1002 Realty Corp. v Gilgurd
2018 NY Slip Op 33329(U)
December 4, 2018
Supreme Court, Kings County
Docket Number: 513071/2015
Judge: Carl J. Landicino

[* 1]

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of December, 2018.

PRESENT:
HON. CARL J. LANDICINO, JSC

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1002 REALTY CORP.,

Plaintiff,

- against -

BORIS GILGURD d/b/a EZ DUCT WORK INC., EZ-DUCT WORK, INC.,

Defendant(s).

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Index No.: 513071/2015

AMENDED
TRIAL DECISION

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HISTORY

Plaintiff 1002 Realty Corporation (hereinafter "Plaintiff") commenced this action by the filing of a Summons and Complaint on October 26, 2015. Defendants Boris Gilgurd (hereinafter "Defendant Gilgurd") and EZ Duct Work, Inc.. (hereinafter "Defendant EZ") (collectively the "Defendants") interposed an Answer with counterclaims on December 17, 2015. Plaintiff replied to the Defendant's Answer by filing "Plaintiff's Verified Answer to Defendants' Counterclaims" on January 12, 2016. Plaintiff maintains the following three claims within the Complaint[1]: 1) breach of contract and damages totaling $462,125.00, 2) *quantum meruit* and damages totaling $462,125.00 and 3) unjust enrichment and damages totaling $465,125.00. The Defendants maintain the following two counterclaims in their Answer filed December 17, 2015:

[1]Plaintiff filed the Summons and Complaint on October 26, 2015 and subsequently filed an Amended Complaint on November 3, 2015. No Answer had been filed previously. Accordingly, any reference to the "Complaint" refers to the Amended Complaint filed on November 3, 2015.

> 30. "...By reason of the malicious prosecution by the plaintiff of the within action the defendants have suffered damages in an amount which exceeds the jurisdiction of the lower Courts;"
>
> 33. "...The plaintiff's filing of the instant action was a device in furtherance of a civil action and for the purposes of injuring the defendants, and constitutes "abuse of process" and has caused the [defendants[2]] to suffer injury, all to its damages in an amount which exceeds the jurisdiction of all lower Courts." (Defendant's Answer dated December 17, 2015)

Note of Issue was filed on December 5, 2016. This matter was assigned to this Part 81 by the Honorable Lawrence Knipel, J.S.C. (Administrative Judge, 2nd Judicial District, Civil Term) from the Non-Jury Trial Assignment Part on August 7, 2017, at which time a trial was scheduled by "So Ordered" Stipulation of the parties. The trial in this matter occurred over the course of three days; October 17, 2017, December 14, 2017 and February 15, 2018. On the final day of trial, the parties agreed to have written Summations together with the trial transcripts submitted to the Court on or before May 7, 2018 in accordance with a "So Ordered" Stipulation the parties. Upon receipt of the submissions on May 7, 2018, the matter was fully submitted and reserved for decision on that day. This Court issued a Trial Decision on November 21, 2018, that contained a calculation error on page 20. That error has been corrected in this Amended Trial Decision but no other substantive changes have been made.

TESTIMONY

Mario Martinelli

Mario Martinelli (hereinafter "M.M." or "Martinelli") testified that he was one of the "managers" of the Plaintiff corporation. He indicated that the other "manager" was Simon

[2]The Answer states "plaintiffs" but as this relates to Defendants' counterclaim, the Court will accept that the counterclaim relates to Defendants' alleged injury and not the Plaintiff's and that this constitutes a ministerial error.

Rubinov. (Tt. 10/17/2017, Pg. 8, Lines 18-24) The witness testified that he managed the building located at 1002 Jamaica Avenue, Brooklyn, New York, indicated that the building was a one story commercial building and that seven tenants occupied the property at the time of trial. (Tt. 10/17/2017, Pg. 9 Line 9 - Pg. 10, Line 9) The witness confirmed that Plaintiff owned the building and property known as 1002 Jamaica Avenue, Brooklyn, New York (hereinafter "Premises" or "Subject Property") (Deed to the Premises admitted on Consent as Plaintiff's Exhibit 1). (Tt. 10/17/2017, Pg. 10 Line 12 - Pg. 11, Line 11)

The witness stated that the Plaintiff Corporation had three (3) shareholders; Defendant Gilgurd and "two estates" respectively related to the children of Martinelli and the children of Simon Rubinov (hereinafter "Rubinov"). (Tt. 10/17/2017, Pg. 12, Lines 10-16) The witness confirmed that Gilgurd was a one-third shareholder of the Plaintiff Corporation and that Gilgurd became a shareholder in the early part of 2016. (Tt. 10/17/2017, Pg. 13, Lines 4-10) The witness testified that before his role as one-third shareholder, Gilgurd's "wife or ex-wife now. I don't know" was a one-third shareholder. (Tt. 10/17/2017, Pg. 13, Lines 11-15)

The witness explained that Mr. Gilgurd and he were previously partners in a mechanical business. "We had a mechanical business. The name was B and R Mechanical and we were full partners in the business. It was me, Boris Gilgurd, Simon Rubinov and Norman Goldberg." He further explained that the business started in or about 1983 and that the partners ceased doing business in or about 1990. (Tt. 10/17/2017, Pg. 13, Line 22 - Pg. 14, Line 13) The witness clarified that the prior business was V and R Mechanical (hereinafter "V&R"), and that it was a corporation. (Tt. 10/17/2017, Pg. 19, Lines 15-21) The witness testified that the V and R business had operated out of a space located in the Subject Property. (Tt. 10/17/2017, Pg. 15, Lines 3-7)

The witness indicated that the Subject Property was purchased by the Plaintiff in or about 1992. (Tt. 10/17/2017, Pg. 15, Lines 11-18) The witness stated more specifically that V&R leased space at the Subject Premises from the prior owner of the Premises, pursuant to a lease agreement which provided for $4,800.00 per month for space constituting approximately 6,000 square feet (the "Leasehold Space"). (Tt. 10/17/2017, Pg. 19, Line 22 - Pg. 20, Line 10)

The witness was shown Plaintiff's Exhibit 2 and indicated that it was a lease agreement (dated May 9, 2017) that he signed on behalf of the Plaintiff and that Gilgurd signed as the Tenant. (Tt. 10/17/2017, Pg. 22, Line 2 - Pg. 23, Line 15) The witness stated that the then current monthly rent that Gilgurd was paying for the Leasehold Space was $5,000.00 per month. (Tt. 10/17/2017, Pg. 27, Lines 19-21) The witness stated that prior to entering into the Current Lease (Plaintiff's Exhibit 2) Gilgurd was paying $2,000.00 per month. (Tt. 10/17/2017, Pg. 28, Lines 2-6) The witness stated that prior to the effective date of the Current Lease (Plaintiff's Exhibit 2) there was no written agreement/lease between the parties in relation to the Leasehold Space but that there was a verbal agreement between the Plaintiff and Gilgurd. The witness stated that "[t]he verbal agreement was that [Gilgurd] was going to pay $2,000.00 a month for the rent, plus additional rent, means taxes, water and insurance. And he was going to maintain the building." (Tt. 10/17/2017, Pg. 28, Line 17 - Pg. 29, Line 2)

The witness testified that Gilgurd failed to pay rent to the Plaintiff, "[s]tarting January 2010 throughout '12, September I believe. And after that he started paying rent from 2012 to 2015. He only paid $2,000.00 a month. No additional rent was paid. And he did not maintain the building." (Tt. 10/17/2017, Pg. 29, Lines 19-25) The witness testified that the space that Gilgurd leased constituted approximately 6,000 square feet. The same space that V & R had previously utilized, the Leasehold Space. (Tt. 10/17/2017, Pg. 37, Lines 8-15)

The witness stated that in January of 2010 he confronted the Defendant Gilgurd about the fact that Gilgurd was not paying rent for the Leasehold Space or managing the Subject Premises. "I advised him that due to the fact that he was not paying the rent, the additional 30% rent, it was not maintaining the property that the rent from January on will go up to $6,000.00." (Tt. 12/14/2017, Pg. 18, Lines 6-19)

The witness testified that the square footage utilized by the Defendant for the period of 2010 to 2015 changed. "One was 7,500. And one was 6,000 square feet." "He gave up 1,500 square feet of the front area of the building." The witness did not recall when that change occurred. (Tt. 12/14/2017, Pg. 24, Line 14 - Pg. 25, Line 7)

The witness testified that the Defendant owed Plaintiff "$115,000.00" for rent and additional rent for the period from January 1, 2010 through September 30, 2015. Thereafter, the witness stated, "450 something thousand. I don't have the exact amount in my head. But that is the amount." (Tt. 12/14/2017, Pg. 29, Lines 13-19) Upon review of Plaintiff's Exhibit 9 the witness concluded that the total amount due and owing for the aforementioned period was $457,091.42." (Tt. 12/14/2017, Pg. 32, Lines 1-24) The witness testified that the lease price per square foot at the Premises, generally ranged from $3.00 to $20.00 per square foot and that Defendant was paying approximately $3.00 per square foot. (Tt. 12/14/2017, Pg. 53, Line 10 - Pg. 54, Line 2)

The witness identified Defendant's Exhibit A as a document (Part of Defendant's Exhibit A[3]) submitted by Plaintiff in relation to a prior Civil Court (L & T) proceeding the Plaintiff prosecuted against the Defendants in relation to the Leasehold Space. The witness confirmed that the exhibit contained a document that was a chart indicating the tenants at, and layout of, the

[3]Defendant's Exhibit A is compromised of approximately 30 pages of separate documents, all made part of Defendant's Exhibit A.

Premises and that it was created on behalf of the Plaintiff. (Tt. 12/14/2017, Pg. 58, Line 21 - Pg. 59, Line 7)

The witness confirmed that Defendant EZ was the only tenant of the building to have dedicated parking. (Tt. 12/14/2017, Pg. 66, Lines 13-19)

The witness stated that the Plaintiff's claims relate to an oral agreement made in 2003 and confirmed that there were no written terms. He stated further that the Defendants failed to abide by the terms in January of 2010. In addition, he stated that from 2003 to 2010 the Defendant did not fully comply with the verbal agreement. "[H]e paid rent. He did not fully comply because he never paid the 30 percent additional rent. Plus he never ever maintained the building." The witness confirmed that the oral agreement was, 1) rent at $2,000.00 per month, plus 2) 30% of utilities, insurance and water and 3) management of the Premises. (Tt. 12/14/2017, Pg. 67, Line 22 - Pg. 68, Line 25) The witness confirmed that from the start of the oral agreement the Defendant Gilgurd did not abide by all of the terms and that, other than discussions with Gilgurd between him and/or Rubinov, there were no writings or Court proceedings in relation to the Plaintiff's contention that Defendant Gilgurd did not abide by the verbal agreement. (Tt. 12/14/2017, Pg. 70, Line 16 - Pg. 72, Line 23) The witness testified in relation to the terms of the verbal agreement and stated, "[b]ased on the discussion that we had, the agreement was supposed to last for two or three years until he would have picked up the - - his business would increase. And based on the discussion nothing would have changed except that two or three years later that the rent would have gone up gradually. That is what we discussed". (Tt. 12/14/2017, Pg. 80, Lines 8-15)

The witness confirmed that from the period of 2003 through 2009 he spent significant periods of time in Brazil. The witness stated that during that period he was in Brazil for approximately eight months each year. The witness confirmed that while in Brazil he received information from his office concerning the Subject Premises. He further specified that the office was located in the residence of Rubinov and that he received this information from Rubinov during the periods when he was in Brazil. (Tt. 12/14/2017, Pg. 86, Line 21 - Pg. 88, Line 8)

The witness denied that he regularly visited Italy after 2009. He stated that he lived in the United States. He indicated that just prior to his testimony he was out of the country for approximately a month and that during that time he had been in Italy for "[a]bout a month and a half." He further indicated that prior to that last visit to Italy he had been in Italy from June to October. (Tt. 12/14/2017, Pg. 88, Lines 9-24) The witness clarified that since 2009 he had been to Italy "[t]wo or three times" for "[t]wo weeks, three weeks" not including the previously referenced visit, when he stayed in Italy from June to October. (Tt. 12/14/2017, Pg. 89, Lines 9-22)

After having testified that he had been in the business of fabricating duct work out of sheet metal with Gilgurd and Rubinov (V&R) at the Leasehold Space, the witness stated that "...we dissolve the partnership. [Gilgurd] remain in to the space. That is where the agreement in 2003 comes in." (Tt. 12/14/2017, Pg. 91, Line 3 - Pg. 92, Line 1) The witness acknowledged that the Leasehold Space was a commercial space, not a retail space, and that it was unfinished. (Tt. 12/14/2017, Pg. 92, Lines 2-7)

The witness confirmed that Plaintiff had sought Court intervention to evict another tenant (La Candella Restaurant) at the Premises for non-payment of rent. (Tt. 12/14/2017, Pg. 93, Lines

1-17) The witness, in response to a series of questions, indicated that a specific space at the Premises in relation to two tenants (first Intriago, then La Candella) was to be utilized as a restaurant, the tenants were never able to achieve legal use, and that rent was abated for "...five months or six months until they would have get the C.O." (Tt. 12/14/2017, Pg. 96, Line 18 - Pg. 97, Line 11) The witness also acknowledged that a proposed tenant (Bellavista Soccer Club), as listed on Plaintiff's tenants list prepared for trial (Plaintiff Exhibit 10 H), never occupied its space. (Tt. 12/14/2017, Pg. 97, Line 21 - Pg. 98, Line 9)

The witness confirmed that Gilgurd (as Plaintiff) and Rubinov (as Defendant) were adversaries in another lawsuit, concerning a property/business that the witness had no interest in. (Tt. 12/14/2017, Pg. 100, Line 13 - Pg. 101, Line 15)

The witness stated that when he met with Gilgurd in January of 2010 "...the building was a mess." (Tt. 12/14/2017, Pg. 104, Line 24 - Pg. 105, Line 1) As to that January meeting in 2010, the witness testified as follows, "[b]asically the end of the meeting I discussed with him that his rent was going up to $6,000.00. He, you know, he had - - we had a back and forth because of his business. He told us that the business wasn't doing well. But we explained to him that we gave him so many chances, you know. And he just never followed it through. I mean, we had a violation from the building department concerning the sidewalk where he had to replace the whole sidewalk. We went to see him. He promised us that he was going to give us the money to pay for the sidewalk, which he never did." (Tt. 12/14/2017, Pg. 105, Lines 4-13) The witness stated further that "[a]t the meeting I put him on notice that the agreement because he did not pay rent and he did not pay for the additional rent and he did not take care of the building, that from $2,000.00 the rent was going to $6,000.00 a month." (Tt. 12/14/2017, Pg. 107, Lines 12-15) The

witness also confirmed that Gilgurd at that time told him that business was bad and he protested. (Tt. 12/14/2017, Pg. 111, Lines 7-8) The witness confirmed that after the January 2010 meeting Gilgurd paid nothing from January 1, 2010 to September 31, 2012. (Tt. 12/14/2017, Pg. 111, Lines 14-18)

Myron Lubitsch

The witness testified that he was self-employed at a Karate School business, that he then currently occupied space at the Subject Premises and began possession on October 30, 1991. (Tt. 12/14/2017, Pg. 117, Lines 3-9) The witness identified Plaintiff's Exhibit 13 as the lease between his business and the owner of the Premises, dated January 1, 2005. (Tt. 12/14/2017, Pg. 117, Line 18 - Pg. 118, Line 21) The witness confirmed that after 2013 his possession of the Premises was subject to a month-to-month tenancy and without a written lease. (Tt. 12/14/2017, Pg. 119, Lines 22-25)

Mohammed Zawgari

The witness testified that he then currently occupied commercial space at the Subject Premises and utilized the space as a "deli grocery". He indicated that he had "...been there for many years." (Tt. 12/14/2017, Pg. 122, Lines 8-18) The witness identified Plaintiff's Exhibit 14 as the written lease for the space, dated June of 2009. (Tt. 12/14/2017, Pg. 122, Line 22 - Pg. 124, Line 11)

Defendant Boris Gilgurd

When asked whether he had any relationship to a company called EZ Duct Work the witness responded, "[y]es, it's company - - my son and my wife." He also stated that Defendant EZ maintained an office at the Premises, since December 2012. (Tt. 2/15/2018, Pg. 5, Lines 4-11)

The witness confirmed that in 2003, three companies, V&R, Boris Sheet Metal ("Boris") and Norris Cooling Mechanical ("Norris"), maintained offices at the Premises located in the Leasehold Space. The witness further stated that he had two partners in those businesses, Martinelli and Rubenov. (Tt.2/15/2018, Pg. 5, Lines 13-23)

The witness represented that Martinelli, Rubinov and he remained in business through 2005, and during the period of 2003 to 2005 the three partners owned the Premises "...33 percent each." (Tt. 2/15/2018, Pg. 5, Line 24 - Pg. 6, Line 9) The witness stated that in 2005, "[Martinelli] leave for Brazil and [Rubinov] retired." (Tt. 2/15/2018, Pg. 6, Lines 10-14)

The witness confirmed that during the period of 2003 to 2005 the businesses were paying rent to the corporate owner of the Premises, the Plaintiff. The witness testified that the rent was charged at $2,000.00 per month with no additional charges and that the rent did not change after Martinelli and Rubinov left. (Tt. 2/15/2018, Pg. 6, Line 15 - Pg. 7, Line 11) The witness confirmed that for the period from 2005 through 2015 the operating businesses at the Leasehold Space continued to pay rent at $2,000.00 per month. (Tt. 2/15/2018, Pg. 7, Lines 12-15)

The witness acknowledged that Rubinov and he had business relationships concerning other properties and that he commenced another proceeding against Rubinov in relation to another building, not located in New York and not related to the Premises. (Tt. 2/15/2018, Pg. 8, Lines 2-20) The witness confirmed that prior to his commencement of the other action neither

Martinelli or Rubinov (including parties on their behalf) ever approached him concerning his use of the Leasehold Space at the Premises. (Tt. 2/15/2018, Pg. 9, Lines 6-10)

The witness testified that the oral agreement terms, relating to the use and occupancy of the Leasehold Space at the Premises, were that "I pay the rent and I take care of our building from A to Z..." "Collect the rent, any necessary - if something is broken, supposed to fix it, we are supposed to clean territory, everything what's supposed to be needs to be done in this building." The witness confirmed that he complied with the terms of the agreement. (Tt. 2/15/2018, Pg. 10, Line 17 - Pg. 11, Line 4) The witness stated that he also employed a bookkeeper who rendered services to the Plaintiff in relation to the management of the Premises, at no charge to the Plaintiff. (Tt. 2/15/2018, Pg. 11, Line 5 - Pg. 12, Line 6)

The witness stated that Martinelli's testimony concerning the agreement of the parties was not true. "Because when I was partner, we just pay $2,000.00." He also testified that there were no submeters for utilities and that "I pay electrical, I pay gas" "Yes, directly to gas company Keyspan." (Tt. 2/15/2018, Pg. 12, Line 10 - Pg. 13, Line 4)

The witness represented that he was never affiliated with EZ. (Tt. 2/15/2018, Pg. 14, Lines 18-22) The witness testified that between 2003 and 2012 he was operating at the Premises as Boris Sheet Metal, a corporation. The witness indicated that EZ began operating in 2012 and that the principals of that entity were his wife and son. He stated that he was not a shareholder in entity. (Tt. 2/15/2018, Pg. 15, Line 6 - Pg. 16, Line 1)

The witness represented that he managed the Subject Premises "[f]rom 2003 to 2014, 15." (Tt. 2/15/2018, Pg. 35, Line 21 - Pg. 36, Line 1) The witness stated that from 2010 to the time of trial his space was 6,000 square feet. (Tt. 2/15/2018, Pg. 37, Lines 20-25)

As to why he would be paying a lower rent per square foot than the other tenants, the witness stated, "[b]ecause in this period no [Rubinov], who retired, and [Martinelli], who was in Brazil, take care of our building. Nobody involved in it. It doesn't matter what's broke. During the day, during the night, we manage the building, cleaning property, fix the gates, fix the system, fix the sewer, and we pay. Not [Plaintiff] paid, we pay for fixing." (Tt. 2/15/2018, Pg. 38, Lines 11-19) The witness indicated that he did not have any documentation reflecting his contention that he maintained the property. (Tt. 2/15/2018, Pg. 35, Line 21 - Pg. 36, Line 1)

The witness testified in relation to the Plaintiff's allegation that no rent was paid from January 1, 2010 through September 31, 2012 and stated "1002 Jamaica Avenue leased two spaces, one space for restaurant, one space for the school. When we lease this space, this space don't have meter for electrical, don't have meter for gas. [Rubinov] knows this, and we discussed with him what happened. I discussed with [Rubinov], it was discussed what amount of money school and restaurant will be paying for gas and electrical. The same time school and restaurant don't pay rent over 14, 15 months. And I told [Rubinov], this is your tenant, what do you plan to do. He says take tenants to the court. Tenants was twice in school, was twice in the court, and still doesn't pay. I told this, [Rubinov], big, big amount of money. When school don't pay electrical bill, Con-Edison came and disconnect the electrical. I supposed to pay all the amount money what school don't pay to ConEdison and to restore the electrical. All the equipment can be working on electricity. The same with gas, school and restaurant was in the gas meter. It was a lot of money, a lot of money. And I paid this money." "[Rubinov] don't give me answer. He just told me, take him to the court. I can't take him to court because it was verbally discussed between [Rubinov], tenants and me. They supposed to pay me every month the same like rent." (Tt. 2/15/2018, Pg. 40, Line 1 - Pg. 41, Line 18)

The witness indicated that he did not breach the agreement and never received notice or a demand in relation thereto. (Tt. 2/15/2018, Pg. 42, Lines 2-24)

Simon Rubinov (Readings of portions of the Deposition Transcript of Simon Rubinov, dated November 21, 2016, into the record, on consent of the parties)

The witness testified that when the Plaintiff was incorporated, Rubinov, Martinelli and Gilgurd were partners. (Tt. 2/15/2018, Pg. 52, Lines 1-11)

The witness testified that V&R ceased doing business in 2003. "[V&R], basically it's just a company, had no space. Because all space was occupied by [Boris]. And he's still there, the same square footage, the same space." (Tt. 2/15/2018, Pg. 52, Lines 13-24) The witness indicated that there was no written lease for Boris or Defendant EZ. (Tt. 2/15/2018, Pg. 54, Lines 4-14) The witness confirmed that there was never a management company for the Plaintiff. (Tt. 2/15/2018, Pg. 54, Lines 2-8) The witness stated that at the time of his testimony the tenants were mailing rent checks to him and that before June of 2016 the tenants were bringing the rent to Gilgurd at his office which the witness identified as EZ. (Tt. 2/15/2018, Pg. 54, Line 10 - Pg. 55, Line 1) The witness confirmed that the checks tendered to Gilgurd would be deposited by Gilgurd's secretary, the secretary was authorized to do so and that he did not pay the secretary to do so. (Tt. 2/15/2018, Pg. 55, Line 14 - Pg. 56, Line 1) The witness confirmed that the agreement of the parties did not change from January 1, 2003 to January 1, 2010. (Tt. 2/15/2018, Pg. 57, Lines 16-21)

The witness confirmed that Martinelli visited Brazil four to five times per year (approximately 8 months per year) from 2003 - 2013. (Tt. 2/15/2018, Pg. 59, Lines 2-17)

CREDIBILITY

It is axiomatic that with respect to the credibility of the parties the Court during the trial " had the opportunity to view the demeanor of the witnesses," and accordingly "was in the best position to gauge their credibility." *Massirman v. Massirman*, 78 AD3d 1021, 911 N.Y.S.2d 462 (2 Dept. 2010), quoting *Peritore v. Peritore*, 66 AD3d 750, 888 N.Y.S.2d 72 (2 Dept. 2009); *see also Varga v. Varga*, 288 AD2d 210, 732 N.Y.S.2d 576 (2 Dept. 2001), quoting *Diaco v. Diaco*, 278 AD2d 358, 717 N.Y.S.2d 635 (2 Dept. 2000); *Ferraro v. Ferraro*, 257 AD2d 596, 684 N.Y.S.2d 274 (2 Dept. 1999). The Court, in this case, viewed the parties during their respective testimony under examination. "In a non-jury trial, evaluating the credibility of the respective witnesses and determining which of the proffered items of evidence are most credible are matters committed to the trial court's sound discretion." *Goldstein v. Guida*, 74 AD3d 1143, 904 N.Y.S.2d 117 (2 Dept. 2010), quoting *Ivani v. Ivani*, 303 AD2d 639, 17 757 N.Y.S.2d 89 (2 Dept. 2003), quoting *L'Esperance v. L'Esperance*, 243 AD2d 446, 663 N.Y.S.2d 95 (2 Dept. 1997); *see also Schwartz v. Schwartz*, 67 AD3d 989, 890 N.Y.S.2d 71 (2 Dept. 2009).

"Where the findings of fact rest in large measure on considerations relating to credibility of witnesses, deference is owed to the trial court's credibility determinations." (internal quotations emitted) *Ning Xiang Liu v. Al Ming Chen*, 133 A.D.3d 644, 19 N.Y.S.3d 565 (2d Dept. 2015) quoting *Papovitch v. Papovitch*, 84 A.D.3d 1045, 923 N.Y.S.2d 209 (2d Dept. 2011) quoting *Paraimnath v. Torres*, 59 A.D.3d 419, 873 N.Y.S.2d 133 (2d Dept. 2009); *See also*, *Zwaryez v. Marina Constr.*, 130 A.D.3d 922, 15 N.Y.S.3d 86 (2d Dept. 2015) An assessment of credibility by the trial court is given a significant level of discretion and deference by the

appellate courts. The Court had the opportunity to observe the witnesses[4] over the course of examination during trial, on many issues related to the dispute and the history of the relationship between the parties.

Overall, the Plaintiff's witness, Martinelli, lacked credibility. Martinelli did not seem candid. His testimony appeared to be planned and he seemed to advocate rather than testify. He did not seem to have a clear grasp of the facts. It was not clear that he possessed the information needed to testify in relation to the matters he testified to. Further, there was little support for his contentions. His manner and demeanor at trial belies his legal position relating to the purported oral agreement between the parties. Martinelli's contention that he explained to the Defendants that the agreement included taxes as "additional rent" and that the Plaintiff had sought a higher rent in 2010 due to the Defendant's alleged failure to maintain the property, is also not credible. Martinelli admittedly spent much of his time, during the period that he alleged that Defendant Gilgurd did not maintain the premises, in Brazil and Italy. He otherwise made infrequent visits to the property. There was no other support for his contention that Gilgurd did not maintain the Premises. His reliance upon Rubinov's reporting on the maintenance of the property is not reliable. Rubinov's deposition testimony did not support Martinelli's contention in this area.

The Defendants' witness, Gilgurd, was also occasionally inconsistent in his testimony. Specifically, with regard to his business relationship with Defendant EZ Duct, he seemed guarded and tense. He otherwise seemed generally credible regarding his conversations with Martinelli. He was candid and clear. His recollection of the facts was believable. His testimony was convincing. He maintained a level of detail that was consistent and seemed truthful. What is

[4] Rubinov was not called to testify during the trial and therefore credibility will be based upon the deposition testimony read during the trial, on consent of both parties.

more, the testimony by Defendant Gilgurd that the $2,000.00 per month oral lease agreement was a product of the parties' history of working together as prior business partners and his denial of the alleged $6,000.00 rental increase was also largely credible. The admissible evidence supported the Court's finding that Gilgurd was generally truthful. Moreover, in light of the history of the relationship reflected by the testimony, there was little to no documentation, written notices or communication. In addition, there was no indication of prior Court intervention between the parties, except for the Commercial L &T proceeding commenced in April 11, 2016. This lends credibility to the Defendants' position that the instant proceeding was initiated based on a separate disagreement and dispute between Gilgurd and Rubinov and serves to severely cloud the Plaintiff's credibility generally. Notwithstanding, the Plaintiff's contentions regarding the limited issue of Defendants' breach of contract were viable, as reflected further herein.

Breach of Contract- First Cause of Action

The Plaintiff's First Cause of Action is for Breach of Contract. The parties concede that there was never a written lease agreement in relation to the Leasehold space between the parties, prior to the written lease agreement dated May 9, 2016, the Current Lease. The parties, however, do agree that they entered into a oral lease agreement regarding the Leasehold Space and Premises generally, on or about January 1, 2003. However, the Plaintiff represents that it agreed to charge Defendants a monthly rent of $2,000.00 per month, instead of $6,000.00 per month, provided that Defendants maintained the property and paid Additional Rent at 30% of the total annual cost of real estate taxes, water and sewer charges, and insurance for the Premises. The Defendants contend that the oral agreement between the parties was such that they agreed to pay

rent at a rate of $2,000.00 per month and maintain and manage the Premises, but that no Additional Rent or charges were discussed. The Defendants further contend that they never agreed to pay $6,000.00 in rent per month, in any event.

An oral lease agreement may be ratified by acts including permitting the tenant to take possession, accepting rent and making improvements to the subject premises. *See Tuttle, Pendelton & Gelston, Inc. v. Dronart Realty Corp.*, 90 A.D.2d 830, 831, 455 N.Y.S.2d 830, 831 [2nd Dept, 1982]. "Generally, a party alleging a breach of contract must 'demonstrate the existence of a ... contract reflecting the terms and conditions of their ... purported agreement.'" *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 181–82, 944 N.E.2d 1104, 1110 [2nd Dept, 2011]. Specifically, "[t]he essential elements of a breach of contract cause of action are "the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach." *Canzona v. Atanasio*, 118 A.D.3d 837, 838, 989 N.Y.S.2d 44, 47 [2nd Dept, 2014], *quoting Dee v. Rakower*, 112 A.D.3d 204, 976 N.Y.S.2d 470 [2nd Dept, 2012].

In this instant proceeding, the Plaintiff has failed to provide sufficient evidence to establish that the parties had entered into an agreement whereby the Defendants would pay anything more than $2,000.00 per month base rent for the Leasehold Space. The Plaintiff's witness, Mario Martinelli, testified (Tt. 10/17/2017, Pg. 28, Line 17 - Pg. 29, Line 2) that the parties had entered into an oral agreements pursuant to which the rent would be $2,000.00 per month and Defendants would maintain the building. However, the Court finds incredible Martinelli's testimony that Defendant Gilgurd also agree to pay what he described as "additional rent," (namely, taxes, water/sewer and insurance). The Court makes this finding because there

was no evidence presented during the trial that the Defendants had ever paid this "additional rent." What is more, there was no evidence presented that the Plaintiff ever sent a written communication to the Defendants, whether in the form of a notice, a letter, an email or even a text message, throughout the more than ten years prior to the instant action, in relation to the terms of the verbal agreement or a breach thereof.

What is more, the Plaintiff did not provide sufficient evidence that he had sought to increase the rent from $2,000.00 to $6,000.00 and that the Defendants agreed to pay this increase. Martinelli testified (Tt. 12/14/2017, Pg. 107, Lines 12-15) that in or about January of 2010 he confronted the Defendant Gilgurd about the fact that Gilgurd was not paying rent or managing the Premises and that as a result the rent from that January on would increase to $6,000.00. Martinelli never testified (Tt. 12/14/2017, Pg. 107, Lines 12-15) that Defendant Gilgurd agreed to these terms. In fact when asked if Gilgurd protested Martinelli said "...yes." If in fact the Defendants never agreed to the increase in the rent alleged by the Plaintiff in January of 2010, then the Parties had not reached an agreement. As such, the rent could not have increased, since any increase would have been a product of a unilateral act of the Plaintiff. "To constitute a valid agreement for the lease of real property, the parties must have reached final agreement upon all its essential terms, without reservation of any term for future negotiations." *Mur-Mil Caterers, Inc. v. Werner*, 166 A.D.2d 565, 566, 560 N.Y.S.2d 849, 850 [2nd Dept, 1990]. This applies whether the subject lease is oral or written. *See Matter of Dodgertown Homeowners Ass'n, Inc.*, 235 A.D.2d 538, 539, 652 N.Y.S.2d 761, 762 [2nd Dept, 1997]; *see also Calkins Corp. Park, LLC v. Eye Physicians & Surgeons of W. New York, P.L.L.C.*, 56 A.D.3d 1122, 868 N.Y.S.2d 427 [4th Dept, 2008] and

Chelsea Business & Property Owners' Ass'n, LLC v The City of New York, No. 113194/10, 2011 WL 5024496 [Sup. Ct. N.Y. Cnty, 2011].

The Defendants contend (Defendant's Memorandum of Law, Page 2) that the only remedy against the Plaintiff "is limited to commencing a summary proceeding to terminate the tenancy and recover for use and occupancy." However, this is incorrect. Instead, this would only apply if the Plaintiff sought removal of the Defendants in the instant proceeding. Then the Plaintiff's sole remedy would have been to treat the Defendant as having held over and seek his removal pursuant to Real Property Law 232-a. *See Jaroslow v. Lehigh Valley R. Co.*, 23 N.Y.2d 991, 993, 246 N.E.2d 757, 758 [1969]. In *Jaroslow*, the Court held that Real Property Law 232-a abolished the common-law rule that a holdover tenant may be held as a tenant for a new term unless the landlord accepts rent for any period after the expiration of the lease, thereby creating a month-to-month tenancy. *Id.* Cases following *Jaroslow* have held that a month-to-month tenancy is created in situations where, after holding over, a tenant paid and the landlord accepted the rent that the parties had previously agreed upon. *See Logan v. Johnson*, 34 A.D.3d 758, 759, 825 N.Y.S.2d 242, 243 [2nd Dept, 2006]. Notwithstanding, the Court finds that this was not the Plaintiff's only remedy. Given that the Plaintiff does not seek possession of the Premises as part of its Complaint, a breach of contract claim is an appropriate means of seeking damages in relation to the previously agreed upon rent of $2,000.00 per month, together with maintenance of the Premises, pursuant to the verbal agreement Gilgurd has acknowledged.

Additionally, the Court herein denies the Defendants' application for a directed verdict and finds that the Plaintiff has provided sufficient evidence that the Defendants have failed to pay the agreed upon $2,000.00 monthly rent for the period of January 2010 through September 2012

(33 x $2,000.00 = $66,000.00).[5] While the witness for the Defendants, Boris Gilgurd, acknowledged that he did not pay rent to the Plaintiff during this period, his testimony regarding his expenses allegedly incurred on behalf of the Plaintiff was unclear and unsupported. Further, it was unclear whether these payments were in keeping with Gilgurd's own acknowledgment that the Defendants, as tenants, were to pay $2,000.00 per month and maintain/manage the general premises "from A to Z." (Tt. 2/15/2018, Pg. 10, Line 17 - Pg. 11, Line 4) There was no support (i.e., documentary evidence) in relation to Gilgurd's testimony that he was instructed to assist with the eviction of another tenant. Gilgurd provided insufficient evidence that the parties had actually agreed that he would do so, in any event. As such, the Court cannot find that Gilgurd is entitled to receive a credit or offset against any rent owed to the Plaintiff, for purported additional expenses he incurred in maintaining/managing the property. However, the Plaintiff, whose witness acknowledged that he was out of the country during much of the period at issue, has failed to provide sufficient proof that Defendant Gilgurd did not adequately maintain the premises.

Quantum Meruit- Second Cause of Action and Unjust Enrichment-Third Cause of Action

Plaintiff's Second Cause of Action is for *Quantum Meruit*. The Plaintiff alleges in its Complaint that equity demands that the Plaintiff be compensated for the fair market rent for the Premises. In its Post Trial Brief, the Plaintiff contends that "[t]he reasonable value and fair market monthly rent that Plaintiff should have received by Defendants should have been

[5] This Court's initial Trial Decision dated November 20, 2018 correctly stated that the Defendants have failed to pay the agreed upon $2,000.00 monthly rent for the period of January 2010 through September 2012, but incorrectly determined the total amount owed. The decision has been amended to show that the correct amount owed for this period (33 months) is $66,000.00. The parties have consented to the correction without further application in accordance with and subject to the stipulation of the parties.

$6,000.00 consistent with what the other commercial tenants were paying per square footage for the years January 1, 2010 through and including September 30, 2015 and which was reflective in the chart of square footage calculations admitted into evidence as Plaintiff's Exhibit 12."

Similarly, the Plaintiff makes a claim for Unjust Enrichment as its Third Cause of Action. In its Complaint the Plaintiff claims that "Defendants have been unjustly enriched to the detriment of Plaintiff by failing to pay Plaintiff the monthly rent and additional rent in the amount of $462,125.00 from January 1, 2010 through and including September 30, 2015." In its Post Trial Brief the Plaintiff contends that "Defendants have been unjustly enriched to the detriment of Plaintiff by failing to pay Plaintiff the monthly rent and additional rent in the amount of $457,091.42 from January 2010 through and including September 30, 2015 which is reflective in the Damage Calculations Chart which is admitted into evidence as Plaintiff's Exhibit 9."

In response, the Defendants contend in their post trial Memorandum of Law that the existence of the Defendants' month to month tenancy, namely the agreement between the parties to pay $2,000.00 per month, bars the Plaintiff from seeking damages under a *quantum meruit* theory or under a theory of unjust enrichment. Specifically, the Defendants argue that such a remedy only exists where there is no agreement between the parties. This Court has already determined that the Plaintiff was only able to prove, by a preponderance of the evidence, that the Defendants breached the verbal agreement, in relation to nonpayment of rent for the period of January 2010 through September 2012, reflecting damages totaling $66,000.00.

The Court finds that the Plaintiff has not provided sufficient evidence to establish a claim for either *quantum meruit* or *unjust enrichment*. "The elements of a cause of action sounding in *quantum meruit* are (1) performance of services in good faith, (2) acceptance of services by the

person to whom they are rendered, (3) expectation of compensation therefor, and (4) reasonable value of the services rendered." *Wehrum v. Illmensee*, 74 A.D.3d 796, 797, 902 N.Y.S.2d 607, 609 [2nd Dept, 2010]. "The elements of unjust enrichment are that the defendants were enriched, at the plaintiff's expense, and that it is against equity and good conscience to permit the defendants to retain what is sought to be recovered." *Cty. of Nassau v. Expedia, Inc.*, 120 A.D.3d 1178, 992 N.Y.S.2d 293 [2nd Dept, 2014]. "The essence of unjust enrichment is that one party has received money or a benefit at the expense of another." *Wells Fargo Bank, N.A. v. Burke*, 155 A.D.3d 668, 671, 64 N.Y.S.3d 228, 232 [2nd Dept, 2017], *quoting City of Syracuse v. R.A.C. Holding, Inc.*, 258 A.D.2d 905, 685 N.Y.S.2d 381 [2nd Dept, 1999]. The Court agrees with the Defendants that *quatum meruit* and unjust enrichment are only available where the existence of a contract is in dispute or does not exist. *See Thompson v. Horowitz*, 141 A.D.3d 642, 643–44, 37 N.Y.S.3d 266, 268 [2nd Dept, 2016]; *El-Nahal v. FA Mgmt., Inc.*, 126 A.D.3d 667, 668, 5 N.Y.S.3d 201, 202 [2nd Dept, 2015]. The Court has determined that the initial oral agreement ($2,000.00 rent per month together with maintenance of the premises) was and continued to be the parties' agreement.

However, even assuming, *arguendo*, that the oral agreement between the parties regarding the rent was in dispute, and that as a result the Plaintiff can maintain his alternate theories based upon the equitable theories of *quantum meruit* and unjust enrichment, the Court finds that the Plaintiff has failed to provide sufficient proof of an "(3) expectation of compensation therefor, and (4) reasonable value of the services rendered." The Plaintiff's only evidence in regard to the element that Plaintiff was expected to be compensated at an amount greater than $2,000.00 per month is Martinelli's testimony. Martinelli, assuming the truth of his statement, testified that he

told Defendant Gilgurd that the rent would be raised to $6,000.00. Martinelli never stated that Gilgurd agreed. In fact, Martinelli states that Gilgurd protested. Further, although Gilgurd, as determined herein, failed to pay rent for a period, the Plaintiff continued to accept payment pursuant to the terms represented by Gilgurd, thereafter. In fact, Martinelli testified that the Defendant did in fact pay $2,000.00 per month from October 1, 2012 through September 30, 2015. (Tt. 12/14/2017, Pg. 32, Lines 9-10) No other notice or communication was offered as evidence by the Plaintiff.

Even assuming that the Plaintiff had maintained a viable claim for *quantum meruit* or unjust enrichment, the testimony of Plaintiff's witnesses regarding what other tenants paid per month as rent at the Premises, was insufficient to satisfy that aspect of the Plaintiff's claims that is based upon the element of "reasonable value of the services rendered." Moreover, the Court finds that the Plaintiff has failed to provide sufficient evidence that $6,000.00 per month was in fact a reasonable value for the Leasehold Space at the Premises. The evidence presented by the Plaintiff was limited to the brief testimony of Myron Lubitsch and Mohammed Zawgari who acknowledged that they paid more than $2,000 per month for a karate school and deli/grocery, respectively. However, those other properties are significantly different in type from the Leasehold Space in as much as they were not rented as a bare warehouse space. One being a commercial space (deli/grocery) and the other being a commercial space (karate school). Moreover, neither of these tenants indicated an obligation to maintain/manage the Premises. As a result the Court finds that these other lease agreements are not comparable and therefore are not sufficient proof of the reasonable value of the services rendered. *See Michaels v. Byung Keun Song*, 138 A.D.3d 1074, 1075, 28 N.Y.S.3d 915, 916 [2nd Dept, 2016]; *Geraldi v. Melamid*, 212

A.D.2d 575, 576, 622 N.Y.S.2d 742, 743 [2nd Dept, 1995]. The Court in Geraldi held that even assuming that the Plaintiff had not sought recovery based on a contract (although one was alleged) the Plaintiff could still recover in *Quantum Meruit*. However, the Plaintiff still had to provide sufficient evidence of the reasonable value of the services rendered. The Court determined that the Plaintiff did not provide sufficient proof. *Id.*

Malicious Prosecution- First Counterclaim and Abuse of Process- Second Counterclaim

The Defendants allege as part of their First Counterclaim for Malicious Prosecution "[t]hat in retaliation for the said action under Kings County index number 503552/2014, the plaintiff herein commenced the within action at the behest of and at the direction of LUDMILLA RUBINOVA and SIMON RUBINOV." Similarly, the Defendants allege as part of their Second Counterclaim for Abuse of Process that "the plaintiff's purpose for commencing the instant proceeding was to exact a benefit in the litigation under Kings County index number 503552/2014, and as a means to prevent the instant defendants from exercising their legal rights." However, in their post trial Memorandum of Law, the Defendants contend and describe both counterclaims as seeking sanctions against the Plaintiff pursuant to 22 NYCRR 130-1.1, for the initiation of the instant action. The Defendants contend that Plaintiff's action is accordingly frivolous. In response, the Plaintiff argues in its Post Trial Brief that the Defendants' counterclaims must be dismissed given that "the trial record is devoid of any evidence to support his counterclaims sounding in malicious prosecution and abuse of process and that no testimony was even given by Defendant Boris Gilgurd during trial to support these counterclaims."

Malicious prosecution and abuse of process are often used interchangeably and will be treated as such herein. "The three essential elements of the tort of abuse of process are "(1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or

justification, and (3) use of the process in a perverted manner to obtain a collateral objective." *Tenore v. Kantrowitz, Goldhamer & Graifman, P.C.*, 76 A.D.3d 556, 557, 907 N.Y.S.2d 255, 257 [2nd Dept, 2010], *quoting Curiano v. Suozzi*, 63 N.Y.2d 113, 469 N.E.2d 1324 [1984]. What is more, "the institution of a civil action by summons and complaint will not give rise to a claim to recover damages for abuse of process, as doing so is not legally considered the type of process capable of being abused." *Muro-Light v. Farley*, 95 A.D.3d 846, 847, 944 N.Y.S.2d 571, 572 [2nd Dept, 2012]. Of significance, a party claiming abuse of process or malicious prosecution must establish that both the commencement of the action and the subsequent conduct of the Plaintiff satisfied the elements above and constituted sanctionable conduct. *See 5000, Inc. v. Hudson One, Inc.*, 130 A.D.3d 678, 680, 13 N.Y.S.3d 509, 511 [2nd Dept, 2015].

In the instant matter, there is no dispute between the parties that a previous lawsuit had been brought by Defendant Gilgurd against a principal of the Plaintiff, Rubinov. During his testimony, Defendant Gilgurd testified credibly that he initiated a prior proceeding against Rubinov "because he withdrew $17,000 from our account to somebody else who I don't know, and he's saying I'm very sorry, it's my mistake, I will reimburse this money." (Tt. 2/15/2018, Pg. 32, Lines 2-4) However, 22 NYCRR 130-1.1(c) states that a matter will be found to be frivolous only if "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." After a review of the claims made by the Plaintiff and the testimony of the parties the Court finds that the Defendants have failed to provide this Court with sufficient proof that the instant proceeding was solely pretextual, or otherwise an abuse of process.

Although the Court did find that the existence of the other proceeding served to support a credibility finding, that finding was on the basis of the existence of the dispute itself. Gilgurd and

Rubinov are clearly at odds. Their relationship has deteriorated to the point that Court intervention became an option. That does not mean that either claim is frivolous. It does, however, lend credibility to Gilgurd's truthfulness in relation to Rubinov's possible motivation. However, no real specificity in relation to the other matter was provided for the Court to permit it to conclude that this case was frivolous or malicious. There is little to no support for that. Especially since the Plaintiff was determined to be entitled to damages in this case. There was no evidence presented by Defendants that the instant matter was "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." As a result, the Defendants First Counterclaim for Malicious Prosecution and the Second Counterclaim for Abuse of Process are hereby denied.

The foregoing constitutes the Decision of the Court.

It is hereby ORDERED as follows:

Plaintiff's First Cause of Action for breach of contract is granted and Plaintiffs are awarded damages in the amount of $66,000.00 as against the Defendants plus interest and costs.

Plaintiff's Second and Third Causes of Action are dismissed.

Defendant's First and Second Counter Claims are dismissed.

Plaintiff to Settle Judgment on Notice together with a copy of this decision within 30 days of the date of entry.

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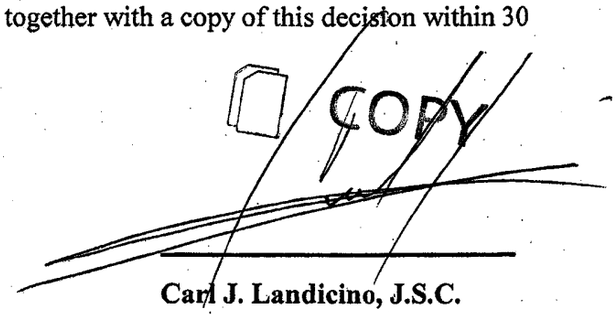

Carl J. Landicino, J.S.C.