair trade practice in violation of [General Statutes §] 42-110 (g)." (Footnotes added.) Baird Post-Evid. Br. (#142), pp. 22-23. BSPM and Northwest deny all of these claims.

"[T]he classic 'bait and switch' operation [is] where a consumer is promised (and pays for) one thing, and is given quite another." *Benevenuti Oil Co.* v. *Foss Consultants, Inc.*, Superior Court, judicial district of New London, Docket No. 01559862 (August 1, 2003, *Corradino, J.*); *Urich* v. *Fish*, Superior Court, judicial district of New Haven, Docket No. 360659 (November 27, 2000, *Blue, J.*) (28 Conn. L. Rptr. 615, 616) (discussing CUTPA claim); see also *CitiMortgage, Inc.* v. *Coolbeth*, 147 Conn. App. 183, 196, 81 A.3d 1189, cert. denied, 311 Conn. 925, 86 A.3d 469 (2013) (referencing bait and switch tactic and noting that no evidence of bait was introduced; implying that a buyer must first be offered one item or term, proceed under the assumption they

[4] "The essential elements to pleading a cause of action under CUTPA are: 1. That the defendant committed an unfair or deceptive act or practice . . . ; 2. That the act complained of was performed in the conduct of trade or commerce; 3.That the prohibited act was the proximate case of harm to the plaintiff." T. Merritt, 16 Connecticut Practice Series: Elements of an Action (2018), § 11:1, p. 1206. "[General Statutes §] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the federal trade commission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other business persons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . . Thus a violation of CUTPA may be established by showing either an actual deceptive practice . . . or a practice amounting to a violation of public policy." (Citation omitted; internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 18-19, 938 A.2d 576 (2008).

will receive that item or term, and then later be given an item or term that is worse than initially offered). In the specific context of CUTPA a "bait and switch" tactic is one where a "seller profits from its [deliberate] deception" when selling a product to a buyer who believes they are receiving one thing, but, in fact, receive something else. *Ferrigno* v. *Pep Boys – Manny, Joe & Jack of Delaware, Inc.*, 47 Conn. Supp. 580, 583, 818 A.2d 903 (2003); *Marino* v. *Bank of America, N.A.*, Superior Court, judicial district of Litchfield, Docket No. CV-07-5001571-S (July 11, 2007, *Pickard, J.*) (43 Conn. L. Rptr. 751, 753). A "bait and switch" tactic is a CUTPA violation. *Osprey Properties, LLC* v. *Corning*, Superior Court, judicial district of Fairfield, Docket No. CV-15-6048525 (October 2, 2015, *Arnold, J.*); *Ferrigno* v. *Pep Boys – Manny, Joe & Jack of Delaware, Inc.*, supra.

Baird is bound by the factual theory alleged in Counts One, Two and Three of her Counterclaim that the corporate entities, BSPM and Northwest, engaged in conduct that amounted to a "bait and switch." See *Genier* v. *Commissioner of Transportation*, 306 Conn. 523, 536-37, 51 A.3d 367 (2012) ([E]ssential allegations may not be supplied by conjecture or remote implication . . . the [pleading] must be *read in its entirety* in such a way as to give effect to the pleading *with reference to the general theory upon which it proceeded* . . . . As long as the pleadings provide sufficient notice of the facts claim and the issues to be tried . . . [it] is [not] insufficient . . . ." [Citation omitted; emphasis added; internal quotation marks omitted]). Contrary to Baird's claims, the evidence does not sufficiently support the theory that BSPM or Northwest engaged in a bait and switch operation. Rather, the evidence strongly suggests that this was a build-out that ran way off course, to titanic proportions, as a result of a lack of communication and mutual understanding between the parties and poor business practices by BSPM. The evidence is lacking as to breach of contract against BSPM. BSPM performed under the build-out contract,

and Baird has occupied the premises under the lease with no complaints regarding the quality of the build-out. Although there were errors in the billing records, the evidence does not support a claim of fraud against BSPM and Northwest. There is little, if any, evidence that BSPM or Northwest committed an unfair or deceptive act or practice. Baird has failed to prove her claims of breach of contract, fraud and CUTPA against BSPM and Northwest.

IV
CONCLUSION

Having weighed all the evidence and assessed the credibility of the witnesses, the court enters the following orders:

(1) BSPM's Revised Complaint, Count One, Breach of Contract – Judgment entered for BSPM and damages are awarded to BSPM in the amount of $25,000 (original agreement) plus $11,000 (modifications) for a total damage award of $36,000. Baird has already paid $20,000 and is entitled to that as a credit, therefore, leaving a balance of $16,000.

(2) BSPM's Revised Complaint, Count Two, Unjust Enrichment – Judgment entered for Baird.

(3) Baird's Claim for Set-Off – Baird prevails on this claim based on legal services provided to Stone and is entitled to a set-off of $11,000.

(4) As a result of the court's holding on BSPM's breach of contract and Baird's set-off claim, there is a balance owed to BSPM of $5000 ($16,000 - $11,000). Baird must pay BSPM damages in the amount of $5000 within sixty days of this decision.

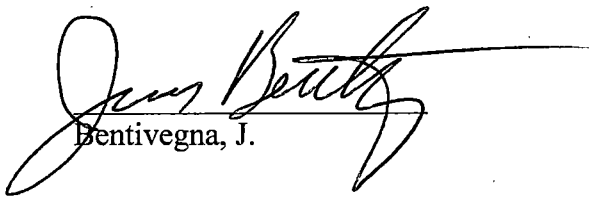
(5) Baird's Counterclaim against BSPM – Judgment enters in favor of BSPM;

(6) Baird's Third Party Complaint against Northwest – Judgment enters in favor of Northwest; and

(7) Any requested relief for prejudgment or post-judgment interest and/or attorney's fees fails based on inadequate legal authority and on insufficient proof.

SO ORDERED.

BY THE COURT,



Bentivegna, J.