STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 26, 2014)

JULIA MONTEIRO	:	
	:	
VS.	:	**C.A. No. PC 06-5064**
	:	
PERFORMANCE ADJUSTING PUBLIC INSURANCE ADJUSTERS, LLC; MULTI-STATE RESTORATION, INC.; and LIBERTY MUTUAL FIRE INSURANCE COMPANY	:	

DECISION

K. RODGERS, J. This non-jury matter was tried before the Court, sitting in Kent County, by agreement of the parties, on Plaintiff Julia Monteiro's (Monteiro or Plaintiff) Complaint for contract damages against Defendants Performance Adjusting Public Insurance Adjusters, LLC (Performance Adjusting) and Multi-State Restoration, Inc. (Multi-State)(collectively, Defendants),[1] and on Defendants' Counterclaims for breach of contract, book account and unjust enrichment. The parties' claims arise from the work performed by Defendants on Plaintiff's real property following a fire.

This Court has jurisdiction pursuant to G.L. 1956 § 8-2-13 and renders its Decision in accordance with Rule 52 of the Rhode Island Superior Court Rules of Civil Procedure.

[1] The claims against Defendant Liberty Mutual Fire Insurance Company (Liberty Mutual) were dismissed with prejudice by Plaintiff by way of Stipulation dated November 27, 2007, and filed with the Court on April 7, 2008.

I

Facts

Having heard the testimony presented by the parties, examined the exhibits admitted into evidence, and assessed the credibility of the witnesses, the Court makes the following findings of fact.

A

The Property

On or about May 24, 2005, Monteiro purchased a two-family home at 346-348 Woonasquatucket Avenue, North Providence (the Property) for $258,000. The purchase price was structured as follows: $18,000 down payment by Monteiro; $202,000 adjustable-rate thirty-year first mortgage from First Franklin, and a $37,000 fixed-rate thirty-year second mortgage also from First Franklin. At the time of the purchase, Monteiro intended to renovate and then rent out the first-floor unit and, thereafter, renovate the two-story unit on the second and third floors of the building where she and her two daughters would reside. In the meantime, Monteiro and her two daughters lived with Monteiro's mother on Carrington Avenue, Providence.

After the closing and through September 2005, Monteiro's two brothers, her then-fiance, and a friend renovated the Property. None of these individuals was a licensed contractor, and there was no evidence that building permits had been obtained for any work they performed. The work generally consisted of cosmetic improvements and included the following: tiling, laying linoleum or sanding the floors in each room in the first-floor unit; painting throughout the first-floor unit; installing new cabinetry in the first-floor unit bathroom; removing old sheetrock and installing new sheetrock and

compound on walls and ceilings throughout the upper two floors; tiling the walls in the second-floor bathroom; and removing linoleum in the kitchen and bathrooms on the top two floors. All this work was performed at no cost to Monteiro. In July 2005, Monteiro rented the first-floor unit at the rate of $1,050 per month.

According to Monteiro, her brothers, her then-fiance and her friend did not in any way change or even touch the existing electrical wiring on either the second or third floors in the course of tearing down the walls and putting up new sheetrock. Monteiro further testified that the electrical system on the second and third floors worked fine before the new sheetrock was installed, and there was no need to hire any professional to do further electrical work. By mid-September 2005, the only renovations Monteiro intended to complete before moving her family into the Property later that month were to sand the floors and to sand and paint the new sheetrock on the second and third floors.

B

The Fire

On September 21, 2005, a fire started in the basement of Monteiro's two-family house.[2] The basement area sustained fire, smoke, soot and water damage. Although the fire was limited to the basement, there was minor damage in one area of the exterior vinyl siding, some smoke damage to the first-floor unit, and some smoke damage in the stairway leading from the basement to the first floor. Additionally, the windows on the first floor and some windows on the second floor were broken in the course of extinguishing the fire. No credible evidence was presented to demonstrate that there had

[2] There was no evidence presented on the cause of the fire or who, if anyone, was responsible for the fire.

been any significant fire, smoke, soot or water damage to the second or third floors. By all accounts, this was a minor fire. Fortunately, no one was injured.

Monteiro's daughter, Sharon Monteiro, first learned of the fire when she received a phone call from the North Providence Fire Marshall while she was at the Carrington Avenue home. The Fire Marshall instructed that the owner of the Property should bring the homeowner's insurance policy to the scene. Sharon Monteiro, in turn, retrieved Plaintiff and brought her to the Property with her homeowner's insurance policy provided by Liberty Mutual. While at the scene of the fire, sometime around 11:00 that morning, Plaintiff was approached by an unknown man who informed her that he could help with boarding up the home. Although unidentified, Plaintiff came to learn the man worked for William D'Amico (D'Amico), a public adjuster. D'Amico is the owner and sole member of Performance Adjusting and the president, manager and sole owner of Multi-State.

On the day of the fire, Lionel Bernardino (Bernardino), the then-Building Official in North Providence, viewed the Property. Bernardino recalled that the fire started in the basement and caused water and smoke damage to the floor joists and to the first-floor unit. He further testified that when a fire is in the basement of a structure he would not ordinarily inspect the upper floors. Indeed, he did not recall having inspected the second and third floors of the Property on September 21, 2005.

C

Agreements with Performance Adjusting and Multi-State

On the day of the fire, Monteiro executed certain documents provided by D'Amico's representative while at the Property. One such document, an Insurance Adjusting Agreement, provided as follows:

> "To the insurance companies interested, we the undersigned hereby agree to retain Performance Adjusting, to assist in the adjustment of the above loss and agree to pay for the services 10% of the total recoverable amount of the loss. We also request that you include Performance Adjusting, on any insurance disbursement whether in part or in whole." Pl.'s Ex. 2, at 1.

Another document, an Authorization to Perform Services and Direction of Payment, provided in part:

> "Customer" [ ] authorizes MULTI-STATE RESTORATION, INC . . . to perform any and all necessary cleaning and construction services on Customer's property at 368 [sic] Woonasquatucket Ave N. Prov . . . and with respect to items that need to be cleaned at a remote location, to remove and clean such items as necessary.
>
> "Customer authorizes _____ Insurance Company . . . to directly and solely pay MULTI-STATE.
>
> "If for any reason the check should come to or be made payable to the Customer, Customer then agrees to pay MULTI-STATE immediately upon receipt of the check from the insurance company . . . .
>
> "If the loss is not covered by insurance, Customer agrees to pay the total amount to MULTI-STATE upon receipt of the invoice.
>
> "It is my understanding that the services to be performed by MULTI-STATE will be limited to those, which are authorized by my Insurance Company.
>
> Liberty Mutual Group_____
>
> . . .
>
> "Customer agrees that MULTI-STATE is working for the Customer and not the Insurance Company or agent/adjuster.

> "Additional remarks: Any work being completed by Multi-State Restoration will not be subject to a 10% fee be [sic] Performance Adjusting, Inc." Pl.'s Ex. 2, at 3.

Thus, on September 21, 2005, Plaintiff entered into two contracts, one with Performance Adjusting and one with Multi-State. See generally Pl.'s Ex. 2.

Later in the afternoon on September 21, 2005, Plaintiff met D'Amico for the first time at 1135 Charles Street, North Providence, the office housing both Performance Adjusting and Multi-State. D'Amico reviewed her Liberty Mutual homeowner's insurance policy at that time. Plaintiff's Deluxe Homeowner's Policy with Liberty Mutual provided $250,000 replacement cost for the dwelling, $25,000 for other structures, $125,000 for personal property, and $50,000 for loss of use.

At that initial meeting, D'Amico explained that Multi-State would use its own funds to remediate the Property until the insurance company paid on the loss under the terms of the homeowner's policy, that Performance Adjusting would deal with the insurance adjuster so that Plaintiff did not have to, and that this would not cost Plaintiff anything so long as Multi-State was performing the construction services.

D

Review and Approvals by Liberty Mutual

After receiving the insurance company information from Plaintiff, D'Amico contacted Liberty Mutual and was directed to adjuster Ricky Turgeon (Turgeon), with whom D'Amico had not had any prior dealings. In the meantime, Performance Adjusting and/or Multi-State began work on the Property; namely, boarding it up, removing water, drying and spraying a microband to stop mold growth. In doing this work, D'Amico

wore two hats: as Plaintiff's public adjuster through Performance Adjusting, as well as her contractor through Multi-State.

On September 22, 2005, D'Amico and Turgeon met at the Property to discuss and review the basic scope of the work to be done. As is typical with a fire loss, the extent of work needed was not apparent immediately after the fire because certain areas remained wet from the firefighting equipment. Accordingly, as is commonplace to allow time for the area to dry out, D'Amico and Turgeon returned to the Property on October 13, 2005, to fully inspect the premises.

Prior to that second meeting, Multi-State prepared and submitted to Liberty Mutual its estimate to repair the fire damage, which totaled $263,958.07. Defs.' Ex. N. That estimate, prepared by D'Amico, reflected minimal work to be done on the second and third floors, including cleaning walls and ceilings, sealing drywall for odor control, replacing certain windows, and some painting in the front stairway. Id. at 12-16.

Turgeon's first estimate for the work Liberty Mutual was authorizing to be done was completed after his second meeting with D'Amico, on November 16, 2005. Defs.' Ex. O. Turgeon's estimate reflected replacement cost value of $113,646.80, depreciation in the amount of $12,341.43, and actual cash value of $101,305.37. Id. at 23-24. The work that Liberty Mutual authorized to be done on the second and third floors was limited to replacing, sealing and painting windows. Id. at 17-19.

By letter dated November 29, 2005, Turgeon advised Monteiro that a payment of $99,305.43 was paid to Performance Adjusting as "[t]he structure damage was resolved on November 29, 2005." Pl.'s Ex. 4. Multi-State deposited the funds into its general business checking account. The $99,305.43 payment reflects the reduction of a $1000

advance and the $1000 applicable deductible from the replacement cost and applicable depreciation set forth in Turgeon's November 16, 2005 estimate.[3] Id. The November 29, 2005 letter was copied to Performance Adjusting and advised that "[t]he repair time based upon the damages should not exceed a four (4) month period of restoration, ending March 31, 2006, this includes application of permit, demolition and rebuild." Id. The letter also reflected that this initial payment included rental loss for September through December, with additional checks to be forwarded each month in the amount of $1050 beginning in January and ending in March 2006. Id.

Although Turgeon's November 29, 2005 letter indicated that the structure damage was resolved as of that date, Turgeon's own deposition testimony, as confirmed by D'Amico's trial testimony, revealed otherwise. See Turgeon Dep. 40, Sept. 25, 2007.[4] D'Amico immediately responded to Turgeon by way of another written estimate to address the differences between the two estimates completed to date. See Defs.' Ex. P. This estimate again reflected only limited work to be performed on the upper two floors of the Property and certainly did not reflect the need for any demolition of existing drywall or electrical work on either the second or third floors. Id. at 9-11.

Thereafter, D'Amico and Turgeon again met at the Property on January 24, 2006, to further narrow the issues on which they differed in their estimates. Turgeon Dep. 60. Turgeon reworked his estimate and agreed that Liberty Mutual would pay $143,241.69 in

[3] A small mathematical error exists in this payment, however, inasmuch as the total should have been $99,305.37 rather than $99,305.43. This error is inconsequential to the issues before the Court.

[4] Turgeon's testimony was presented by way of designated deposition testimony pursuant to R.I. R. Evid. 804(b)(1), as the parties represented that he was unavailable at the time of trial.

replacement costs for the loss. Defs.' Ex. Q. Liberty Mutual's own in-house contractor attended that inspection and concurred with Turgeon's estimate. Turgeon Dep. 62.[5]

By letter dated February 1, 2006 to Monteiro, with a copy to Performance Adjusting, Turgeon confirmed that he was making some revisions to his original estimate following his January 24, 2006 inspection of the Property. Defs.' Ex. F. Moreover, that letter confirmed that the period of restoration for which Liberty Mutual would pay for loss of fair rental value was four months, ending on March 31, 2006, which remained the time period that would include application for permits, demolition and rebuilding. Id.

By check dated February 17, 2006, Liberty Mutual tendered an additional $27,476.90 under Plaintiff's policy for additional building damage and cleaning of the second and third floors. Pl.'s Ex. 6. Monteiro endorsed the check at D'Amico's request and the funds were deposited by Multi-State into its general business checking account. Thus, by mid-February 2006, Multi-State had received $126,782.27[6] from Liberty Mutual to repair Plaintiff's Property that had been damaged by the fire.

Without ever responding to Turgeon or Liberty Mutual in writing after receiving the additional funds in mid-February, D'Amico, in his role as a public adjuster, determined that his negotiations with Liberty Mutual had not concluded. Turgeon

[5] Although Turgeon testified that Liberty Mutual's in-house contractor was involved "after maybe the second inspection or maybe upon the third with [D'Amico]," D'Amico's trial testimony confirmed that Turgeon crafted his $143,241.69 estimate after meeting at the site with Liberty Mutual's contractor. Thus, this Court concludes that it was the January 2006 meeting at the Property that Liberty Mutual's in-house contractor attended, not the second inspection on October 13, 2005.

[6] This amount reflects Liberty Mutual's revised estimate of $143,241.69, less depreciation in the amount of $17,800.07, and a $1,000 deductible, plus a cleaning fee for the second and third floors in the amount of $2,340.65. See Pl.'s Ex. 6. As Liberty Mutual had already paid $99,305.37 on the fire loss in November 2005, the difference of $27,476.90 was tendered on February 17, 2006.

disagreed and testified at his deposition that he assumed D'Amico accepted the revised estimate of $143,241.69[7] because D'Amico never wrote back to Turgeon after Turgeon's February 17, 2006 communication and disbursement. Turgeon Dep. 31, 36.

E

Work Performed by Multi-State

For the duration of the period that D'Amico was negotiating with Liberty Mutual, and notwithstanding the substantial payments that had been made to Multi-State by mid-February 2006, little had been done in the way of actual construction at the Property. According to D'Amico, there were two reasons for this. First, he testified that work on the Property "could only be done once numbers were agreed to," and that any work that was being done was "minimal." In determining for himself in February 2006 that Plaintiff "didn't get the right number," D'Amico proclaimed the negotiating process to still be ongoing, without notifying Liberty Mutual. Second, D'Amico faulted the inferior workmanship on the second and third floors that allegedly raised "code issues" with local building officials as the basis for doing little work on the Property.

According to Plaintiff, who was anxious to get the Property repaired, to rent out the first floor unit again, and to move her family in to the top two floors, she routinely inquired of the status from D'Amico and reminded him that Liberty Mutual had given only four months, through March 31, 2006, to repair the Property. D'Amico advised

[7] This revised estimate is $1000 greater than the $142,241.69 figure upon which Defendants calculate damages to Performance Adjusting. See Defs.' Ex. J, at 5; Defs.' Post-Trial Mem., at 26; Defs.' Reply Mem., at 16. Additionally, Defendants continually refer in their post-trial memoranda to the revised estimate of roughly $142,000. See, e.g., Defs.' Post-Trial Mem., at 17-18, 20-21; Defs.' Reply Mem., at 10-11. The difference appears to be the $1000 deductible paid. See Defs.' Ex. Q, at 24. For consistency and because Defendants employ the lesser amount in calculating damages, the Court will hereafter use the $142,241.69 as the total amount of loss determined by Liberty Mutual.

Plaintiff to take Liberty Mutual's November 29, 2005 letter regarding both the amount paid and the four-month period of restoration "with a grain of salt" because "it [didn't] mean it's what the final number is or how much time it would be." In December 2005, Plaintiff "checked every day" to see how the repair work was going and noted at that time that the electrical work was just beginning. She reported to D'Amico that she was not satisfied at that time with the progress of the work. D'Amico responded that he had a problem pulling permits with North Providence officials, to which Plaintiff then asked to see correspondence from the Town. No such correspondence was produced in response to Plaintiff's request, nor produced at trial.

Sharon Monteiro also checked on the Property frequently to see if work was being done. In March 2006, she observed a moving truck with Multi-State's name and telephone number on it at the Property and materials in the dumpster that she believed did not originate from the Property. That same month, she and Plaintiff visited the North Providence Building Inspector's office to review any documentation that addressed the purported difficulty in pulling permits as D'Amico had claimed. There was nothing in the Town's files which indicated that there was faulty wiring or a cease and desist order relating to the Property. An electrical permit had been issued just days before the Monteiros visited the Building Inspector's office.

F

Plaintiff's Affidavit

During the time period in which Plaintiff and her daughter asserted that they continually checked on the status of the work being done on the Property, Plaintiff executed an Affidavit prepared by or at the direction of Defendants. On March 7, 2006,

several weeks after Liberty Mutual had paid out $126,782.27, Plaintiff executed an Affidavit that was notarized by Multi-State's then-counsel Joseph J. Hurley in North Providence. Pl.'s Ex. 7. That Affidavit provides:

> "I am the owner of 346-348 Woonasquatucket Avenue, North Providence, which was substantially damaged by a fire on September 21, 2005. Following this fire, I engaged the services of a person who represented himself to be a licensed building contractor. He stated that he would obtain all necessary building permits and then perform the necessary work. It has subsequently come to my attention that he did not obtain the required building permits, and was acting in violation of local building codes. I have attempted to contact him to discuss this; however, he does not respond to my telephone calls and appears to have removed himself from the Providence area. As a result, in order to have the work completed in compliance with local building codes and ordinances, I have retained Multi-State Restoration, Inc., to perform the work which was to have been done by him." Pl.'s Ex. 7.

G

Defendants' Termination

In April 2006, Plaintiff continued to follow up on Multi-State's progress on the Property and was unsatisfied. Plaintiff attempted to speak to D'Amico by phone and in person at his office, but he never returned her calls nor met with her at his office. These efforts lasted through May 2006, at which time Sharon Monteiro discovered that the upper floors of the Property had been "gutted."

By letter dated May 12, 2006, counsel for Monteiro directed Multi-State to cease and desist from any further work on the Property. Defs.' Ex. E. Additionally, Multi-State was requested to provide counsel with a full and complete accounting of all work completed to date, the value of the work completed, and the date and amount of all monies received relative to the Property. Id. In response, D'Amico prepared and

forwarded four invoices: (1) $99,789.85 for construction work completed on the Property; (2) $3375.00 for packing, moving and storing contents; (3) $3485.00 for emergency call services; and (4) $9056.06 for the 10% fee that Performance Adjusting earned for the portion of work that was not performed by Multi-State. Defs.' Ex. J. Thus, Defendants contend that they collectively earned $115,705.91 out of the $126,782.27 paid by Liberty Mutual through February 2006. Id.; cf. Pl.'s Exs. 4, 6.

According to D'Amico, after he provided Defendants' four invoices, he conferred with Plaintiff's then-counsel, explained that the main reason for the delay in completing the work had been the code issues relating to work done on the second and third floors without proper permits before the fire, and that they reached an agreement that Multi-State would proceed with and complete the project within three months at no further cost to Plaintiff.

By July 2006, Plaintiff changed course and directed her then-counsel to inform D'Amico that Plaintiff did not want Multi-State to continue work on the Property. No additional work was performed on the Property by Defendants after July 2006.[8]

H

Plaintiff's Assessment of Damages

With $126,782.27 having been placed in Multi-State's own account as paid under Plaintiff's insurance policy with Liberty Mutual, Plaintiff undertook to demonstrate the work Multi-State had actually performed and what work remained to be done at the Property. Plaintiff engaged the services of Harry Angevine (Angevine), a licensed general contractor involved in residential home construction and renovation. Angevine

[8] No credible testimony was offered which reflected the extent to which Multi-State performed any work on the Property from May through July 2006.

inspected the Property on at least three occasions between May and July 2006. By letter date July 14, 2006, Angevine concluded that the work completed by Multi-State to date was valued at $23,258. Pl.'s Ex. 13. Specifically, he estimated the value of the work done by Multi-State to be as follows: $4400 for demolition and removal of debris; $3650 for rough carpentry; $6800 for rough electric; $5375 for rough plumbing and HVAC; and $3033 for 15% in overhead and profit. Id. Angevine also concluded, without any breakdown of the scope of work or value thereof, that the balance of the work that was needed to be done on the Property was $126,000. Id.

Almost one year later, by letter dated August 15, 2007, Angevine compiled an itemized list of what additional work would be required to make the Property habitable, totaling $98,100. Pl.'s Ex. 14. Angevine's most recent list specifies the cost to complete eight areas of work proposed to be performed, with an additional cost for overhead and profit and for a superintendent's compensation. Id. at 3.

Plaintiff also procured an estimate from MC Contrata Remodeling Company, a Central Falls company. Although no witness was offered to explain this estimate, the parties agreed that the September 12, 2007 estimate presented by Manuel Coelho would be a full exhibit. Pl.'s Ex. 15. Manuel Coelho's estimate did not specify the values of the various areas of work to be performed, but merely reported a lump sum figure of $123,000. Id.

I

The Parties' Claims

Plaintiff originally filed her single-count Complaint against Defendants in September 2006, to which Defendants asserted affirmative defenses and each party asserted counterclaims. In January 2007, in response to Plaintiff's Amended Complaint adding a claim against Liberty Mutual, Defendants again asserted those same affirmative defenses and counterclaims. Defendants' affirmative defenses state that Defendants performed and/or substantially performed their obligations under their contracts, that Plaintiff caused any and all delays in the progression of the restoration project, that delays in the project were outside Defendants' control, and that any damages due Plaintiff should be set off by sums owed to Defendants for services rendered before Defendants were terminated.[9] Multi-State's Counterclaim seeks recovery for breach of contract, book account and unjust enrichment, and Performance Adjusting asserts claims against Plaintiff for breach of contract and unjust enrichment.

Plaintiff's affirmative defenses to Multi-State's Counterclaim assert that Multi-State breached its contract, failed to perform in a workmanlike manner, incurred unnecessary delays, and was unjustly enriched by the payments made by Liberty Mutual. As against Performance Adjusting, Plaintiff raises the affirmative defense of unjust

[9] Defendants also asserted as affirmative defenses that Plaintiff failed to mitigate damages and that Plaintiff is barred from recovery by the doctrines of waiver, unclean hands, and equitable estoppel. None of these affirmative defenses was addressed in any fashion at trial or in Defendants' post-trial memoranda, and therefore appear to have been waived by Defendants.

enrichment, breach of contract and failure to perform its duties in accordance with G.L. 1956 § 27-10-3.[10]

After suit was filed, Plaintiff pursued settlement with Liberty Mutual. Ultimately, Liberty Mutual and Plaintiff agreed on the terms of that settlement based upon the amounts paid to date and Plaintiff's policy limits. In executing that settlement agreement, Plaintiff accepted the settlement funds as follows: (1) $12,800 for recoverable depreciation; (2) $15,000 in loss of rental income; and (3) $13,353.84 in code upgrades. Defs.' Ex. I.

By Order entered on June 25, 2007, and by agreement of the parties, Defendants deposited $9880.30 into the Court Registry. Notably, this amount does not accurately account for what Defendants maintained they had collectively earned out of the $126,782.27 paid by Liberty Mutual.[11]

II

Presentation of Witnesses

In support of Plaintiff's claims, Plaintiff presented her own testimony and that of her daughter Sharon Monteiro, Angevine, Bernardino, and present North Providence Electrical Inspector William Signoriello (Signoriello). Defendants presented the testimony of D'Amico and Dennis Walsh (Walsh), a licensed public adjuster and

[10] Section 27-10-3 governs the issuance of an insurance claims adjuster license by the State insurance commissioner. Plaintiff has not argued to this Court in any manner how Performance Adjusting has failed to comply with § 27-10-3, nor how such alleged violation bars Performance Adjusting from recovery, and therefore this affirmative defense has been waived.

[11] If Defendants were correct that the value of their work was $115,705.91, as reflected in their four invoices, see Defs.' Ex. J, then Defendants had earned all but $11,076.36 of the $126,782.27 paid by Liberty Mutual as of February 2006 and deposited into Multi-State's general business checking account, not $9,880.30.

contractor. Additionally, this Court was presented with specified excerpts of the deposition transcript of Turgeon.[12] The Court will assess, in turn, each witness's credibility and, to the extent not addressed supra, Section I, the content of his or her testimony.

A

Plaintiff

Monteiro presented as a prepared and scripted witness. On direct examination, it was evident to this Court that Monteiro sought the Court's sympathy. She would have this Court believe that she was naïve, trusting and was taken advantage of by an unscrupulous contractor, even signing legal documents which she neither read nor understood, simply because D'Amico asked her to. For the reasons that follow, this Court does not accept such a characterization.

Monteiro testified how she financed the purchase of the Property in May 2005, for $258,000. She saved for fifteen years for the $18,000 down payment on the Property. She entered into an adjustable-rate mortgage agreement with First Franklin for roughly $202,000, and on the same day, entered into a second, fixed-rate mortgage agreement with First Franklin for roughly $38,000.[13] Having spent her life savings on the down payment, it is understandable that Monteiro had little funds with which to renovate the

[12] Contrary to Defendants' repeated assertion in their Post-Trial Brief and Reply, Turgeon's entire deposition transcript was not admitted into evidence in full. Rather, it was only specified pages and lines of that transcript set forth on the record before this Court that were identified by the parties to be used in accordance with Rule 804(b)(1) of the Rhode Island Rules of Evidence.

[13] While the Court certainly does not fault Monteiro for taking advantage of creative financing offered by First Franklin in May 2005, which resulted in two loans that were secured with less than 7% of equity in the Property, this is but one example of the loose lending practices in the sub-prime real estate market that has contributed to this country's economic crisis beginning in the Fall of 2008.

Property. She relied on her brothers, a friend and her then-fiance to work on each unit after she closed on the Property. The Court finds that Plaintiff was well aware that these particular individuals were working on the Property before the fire and that they were unlicensed.

In requesting substantial damages from this Court, Plaintiff's testimony, and that of her daughter, revealed a series of transactions in which, at the end of the day, Plaintiff was able to purchase the Property at a short sale, which Property she now owns free and clear of mortgages. Monteiro herself comprehensively testified about these transactions, which leads this Court to conclude that she is much more savvy and knowledgeable than she is naïve.

Monteiro attempted to demonstrate how trusting she was of Defendants. She testified on cross-examination that she trusted Multi-State as early as the time she signed documents at the scene of the Property without reading them and Multi-State began to board up the building, before she even met D'Amico on the day of the fire. Although she testified on direct that she began to become concerned after Liberty Mutual paid $99,305.37 on the loss in November 2005 and little work had been done on the Property when she "checked every day" in December 2005, it was not until February 2006, after Liberty Mutual had disbursed a total of $126,782.27 on the fire loss and D'Amico advised her that he would negotiate for more money and/or that she would have to sue Liberty Mutual, that she distrusted D'Amico. Monteiro's testimony on redirect regarding when she began to distrust D'Amico can best be described as adamant.

Notwithstanding her repeated sentiment that she distrusted D'Amico in February 2006, Monteiro testified that she had no understanding what she was signing when she

executed the Affidavit on March 7, 2006, that D'Amico did not explain it to her, but that she signed it "because she trusted him." On numerous occasions, through tears, Monteiro responded that she was "stressed out" when asked about documents she signed without reading. The Court finds this line of testimony to be entirely lacking in credibility. First, given that Monteiro so emphatically distrusted D'Amico in February 2006, it makes little sense that she would execute a document blindly just a few weeks later because D'Amico asked her to. Thus, the reasonable inference this Court draws is that she was indeed aware of what she was signing. Second, it is understandable that Monteiro would now attempt to distance herself from the Affidavit because it is a knowingly false statement. Monteiro well knew who worked on the Property before the fire and that they were unlicensed, there was no evidence that she had engaged anyone outside of Multi-State after the fire as stated in the Affidavit, and there was no evidence that her brothers, her friend and her then-fiance had fled the jurisdiction and/or were unresponsive to her. The content of the false statement that Plaintiff knowingly executed leads this Court to conclude that Monteiro was aware that code violations may exist on the upper two floors and that she was a knowing participant in the plan orchestrated by D'Amico to get the permits needed to proceed with the work on the Property. Accordingly, this Court expressly finds that Plaintiff had knowledge of and implicitly consented to work being done by Multi-State on the second and third floors to rectify the alleged code violations, whether such code violations did or did not exist.

In April 2006, Monteiro again went to the Property almost every day and continued to be frustrated by the lack of progress. According to Monteiro, she did not learn that the upper two floors had been gutted until her daughter discovered it in May

2006. While the Court finds that Monteiro was aware and consented to work being done on the second and third floors, the Court also finds that Monteiro was surprised by the extent to which Multi-State's work implicated the previous unlicensed work performed by her friends and relatives; namely, the demolition of the sheetrock. This response demonstrates Plaintiff's naivete, as she continually testified that while her brothers, friend and then-fiance erected new sheetrock, they "never touched the wires." While it may be accurate that they did not "rewire" the Property, the extensive construction work they did throughout the Property still required compliance with all building codes, including electrical and plumbing. Monteiro failed to appreciate this even throughout the trial, and her surprise in May 2006 when she learned that the upper two floors were gutted appeared to be genuine. This does not diminish the fact, however, that Monteiro had knowledge of and implicitly consented to Multi-State performing work on the upper floors of the Property.

In addition to these overarching credibility issues, Monteiro's responses on cross-examination differed in many respects from her testimony on direct on the same subject, even on minor points. This further supports the Court's conclusion that Plaintiff's direct testimony was scripted and, ultimately, that she is not credible. By way of example, on direct examination she clearly recalled that at the scene of the fire she was approached by a man who worked for D'Amico who said he would board up the doors and windows with plywood, and that she signed the Insurance Adjusting Agreement with Performance Adjusting at the scene. She stated that only the first floor windows and one third-floor window were boarded up. On cross-examination, however, she stated that she was "stressed out," and that she initially refused the efforts of this unidentified representative

of Multi-State to help her board up the Property. When asked if she recalled being told by a police officer that the gentleman was just trying to help her, she then admitted to signing one paper at the scene without reading it. Unlike on direct examination when she expressly stated that she signed the Insurance Adjusting Agreement, on cross-examination Monteiro could not identify which document she signed at the scene when asked.

With respect to Monteiro's first meeting with D'Amico at his office on the afternoon of the fire, Monteiro testified on direct that she brought her Liberty Mutual insurance policy with her to that meeting. On cross-examination, however, she stated that D'Amico already had her insurance policy in his office as she had given the policy to the unidentified individual she met at the Property earlier that day. She also stated on direct that D'Amico had Turgeon's business card, and that D'Amico informed her that he would call "the guy [D'Amico] knew from Liberty Mutual." On cross-examination, Monteiro testified that D'Amico called Turgeon in her presence and, thereafter, D'Amico told her, "You're all set. I will do the best I can for you."

Despite this Court's finding that Monteiro is not credible, this Court does accept as true Plaintiff's testimony regarding her displeasure with the progress of the work on the Property.

In conclusion, this Court finds that Monteiro lacked credibility. She appeared to the Court to be scripted in her direct examination, only to contradict herself on cross-examination and shed tears when faced with documents she signed but claims she never read. Her detailed testimony concerning damages she sought and the series of transactions that allowed her to avoid foreclosure and purchase the Property at a short

sale free and clear of mortgages, leads this Court to find that she is more knowledgeable and savvy and less the trusting victim. Moreover, and importantly, her execution of the Affidavit and her attempts to distance herself from the false statements therein leads this Court to the reasonable inference that she knew what she was signing, and that she was a knowing participant in D'Amico's plan to get permits issued and proceed with the work, including work on the second and third floors.

B

Sharon Monteiro

Sharon Monteiro, a twenty-four year old student at the Community College of Rhode Island, testified to her involvement with the Property in the Spring of 2006; namely, driving by once or twice per week to check on the status of the work. She also testified to the information contained in Excel spreadsheets that she had prepared as evidence of Plaintiff's damages. Included in such spreadsheets were a summary of mortgage payments her mother made, real estate taxes paid, and amounts her mother borrowed from Plaintiff's mother, brother, sister, a friend, and the Dexter Credit Union to either become current on her mortgage or taxes or for the purpose of purchasing the Property at a short sale. She described generally the time periods in which Plaintiff improved the Property during the pendency of this case; namely, that no work was done by Plaintiff from 2006-2007, that Plaintiff fixed things "little by little" in 2008, including the windows and boiler, and that, in 2010, the first floor was finished, with new sheetrock, plaster, floors in the living and dining rooms, a new bathroom and a new kitchen. In sum, Sharon Monteiro presented as a credible and knowledgeable witness, albeit biased in favor of her mother.

C

Harry Angevine

Plaintiff's construction expert, Angevine, also presented as a credible witness. His professional experience began in 1978 as a laborer for a general contractor; he eventually became a carpenter and carpenter foreman. Since the mid-1990s, he has owned or been part of organizations concentrating in residential construction and renovation. He was engaged by Plaintiff at the suggestion of her then-counsel, Paul Lancia, Esquire, with whom Angevine was quite friendly.

Angevine admittedly does not serve as a public adjuster nor has he negotiated fire losses with insurance companies on more than one occasion. He was unfamiliar with some of the emergency work performed after a fire, such as when to use microband spray and deodorizer and when and how to power wash in a confined space such as a basement.

Angevine acknowledged that, in offering his opinion, he was only considering construction costs, and not the emergency service fees, fees relating to the handling of contents in the Property or the 10% fee for Performance Adjusting's services if Multi-State were not performing the work. Further, he acknowledged that his written opinions were offered without any knowledge of what work Liberty Mutual and Multi-State had identified as the scope of the work, what Liberty Mutual had paid to be done, or what work Multi-State claimed it had done. Rather, at the time of Angevine's first written opinion dated July 14, 2006, he relied solely on what Plaintiff and/or counsel stated had been or should have been done on the first floor and in the basement only. Notwithstanding the shaky foundation upon which his opinions were based, Angevine's testimony before this Court served to meld the cracks in that foundation as he compared

his own observations of the Property with the specific line items in the construction invoice upon which Multi-State relied.

D

Lionel Bernardino

Bernardino's recollection of the Property in 2005 and 2006 was vague and inconclusive. He testified that he observed the upper two floors of the Property and noted that electrical wires were stapled to the front of studs with sheetrock placed over it, in violation of the building code. However, he could not recall when that inspection took place, but that it was not at or around the time of the fire. Notably, the only other date Bernardino recalled being at the Property, aside from the date of the fire, was in March 2008, when the North Providence police reported to him that the boards were off the back door and a side window at the Property, thus creating a safety hazard. As Building Official, Bernardino went to the Property and went floor to floor to ensure that no vagrants were living in the vacant building. He testified that, at that time, he noted that construction work was being done without permits. Accordingly, he sent a code violation letter to D'Amico. There was no evidence presented that this event took place some other time than March 2008 as Bernardino stated.

This Court concludes from Bernardino's limited recollection that any code violation he observed at the Property was in 2008, well after D'Amico's representations to Plaintiff that code violations from unauthorized work was the cause of the delay in completing work on the Property.

E

William Signoriello

Signoriello served as North Providence's Minimum Housing Inspector in March 2006 and became North Providence's Electrical Inspector in January 2007. He could not state when he visited the Property but testified on cross-examination that he "assumed maybe 2006 or 2007." On the one occasion that he was on the Property, he observed romex (wiring) improperly installed into the studding. He testified on direct that he made these observations on the second floor, but on cross-examination he stated that the faulty wiring was on the third floor and that the second floor had been gutted. Despite what he considered to be a safety issue, he never placed his observations in writing, did not issue a cease and desist order, and never returned to the Property to see if the violations had been properly fixed.

When combined with Bernardino's testimony, Signoriello's testimony further demonstrates that there had been no documented code violations at the time that D'Amico first advised Monteiro of the reason for delay in December 2005, and that no such violations were documented through March 7, 2006, when Plaintiff executed the Affidavit at D'Amico's request.

F

William D'Amico

D'Amico appeared equally as lacking incredibility as Plaintiff. Although serving as a contractor for twenty years, he has been a public adjuster for only seven years at the time of trial. While his explanations of what emergency services were needed in responding to a fire loss were helpful and credible, his testimony and exhibits were

otherwise replete with overstatements and exaggerations, both in the scope of work needed and in expenses for work allegedly performed. By way of example, the first estimate he submitted to Liberty Mutual was prior to even meeting with Turgeon for their first full inspection and resulted in an estimated cost of $263,958.07, just higher than the $250,000 policy limit, for what he characterized as a "minor fire." See Defs.' Ex. N. There was no evidence that he had met Monteiro at the Property to discuss and review the loss and to help craft his first estimate. By contrast, the first estimate by Turgeon was completed after the first full inspection and was more than 50% lower than D'Amico's estimate. Cf. Defs.' Ex. O. Additionally, when asked in May 2006 to account for the work performed to date, his calculation for what he previously described as being "minimal work" until the "final numbers were agreed upon," came strikingly close to the amount that Defendants had retained from the proceeds paid by Liberty Mutual. See Defs.' Ex. J; cf. Pl.'s Exs. 4, 6. Such coincidences are disingenuous attempts to obtain the most lucrative fee for Defendants, and, therefore, this Court wholly rejects Defendants' manner of calculating the costs associated with the work performed and materials provided.

This Court also has cause to reject specific line items in Defendants' invoices as further evidence of D'Amico's exaggeration of the scope of the work performed; namely, D'Amico's line item for replacement windows at a cost of $2800. See Defs' Ex. J, at 2. D'Amico testified that he ordered those replacement windows as a rush order after he and Attorney Lancia met, which meeting took place sometime after he submitted to Attorney

Lancia his invoices as representative of the work performed to date.[14] If D'Amico's testimony was truthful, then the cost of replacement windows would not have been incurred before he met with Attorney Lancia, and, therefore, this line item should not have appeared on the invoice D'Amico prepared before that meeting. This Court views this evidence as further basis upon which this Court concludes that D'Amico's testimony and his calculation of damages are wholly lacking in credibility.

D'Amico's calculations also demonstrate an inconsistency in his assessment of what work had been performed by Multi-State as of May 2006. Defendants' invoices reflect a total of $115,705.91, of which $99,789.85 was alleged to have been incurred for construction costs. Defs.' Ex. J, at 1-2. Notably, Performance Adjusting's calculation of the 10% of the total loss that was unearned by Multi-State utilizes the figure of $51,681.06 as work having been done by Multi-State. Id. at 5. D'Amico's oral testimony that this $51,681.06 figure was based upon "insurance related work paid by the carrier" to Multi-State to date is not supported in any documentary or testamentary evidence.

This Court also rejects D'Amico's stated reason for the delay in the work on the Property. As early as December 2005, D'Amico advised Plaintiff that the delays were

[14] Defendants' Post-Trial Memorandum on this subject includes a recitation of facts that was not presented at trial and does not otherwise comport with D'Amico's own trial testimony. See Defs.' Post-Trial Mem., at 10-11 (relying upon series of letters and faxes between D'Amico and Attorney Lancia that were not introduced into evidence and suggesting that Multi-State sent its "accounting" to Attorney Lancia on July 26, 2006). D'Amico testified on direct examination that after he received Attorney Lancia's letter dated May 12, 2006, see Defs.' Ex. E, he "put the paperwork together and called Lancia," and a meeting with Attorney Lancia thereafter took place. This Court wholly rejects Defendants' attempt to rewrite the trial testimony. Additionally, this Court finds there was no credible evidence that there existed any agreement between Plaintiff and Multi-State after Attorney Lancia's termination letter to complete work on the Property. Thus, this Court accepts May 12, 2006 as the date of termination. See id.

caused by code violations. Neither D'Amico, Turgeon or Liberty Mutual's in-house contractor noted any potential electrical or other code issues on the upper floors when inspecting the Property on several occasions between September 2005 and January 2006. Additionally, there was no credible evidence that any official identified code violations anywhere on the Property in late 2005 until the contracts were terminated by Plaintiff. There would have been such documentation in the Building Official's file, or that of the Minimum Housing Inspector or Electrical Inspector, but none was produced at trial. Additionally, both Bernardino and Signoriello lacked any specific recollection of violations in 2005 or 2006, but each recalls safety issues thereafter. This Court infers from this testimony that the alleged existence of code violations merely provided D'Amico with an excuse for Multi-State's delay.

There is little doubt that D'Amico wanted the total loss to be higher than $142,241.69, as Multi-State would financially benefit from performing more work. However, this Court cannot accept that the parties were "still negotiating" the claim after Liberty Mutual paid out a total of $126,782.27 as of February 17, 2006, as D'Amico claimed. D'Amico did nothing to advise Turgeon that the total loss figure was unacceptable, yet he maintained control of all of the proceeds paid by Liberty Mutual. Faced, then, with having to proceed with the work, D'Amico drafted or caused to be drafted the knowingly false Affidavit for Monteiro's execution, seemingly solidifying D'Amico's ongoing "excuse" that the poor workmanship on the upper two floors by unlicensed contractors engaged by Plaintiff caused the delay in Multi-State's work on the Property. The evidence never addressed whether the Affidavit was required by a particular Town official. In any event, and despite this Court's skeptical view of

D'Amico's real motive behind the Affidavit, it is evident that D'Amico and Monteiro did discuss and implicitly agreed in March 2006 that work would be performed by Multi-State on the upper two floors of the Property.

G

Dennis Walsh

Walsh is a professional insurance adjuster, a licensed contractor and a licensed public adjuster. He has worked in these general areas since 1986 for various entities. He is familiar with the negotiating process on fire loss claims and he offered credible testimony that, depending on the size of the claim, negotiations can take weeks or up to six months. He also testified that negotiations can affect the construction process inasmuch as an insurance repair contractor seeks an agreement with the insurance company before beginning construction. Notwithstanding this general principle, most insurance repair contractors would begin a job with the permitting process and selective demolition. Upon receiving settlement funds, work would begin. From the time of loss to the completion of work, Walsh estimated that it could take eight to ten months.

Walsh never viewed the Property nor the work that Multi-State purported to have done. Nonetheless, he was questioned at length on direct examination about the propriety of each line item on Defendants' invoices. The gist of his testimony was that Multi-State complied with the industry standards in separating out each line item, and the costs of each line item appeared to comport with prices in the industry. Absent his review of the Property itself to ensure that such work had been completed, his testimony concerning Multi-State's invoice had little probative value. However, the one line item that is

relevant is the 10% for overhead and 10% profit. Walsh testified that these percentages are common in the industry, and this Court accepts that testimony as true.

On direct examination, Walsh discussed the role of the public adjuster when a code violation appears in an ongoing insurance repair job. He stated that, as the adjuster, he would document with the inspector what was required to bring the project up to code and seek written direction from the pertinent inspector. According to Walsh, contractors are required to produce specific and separate documents showing what was spent on code-related upgrades as opposed to other covered construction expenses, and that such specified code upgrade expenses must indeed be incurred before a claim for code upgrades may be submitted to an insurance company for coverage. Defendants' own witness highlighted for this Court that D'Amico had wholly failed to document with the Building Official, the Minimum Housing Inspector or the Electrical Inspector the alleged "code violations" from the outset. This line of testimony from Walsh further calls into question D'Amico's veracity in relying upon such undocumented "code violations" as the basis for the delay in the work on the Property.

III

Standard of Review

Rule 52(a) of the Superior Court Rules of Civil Procedure provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." Super. R. Civ. P. 52(a). In a non-jury trial, the trial justice sits as the trier of fact as well as of law. Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984). "Consequently, he [or she] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences." Id. A trial

justice's findings of fact will not be disturbed unless such findings are clearly erroneous, the trial justice misconceived or overlooked material evidence, or unless the decision fails to do substantial justice between the parties. Opella v. Opella, 896 A.2d 714, 718 (R.I. 2006) (quoting Bogosian v. Bederman, 823 A.2d 1117, 1120 (R.I. 2003)). While the trial justice's analysis of the evidence and findings need not be exhaustive or "categorically accept or reject each piece of evidence," the trial justice's decision must '"reasonably indicate[] that [she] exercised [her] independent judgment in passing on the weight of the testimony and credibility of the witnesses."' Notarantonio v. Notarantonio, 941 A.2d 138, 144, 147 (R.I. 2008) (quoting McBurney v. Roszkowski, 875 A.2d 428, 436 (R.I. 2005)). Further, although the trial justice is required to make specific findings of fact, '"[e]ven brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case."' Hilley v. Lawrence, 972 A.2d 643, 651 (R.I. 2009) (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998)).

IV

Analysis

A

Claims for Breaches of Contracts

Plaintiff's Amended Complaint sets forth a single count against Defendants for breach of contract. Plaintiff's Post-Trial Memorandum fails to separately address the two contracts and the parties' respective obligations therein, but rather discusses just Multi-State's actions and inactions as a basis for a substantial award. See Pl.'s Post-Trial

Mem., at 10-18.[15] The only reference to Performance Adjusting is Plaintiff's contention that both Multi-State and Performance Adjusting "were equally aware of Plaintiff's loss of rental income and the fact that Liberty Mutual had established a cap of six months from the date of the fire for how long Liberty Mutual would reimburse Plaintiff." Pl.'s Post-Trial Mem., at 12.[16]

By contrast, Defendants' Counterclaim sets forth separate counts for breach of the Performance Adjusting contract with Plaintiff and the Multi-State contract with Plaintiff. Defendants attempt to delineate the acts of each named defendant and the damages due to each for breach of contact. See Defs.' Post-Trial Mem., at 23-26; Defs.' Reply Mem., at 13-16. Additionally, Defendants have asserted in their affirmative defenses and in their Post-Trial Memorandum that they substantially performed their obligations under the contracts and were terminated without justification. See Defs.' Post-Trial Mem., at 23-26; Defs.' Reply Mem., at 13-16.

The parties do not dispute that there existed two valid and enforceable contracts—one between Plaintiff and Performance Adjusting and the other between Plaintiff and Multi-State—that were created by an offer and acceptance and were supported by consideration. It is also undisputed that there was a meeting of the minds on the material terms of each contract. Rhode Island courts have long recognized that when a breach of a

[15] Beyond the sole breach of contract count in her Amended Complaint, however, Plaintiff also asks this Court to make a finding that Defendants engaged in fraudulent misrepresentation, as such finding "could be extremely helpful regarding Plaintiff's efforts to prevent Defendants from obtaining a discharge in Bankruptcy." Pl.'s Post-Trial Mem., at 17. This Court declines Plaintiff's invitation as being wholly irrelevant and well beyond the scope of the legal and factual issues raised by the parties in their pleadings.

[16] It is axiomatic that before the Court can award damages for loss of rental income against Performance Adjusting, there must be some breach of contract by Performance Adjusting, which Plaintiff wholly failed to address.

construction contract occurs, the property owner may recover damages based upon the cost to complete the contract or to repair the alleged defects. See, e.g., Jalex Builders, Inc. v. Monaghan, 840 A.2d 1142, 1143 (R.I. 2004); DeChristofaro v. Machala, 685 A.2d 258, 267-68 (R.I. 1996); Zuccaro v. Frenze, 76 R.I. 391, 393, 71 A.2d 277, 278 (1950).

The doctrine of substantial performance has been applied by Rhode Island courts to construction and other building improvement contracts. See, e.g., Butera v. Boucher, 798 A.2d 340 (R.I. 2002) (residential building contract); National Chain Co. v. Campbell, 487 A.2d 132 (R.I. 1985) (wallpaper contract); DiMario v. Heeks, 116 R.I. 44, 351 A.2d 837 (1976) (building remodeling contract). This doctrine "recognizes that it would be unreasonable to condition recovery upon strict performance where minor defects or omissions could be remedied by repair." National Chain, 487 A.2d at 135. Our Supreme Court has identified two circumstances in which a contractor is not afforded the benefit of the substantial-performance doctrine. First, the doctrine is "inappropriate . . . in situations in which the contractor's performance is worthless and the work has to be redone completely. In these situations, the contractor is liable for the cost to the owner of having the job redone" Id. (citations omitted). Second, the substantial performance doctrine has been held to be inapplicable when the owner terminates the builder's contract before the contractor has time to complete its obligations. Butera, 798 A.2d at 346 (emphasis added). In such a case, "'[a] party to a building and construction contract who has performed part of it according to its terms, but is prevented by the other party from completing the contract, may recover compensation for the work performed and the materials furnished.'" Id. at 347 (quoting 13 Am. Jur. 2d Building and Construction Contracts § 50 (2000)).

1

Breach of Performance Adjusting's Contract

Plaintiff has failed to specify how Performance Adjusting breached its contract with Plaintiff to serve as the adjuster in handling Plaintiff's fire loss claim with her insurer, Liberty Mutual. Although there was some evidence that D'Amico believed he had not yet "gotten the right number" from Liberty Mutual, it is clear that D'Amico, in his capacity as an insurance adjuster and owner and sole member of Performance Adjusting, did negotiate Plaintiff's claim on her behalf. Through those negotiations, Liberty Mutual paid the total gross amount of $142,241.69, which resulted in a net disbursement in the amount of $126,782.27. Having found that the "total recoverable amount of the loss" under the Performance Adjusting contract is $142,241.69, see supra n.7, under the terms of the Insurance Adjusting Agreement, Performance Adjusting is entitled to 10% of the total recoverable amount of the loss, or $14,224.17.

Defendants do not dispute, however, that this amount due is offset by 10% of the value of the work that was performed by co-Defendant Multi-State. Indeed, that is the manner in which Performance Adjusting calculates its damages. See Defs.' Ex. J, at 5; see also Defs.' Post-Trial Mem., at 26, Defs.' Reply Mem., at 16. Implicit in its argument is that Plaintiff is in breach of her contract with Performance Adjusting to the extent that Performance Adjusting has not been compensated for 10% of the work that was not performed by Multi-State out of the negotiated total loss amount of $142,241.69. Thus, Performance Adjusting's damages are based upon what this Court determines was the amount of work performed by Multi-State and will be addressed infra, Section IV(B).

2

Breach of Multi-State's Contract

a

Multi-State's Breach of Contract

Plaintiff's Post-Trial Memorandum provides minimal insight into the manner in which Plaintiff maintains that Multi-State breached its contract, but rather focuses on the method of calculating substantial damages that she claims are owed. See generally Pl.'s Post-Trial Mem., at 10-18. It appears from her proposed Findings of Fact that her breach of contract claim against Multi-State is premised on Multi-State's failure to comply with Liberty Mutual's "deadline." Id. at 8. To this end, the Court relies on the following assertions in Plaintiff's proposed Findings of Fact:

> "49. The repair work was not completed on March 31, 2006.
>
> "50. The repair work was not completed as of May 12, 2006.
>
> "51. On May 12, 2006, approximately 8 months after the fire, Plaintiff had a reasonable basis for concluding that Multi-State was in breach of its contract for failure to complete work in a timely manner. (Defendants' Exhibit E).
>
> "52. Plaintiff's May 12, 2006 termination of Defendants was legally and factually justified based on William D'Amico's failure and refusal to return Plaintiff's phone calls; failure to be anywhere close to completion 2 months after the completion deadline set by Liberty Mutual; and the gutting of the upper floors without Plaintiff's knowledge or consent." Id.

i

Time of the Essence

The evidence before this Court demonstrates that it was Turgeon from Liberty Mutual who established, by letters to Plaintiff with copies to Defendants, that the work on the Property should be completed by March 31, 2006. See Pl.'s Exs. 4, 6. Importantly,

there was no date specified in Multi-State's contract with Plaintiff[17] when the work on the Property was to be completed, nor is there any reference therein that the parties shall abide by Liberty Mutual's determination of when the work should be completed. See Pl.'s Ex. 2, at 2-3.

Plaintiff has offered no support which would allow this Court to conclude that a third-party could impose a time-is-of-the-essence clause into a contract to which he or she is not a party. Indeed, the Rhode Island Supreme Court has not liberally applied time provisions as material terms of a contract even when time provisions are agreed to by the parties to the contract. "It is well settled that generally, 'contract provisions relating to time do not by their mere presence in an agreement make time of the essence thereof so that a breach of the time element will excuse nonperformance.'" Parker v. Byrne, 996 A.2d 627, 633 (R.I. 2010) (quoting Lajayi v. Fafiyebi, 860 A.2d 680, 688 (R.I. 2004) (quoting Jakober v. E.M. Loew's Capitol Theatre, Inc., 107 R.I. 104, 114, 265 A.2d 429, 435 (1970))). Our Supreme Court has further elaborated:

> "'That the parties to a contract intended to make time of the essence may appear by express stipulation therein or it may be found in the nature or purpose of the contract or in the circumstances under which it was made. There must, however, be some evidence from which such intent can be ascertained, and the party contending that time is of the essence of the contract has the burden of proof thereon.'
>
> . . .
>
> "If that party is unable to satisfy his or her burden, then performance within a reasonable time of the contemplated date is sufficient." 1800 Smith Street Assocs, LP v. Gencarelli, 888 A.2d 46, 53 (R.I. 2005) (quoting Safeway Sys., Inc. v. Manuel Bros., Inc., 102 R.I. 136, 145-46, 228 A.2d 851, 856 (R.I. 1967)) (other internal citation omitted).

[17] Similarly, there was no date specified in Performance Adjusting's contract with Plaintiff by which the negotiations were to be completed.

The express terms of the contract, the nature of the contract, and the circumstances under which Plaintiff's contract with Multi-State was formed in September 2005 lead this Court to conclude that the parties did not intend to make time of the essence in the performance of the Multi-State contract. Moreover, the circumstances after the formation of the contract upon which Plaintiff appears to rely; namely, Turgeon's written statements that the repair time should not exceed four months, or March 31, 2006, do not alter this Court's conclusion. The testimony of both Plaintiff and D'Amico confirm that D'Amico had advised Plaintiff to take Turgeon's timeline "with a grain of salt," thus establishing that there was no meeting of the minds as between Plaintiff and D'Amico that March 31, 2006 was the completion date for all work to be performed under either or both of the contracts. This Court finds that Plaintiff has failed to sustain her burden of proving that time was of the essence of the Multi-State contract. Multi-State was not required to complete work under the contract by March 31, 2006, but rather was required to perform within a reasonable time. See 1800 Smith Street Assocs., 888 A.2d at 53.

The credible testimony presented by Walsh demonstrated that D'Amico was operating within the bounds of reason in completing work on the Property. Although not to Plaintiff's satisfaction, the evidence demonstrated that it was reasonable for eight to ten months to elapse from the time of a fire to the completion of reconstruction work. Additionally, as of March 7, 2006, Plaintiff was aware that work would also be done thereafter on the upper two floors to address "code issues," and shortly thereafter Plaintiff and her daughter had notice that permits had just been issued by the Town. It was unreasonable then for Plaintiff, through counsel, to order Multi-State to cease and desist

on May 12, 2006. The Court concludes that Plaintiff has failed to prove by a preponderance of the evidence that Multi-State failed to perform in a timely manner under the contract and under the circumstances.

ii

D'Amico's Failure to Return Plaintiff's Calls

Plaintiff's assertion that she was legally entitled to terminate her contract with Multi-State because D'Amico failed to return phone calls is without merit. Plaintiff provides no legal support for such a conclusion. The Court rejects this inaction by D'Amico as a justifiable basis for Plaintiff's termination of her contract with Multi-State.

iii

Plaintiff's Knowledge of Work Performed on Upper Floors

Finally, Plaintiff appears to contend that her lack of knowledge or consent to Multi-State regarding gutting the upper floors of the Property constitutes a breach of the contract. This Court rejects this factual premise and, therefore, Plaintiff's conclusion. As discussed supra, Section II(A), this Court does not find Plaintiff's testimony credible as it relates to her knowledge of the work performed by Multi-State on the upper two floors. Plaintiff's Affidavit dated March 7, 2006, which she attempted to disclaim, confirms that she was aware that Multi-State intended to proceed with the permits and perform the work on the Property, including work on the upper two floors. This Court rejects the assertion that Plaintiff was unaware of what she was signing.

For all these reasons, this Court finds that Plaintiff has failed to prove by a preponderance of the evidence that Multi-State was in breach of its contract with Plaintiff, and Plaintiff is not entitled to damages.

b

Plaintiff's Breach of Multi-State's Contract

Although the evidence demonstrated that Plaintiff was frustrated by the snail's pace of progress on the Property, Defendants have proven by a preponderance of the evidence that Plaintiff terminated the contracts with Defendants at a time when Multi-State was still performing under the contract. Thus, it is not required that Multi-State substantially performed their obligations under the contracts in order to recover on their Counterclaims. Butera, 798 A.2d at 346. Rather, because Multi-State was prevented by Plaintiff from completing work under its contract, Multi-State may recover compensation for work performed and the materials furnished without the need to establish its substantial performance. Id. at 347.

Plaintiff's termination of both contracts was without justification. For the same reasons that this Court has found that Plaintiff has failed to sustain her burden of proof that Multi-State breached the contract, see supra Section IV(A)(2)(a)(i), this Court also finds that Multi-State has sustained its burden that Plaintiff was in breach of the contract. Again, there is credible testimony from Walsh that the time between a fire loss and the completion of the work can be eight to ten months. Additionally, Monteiro was aware as of March 7, 2006, when she executed the Affidavit, that permits were then being sought and work would proceed. This Court concludes that it was unreasonable for Monteiro to terminate Multi-State just nine weeks thereafter.

Based upon the credible evidence of record, this Court finds that it was Plaintiff who breached the contract with Multi-State and not Multi-State who breached the contract. Accordingly, Multi-State is entitled to damages.

B

Defendants' Damages

Multi-State's damages for Plaintiff's breach of Multi-State's contract is based upon the work performed and the materials furnished at the time of termination. Butera, 798 A.2d at 347. Additionally, this Court has to consider the total amount withheld by Multi-State from Liberty Mutual's disbursements to determine what amount Multi-State's damages should be set off. In other words, if there is any amount of the $116,901.97 that had been retained by Defendants that is proven to not have been earned, then such unearned amount shall be returned to Plaintiff.

The extent of the work performed by Multi-State on the Property was the subject of significant testimony by D'Amico and Angevine, as well as a number of exhibits.[18] Defendants maintain that Angevine's testimony lacked sufficient foundation because it was based upon only Plaintiff's description of what was done in the basement and first floor of the Property. Defendants further maintain that D'Amico's testimony and Exhibit J support Defendants' request for damages as follows:

(1) $9056.56 to Performance Adjusting for 10% of the difference between the total loss of $142,241.69 and $51,681.06, the latter figure representing the work performed by Multi-State;

(2) $3485.00 to Multi-State for emergency services;

[18] The Court specifically excludes the agreed-upon exhibit executed by Manuel Coelho and Angevine's two opinions that between $98,100 and $126,000 in work was needed to repair the Property. Pl.'s Exs. 13, 14, 15. Those exhibits, or portions thereof, purport to itemize the corrective work to be performed and the cost thereof, which information is relevant only to the issue of Plaintiff's damages for Multi-State's breach of contract. As this Court has found that Multi-State did not breach its contract with Plaintiff, such information now has no bearing on the assessment of damages.

(3) $3375.00 to Multi-State for contents handling; and

(4) $99,789.85 for structural repairs and code work, which includes 10% profit and 10% overhead.

In Angevine's first written submission and in his oral testimony to the Court, he opined that the total amount of work performed by Multi-State to date was $23,258. See Pl.'s Ex. 13. Angevine also testified on the propriety and/or completion of the itemized work set forth in Multi-State's invoice for $99,789.85, and compared those line items to his own report dated July 14, 2006. See Defs.' Ex. J, at 1-2.

The Court finds Angevine's testimony to be credible and helpful in determining the costs for the work performed and materials furnished by Multi-State up through May 12, 2006.[19] The Court further notes, however, and accepts in part, Defendants' contention that Angevine's July 14, 2006 written estimate lacks foundation because, without an understanding from any of Liberty Mutual's estimates, Multi-State's estimates, or Multi-State's invoice (none of which Angevine had when he drafted his July 14, 2006 opinion) as to what the scope of the work was that was contemplated or that was claimed to have been done, Angevine was blindly concluding what may or may not have been performed by the contractor. On the other hand, to the extent that Angevine at trial reviewed Multi-State's invoice line-by-line and contrasted those line items with what he observed and with his previous opinion concluding that $23,258 worth of work had been performed, the Court finds that such testimony cured the foundational deficiencies.

[19] To the extent D'Amico claimed that Multi-State performed additional work between May 12, 2006 and July 2006 based upon an agreement between the parties, there was no credible evidence what work had been performed. In any event, Angevine inspected the Property on three occasions between May and July 14, 2006, and, therefore, would have necessarily included a review of the work purportedly performed by Multi-State between May and July 2006.

This Court accepts Angevine's testimony as being credible in concluding, after viewing the Property on at least three occasions, that certain line items set forth on Multi-State's invoice had not been performed. This Court concludes that the following line items shall not be included as Multi-State's damages. Included among these line items are the winterization of the Property at a cost of $1050, which he concluded was not needed as the plumbing and HVAC at the Property were inoperable. See Defs.' Ex. J, at 1. Additionally, Angevine testified that there was no evidence in the basement that soda blasting was conducted in the basement, notwithstanding Multi-State's line item valuing it at $1800. See id. There remained soot on some floor joists in the basement and on the walls of the first floor bedroom, and there would be no reason to clean for soot and smoke in the basement and on all three floors, valued by Multi-State at $3000, when those areas were gutted. See id. There was no evidence that there had been temporary shoring, valued at $1500, or soot sealing of the basement walls, ceiling and framing with any oil based primer or sealer, valued at $1800. See id. There was also no evidence that replacement windows had been ordered and/or delivered to the Property, and this Court expressly rejects D'Amico's testimony that he ordered those windows as a rush after he and Attorney Lancia met. See Section II(F), supra. The value of that line item on Multi-State's invoice is $2800. Defs.' Ex. J, at 2. Finally, in this category, according to Angevine, there was no evidence of any new structural framing on the Property either related or unrelated to the fire, and, therefore, this Court will exclude the line item valued at $2100. See id.

Angevine testified that the following line items in Multi-State's invoice were included within his more-broadly stated items in his July 12, 2006 opinion. The Court

accepts these representations as credible, and therefore excludes the values listed by Multi-State as being excessive and adopts the corresponding amounts set forth by Angevine as the basis for calculating Multi-State's damages. Included in this category are the costs for temporary electrical, temporary gas (for heating) and temporary heating, and all permitting, which collectively account for $2325 in costs. Defs.' Ex. J, at 1. Angevine testified that each of these costs is properly included in the contractor's overhead, which he included in his own estimate. See Pl.'s Ex. 13. Also, more appropriately included as part of overhead as opposed to a separate line item expense provided by Multi-State, was its legal expense for drafting a letter to Monteiro's tenant,[20] post and continuous cleaning and supervision fee, all totaling $4825. See Defs.' Ex. J, at 1. Additionally, the costs for yard cleanup after the fire valued at $275, hauling unwanted contents to a dumpster valued at $1080, and a separate line item for the dumpster valued at $2750, see id., were part and parcel of Angevine's estimated value of $4400 for all demolition and removal of debris, cf. Pl.'s Ex. 13; and, in any event, Angevine testified that the values set forth in Multi-State's invoice for these line items were excessive. The entries for repair framing and for demolition, rough and inspection for electrical, plumbing and HVAC, valued by Multi-State at $4200, $23,405, $8650 and $1275, respectively, see Defs.' Ex. J, at 1, were all included and more accurately accounted for in Angevine's written estimates for rough carpentry, rough electrical and rough plumbing of $3650, $6800 and $5375, respectively. Cf. Pl.'s Ex. 13

[20] Multi-State's invoice reflects an expense for "drafting letters to tenants." Defs.' Ex. J, at 1. It is undisputed that Plaintiff had just one tenant, not multiple tenants, and there were no such letters introduced to the Court in any event. This is further evidence that Multi-State overstated the work it performed and the materials provided.

Multi-State's entry for demolition of the basement and three floors, valued at $10,260, is a category of its own. See Defs.' Ex. J, at 1. Angevine testified that he included the demolition of the basement and first floor in his estimate of $4400 for demolition and removal of debris because, as he understood, the construction work should have been limited to the fire loss in the basement and first floor. While the Court can appreciate why Angevine reached that conclusion, given the limited information originally provided to him by Plaintiff and Plaintiff's persistence that she had no knowledge of and did not consent for Multi-State to demolish the upper two floors, the state of the record leads this Court to conclude that Angevine's conclusion in this regard is faulty. As this Court has rejected Plaintiff's contention that she was unaware that Multi-State was doing work on the upper two floors, and as the question is not what construction was covered by insurance but instead what work Multi-State performed by the time of the termination, this Court finds that Multi-State is entitled to additional demolition fees for the upper two floors that would equate with the amount that Angevine estimated for demolition and removal of debris to date, or an additional $4400.[21]

Finally, this Court concludes from Angevine's testimony that Multi-State should indeed be credited for certain line items in Multi-State's invoice. Angevine was inconsistent in his testimony that Multi-State earned the $1275 fee for boarding up the Property, see Defs.' Ex. J, at 1, in that he confusingly testified both that that fee was

[21] Because there is no breakdown for Angevine's estimate of $4400, see Pl.'s Ex. 13, it is impossible for this Court to identify what portion thereof reflects demolition of two of the four floors, as opposed to yard cleanup, hauling unwanted contents and the cost of the dumpster, all of which Angevine testified was included in his $4400 estimate. The Court will note, however, that it expressly rejects dividing Multi-State's demolition figure of $10,260 in half, see Defs.' Ex. J, at 1, to reflect the demolition of two of the four floors, because the Court finds that Multi-State's line items and invoice as a whole are inflated.

included in his own estimate of $3650 for rough carpentry and that it was not included in his $23,258 estimate. See Pl.'s Ex. 13. This Court will accept the additional amount of $1275 as Multi-State's damages. Angevine expressed no opinion whether the lawn was cut and cleaned up, at a cost of $175, and that asbestos was removed, at a cost of $1600. See Defs.' Ex. J, at 1-2. Additionally, because Angevine lacks specific familiarity with fire losses, this Court rejects his conclusion that there would be no need for spraying microband and deodorizer and power washing the confined area such as a basement. This Court accepts the respective amounts of $250 and $375 as properly included in Multi-State's damages. See id. at 1.

This Court also accepts Multi-State's invoices for emergency services and contents handling. Angevine expressed no opinion on the propriety of the charges set forth in either invoice, and Defendants' expert, Walsh, testified that these invoices are commonly made separate from the building and construction invoices because they are generally covered under separate provisions in insurance policies. Further, to the extent that the emergency services invoice includes line items that appear to overlap with line items on Multi-State's construction invoice, Walsh credibly explained that some areas are required to be retreated on occasion once the construction begins. For these reasons, this Court accepts Multi-State's invoices for emergency services and contents handling, in the amounts of $3485 and $3375, see id. at 3-4, respectively, as being included in Multi-State's damages.

In summary, this Court finds that Multi-State has performed work on the Property up to the time of termination on May 12, 2006, for which they are entitled to be paid. Butera, 798 A.2d at 346. The amount of Multi-State's damages include all the work

estimated by Angevine (excluding the 15% overhead and profit) or $20,225, see Pl.'s Ex. 13, plus $4400 for additional demolition work, and each of the expenses listed in Multi-State's invoice for board up fees, lawn cutting and clean up, asbestos removal, microband spray and power washing, which subtotal $3675, see Defs.' Ex. J, at 1-2, collectively totaling $28,300. Multi-State is also entitled to overhead and profit, which Walsh testified is commonly assessed in the industry at 10% for each, or $2,830 for each. Therefore, for the construction work performed, Multi-State is entitled to be compensated $33,960, and is also entitled to be compensated for emergency services and contents handling, see id. at 3-4, for a total amount due to Multi-State of $40,820.

Given that Multi-State has earned $40,820 of the total amount paid by Liberty Mutual, Performance Adjusting is entitled to be paid 10% of the unearned amount of the total loss. The difference between the total loss paid by Liberty Mutual of $142,241.69 and the amount earned by Multi-State is $101,421.69. Accordingly, Performance Adjusting is entitled to damages based upon 10% of that amount, or $10,142.17.

C

Set Off

The final stage of calculations requires the Court to determine what amount should be returned to Plaintiff out of the funds paid by Liberty Mutual and maintained by Defendants. Liberty Mutual disbursed $126,782.27 and Defendants paid only $9880.30 into the Court Registry. Accordingly, Defendants maintained control of $116,901.97 of the insurance proceeds, of which Defendants collectively are entitled to $50,962.17.[22]

[22] The Court, in its discretion, expressly declines to award prejudgment interest to Defendants in accordance with G.L. 1956 § 9-21-10. See Commercial Assoc. Inc. v. Tilcon Gammino, Inc., 801 F. Supp. 939, 942-43 (D.R.I. 1992) aff'd 998 F.2d 1092 (1st

Plaintiff then is entitled to the return of $65,939.80 from Defendants, and to the entire sum of $9,880.30 in the Court Registry.

D

Defendants' Claims for Unjust Enrichment

Both Defendants assert that they are entitled to relief from Plaintiff for unjust enrichment.[23] Under the equitable doctrine of unjust enrichment, a person is not permitted to enrich himself or herself at the expense of another by receiving property or benefits without making compensation for the same. Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 99, (R.I. 2006) (citing R & B Elec. Co. v. Amco Constr. Co., 471 A.2d 1351, 1355 (R.I. 1984)). To recover under a claim for unjust enrichment, Defendants here are required to prove three elements: "'(1) a benefit must be conferred upon [Plaintiff] by the[se Defendants], (2) there must be appreciation by [Plaintiff] of such benefit, and (3) there must be an acceptance of such benefit in such circumstances that it would be inequitable for [Plaintiff] to retain the benefit without paying the value thereof.'" Id. (quoting Bouchard v. Price, 694 A.2d 670, 673 (R.I. 1997)). However, "[s]imply conferring a benefit . . . is not sufficient to establish a claim for unjust enrichment. 'The most significant requirement . . . is that the enrichment to [Plaintiff] be unjust.'" R & B

Cir. 1993) (finding state statute does not abrogate court's discretion to determine whether and to what extent prejudgment interest is awarded). Prejudgment interest statutes serve the dual purpose of encouraging the early settlement of claims and compensating plaintiffs for waiting for recompense to which they are legally entitled. Martin v. Lumbermen's Mut. Cas. Co., 559 A.2d 1028, 1031 (R.I. 1989). Because Defendants retained all the proceeds from Liberty Mutual, save the small amount placed in the Court Registry, yet were only entitled to a portion thereof, Defendants had the benefit of the use of those funds during the pendency of this case. It would be inherently unjust to charge Plaintiff with prejudgment interest when she was deprived the use of the remaining insurance proceeds that Defendants did not earn.

[23] Defendants' post-trial memoranda failed to address these counts in any way.

Elec. Co., 471 A.2d at 1356 (quoting Paschall's, Inc. v. Dozier, 219 Tenn. 45, 57, 407 S.W.2d 150, 155 (1966)).

In the instant case, Defendants have failed to prove by a preponderance of the evidence that Plaintiff has failed to pay the value of the benefits conferred upon Plaintiff vis-à-vis Performance Adjusting's services and the work performed by Multi-State on the Property. To the contrary, Defendants have maintained for their own use $116,901.27 out of the $126,782.27 paid by Liberty Mutual on this loss. Although paid by another entity and not by Plaintiff, it is evident that Defendants have been compensated and that the enrichment to Plaintiff's Property was not unjust. Neither Defendant is entitled to relief for unjust enrichment, and, therefore, Plaintiff is entitled to judgment on Count III of Multi-State's Amended Counterclaim and Count II of Performance Adjusting's Amended Counterclaim.

E

Multi-State's Claim for Book Account

Count II of Multi-State's Amended Counterclaim asserts that Multi-State is entitled to recover on its book account with Plaintiff.[24] As discussed at length, supra, Section IV(B), this Court rejects Multi-State's accounting as being a fair and accurate representation of the services and/or goods provided to Plaintiff. Accordingly, Multi-State is not entitled to relief hereunder and judgment shall enter for Plaintiff on Count II of Multi-State's Amended Counterclaim.

[24] Multi-State fails to address this Count in its post-trial memoranda.

V

Conclusion

Based on the testimony, evidence and memoranda submitted, and for the reasons stated above, this Court finds in favor of Defendants on the sole count in Plaintiff's Amended Complaint, in favor of Defendants on Count I of their respective Amended Counterclaims, and in favor of Plaintiff on all remaining counts in each Defendant's Amended Counterclaim. Judgment shall enter for Multi-State on Count I of its Amended Counterclaim in the amount of $40,820.00; judgment shall enter for Performance Adjusting on Count I of its Amended Counterclaim in the amount of $10,142.17. Neither Defendant is entitled to pre-judgment interest.

As these judgments have been wholly satisfied by virtue of the funds paid by Liberty Mutual and retained by Defendants, Defendants are hereby ordered to return the amount of $65,939.80 to Plaintiff, and Plaintiff shall be entitled to all funds deposited in the Court Registry, including any and all interest accrued thereon.

Counsel for Defendants shall submit an appropriate form of judgment in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Julia Monteiro v. Performance Adjusting Public Insurance Adjusters, LLC, et al.**
CASE NO:	**C.A. PC-2006-5064**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**March 26, 2014**
JUSTICE/MAGISTRATE:	**Kristin E. Rodgers**
ATTORNEYS:	
For Plaintiff:	**Casby Harrison, III, Esq.**
For Defendant:	**William A. Quattrucci, Jr., Esq.**