Supreme Court of the County of Suffolk
State of New York - Part XLVI
Memorandum Decision After Trial

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

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WALTER BOSS, INC.

v

JAY CLEARY, WALTER KOHLER and EDWARD JONES

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INDEX NO.: 013643/2008

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In the World of Commerce, Contract is an engine mightier than any machine. It allows combinations of capital, labor, chattels and realty to ensure the profit of individual and collective interest. When properly applied, the Common Law of Contracts regulates business relationships with the consistency of a metronome. All directed, ideally, for the betterment of humanity.

The matter at hand arises from the construction of a house. Sounding in law and equity, the Plaintiff Corporation has filed a complaint asserting five causes of action against the Defendants: (1) foreclosure of a mechanics lien; (2) breach of contract; (3) unjust enrichment (4) *quantum meruit;* and (5) an account stated. The differing averments of the parties mandated a trial to resolve the issues of fact.

Prior to the Court's discussion of the facts and law, we would be remiss if the Counsel who appeared herein, Ms. Schlimbaum, Ms. Blair and Mr. Snead were not thanked for their efforts. In preparation they were thorough and exact. At trial, the thoughtful insight of their

questioning was allied to mutual courtesy. Finally, their Post Trial Briefs are notable for their sagacity. Such advocates honor their clients, this Court and thus the law itself.

Plaintiff called the following witnesses during the course of its direct case: Walter Boss, Walter Kohler, Jay Cleary, and Edward Jones.

The Defendants called Edward Jones, Michele Quatrale and Arthur Nelsen. Additionally, Walter Kohler was recalled to the stand.

Initially, the Court will recount the testimony. The Plaintiff first called Mr. Walter Boss, the principal of the Plaintiff Corporation, a construction company.

Mr. Walter Boss stated that he was contacted by the Defendant Mr. Walter Kohler in September of 2006. The purpose of their discussion was Mr. Kohler's request to retain Boss Inc. to replace the pilings of the foundation for a house at Eleven Ocean Walk, Fire Island Pines, Suffolk County, New York. Mr. Boss informed Mr. Kohler that approximately ten pilings needed to be replaced for a total cost of $7200.00. Mr. Kohler agreed to this proposal and gave Plaintiff a deposit of $6,000.00.

The work commenced but difficulties soon arose. Mr. Boss discovered that other parts of the house had deteriorated and that a prior modification of the structure had occurred without the obtaining of a building permit. A certificate of occupancy for the altered building was also lacking.

Mr. Boss met again with Mr. Kohler and negotiated to extensively rebuild Eleven Ocean Walk. Mr. Boss' testimony indicates that Mr. Kohler claimed to have authority from his partners Jay Cleary, Edward Jones and John O'Connor for the additional work. (Trial Transcript 12/5/2016, pp.18-21, 23, 59). Mr. Boss, however, admitted that there is no signed written contract.

Mr. Kohler asked Mr. Boss to design and rebuild the home so that it would be ready for a summer rental. This required a completion date of May 2007. Mr. Boss agreed to this. (Trial Transcript 12/5/2016, pp.24-25).

Mr. Boss indicated that he met very frequently with Mr. Kohler. This interaction is manifested in a drawing Mr. Kohler gave Mr. Boss to graphically express his wishes for the property (Plaintiff's Exhibit 4) as well as notes for the project (Plaintiff's Exhibit 2).

Construction plans prepared by the "Down to the Last Detail" design company were drawn up. An initial plan was prepared on 01/27/ 2007 (Plaintiff's Exhibit 54) and the final plan was in Mr. Boss' hands on 03/21/2007 (Plaintiff's Exhibit 55). Mr. Kohler worked with him in specifying changes to the property during this time period.

After receiving the "go ahead" from Mr. Kohler, Mr. Boss began the reconstruction in earnest. On 02/16, 2007 Mr. Boss handed Mr. Kohler a building estimate of $225.00 per sq. ft. for the 1st floor, $200.00 per sq. ft. for the 2nd floor and $25.00 per sq. ft. for the roof deck. A total estimated cost of $498,680.00. was projected. (Trial Transcript 12/05/2016, pp.70-79, Plaintiff's Exhibit 7).

The work proceeded on the house with Mr. Boss and Mr. Kohler meeting on a regular basis. A 03/26/ 2007 memorial (referred to by the witness as a "Punch List") for work was prepared and delivered to Mr. Kohler (Plaintiff's Exhibit 8). Items were removed from the Contract with an adjustment for price (Plaintiff's Exhibit 9).

On 04/07/2007 another invoice was prepared and given to Mr. Kohler. It reflected an agreed upon price of $501,180.00 for work and materials. (Plaintiff's Exhibit 10). Items one through six on Exhibit 10 had been completed which represented $197,100.00 in services accomplished as of that date. (Trial Transcript 12/05/2016, p.102).

Discussions between Mr. Boss and Mr. Kohler resulted in further work changes. There was an increase in price for the roof deck and rails, wood floors, temporary interior stairs and excavation. There was a decrease reflected for the bathroom. This was memorialized in an estimate (Plaintiff's Exhibit 11). Further discussions ensued concerning a silestone countertop. A Contract was prepared by Mr. Boss on or about 04/29/2007 (Exhibit 12) and sent to Mr. Kohler. The total price for the work and materials was to be $507,995.00.

Mr. Boss stated that the final invoice for the work were prepared and/or dated 08/02/2007. (Plaintiff's Exhibits 17, 18 and 19). Plaintiff's Exhibit 19 notes that it was a final invoice and was for work at Eleven Ocean Walk. Mr. Boss prepared a record of payments made on account (Plaintiffs' Exhibit 23) which totaled $185,000.00. This left an unpaid balance of $323,095.00. After giving a copy to Mr. Kohler by hand, Mr. Boss stated he handed an updated copy of the 08/02/2007 invoice to Mr. Cleary on the Fire Island Pines ferry dock on 08/09/2007. Exhibit 19 stated a total price $508,095.00 which did not reflect earlier payments to Mr. Boss (Trial Transcript 12/5/2016, pp.150-157).

After the invoice (Exhibit 19) was delivered on August 9th, 2007, a door ordered for Eleven Ocean Walk arrived. Mr. Boss indicated that he advanced the sum of $2,060.57 for it. Mr. Kohler directed that it be delivered it to the Shell Walk property jointly owned by Mr. Kohler and Mr. Jones. Mr. Boss then added the door's cost to the Invoice (Exhibit 21). It brought the total to $510,155.57. (Trial Transcript 12/6/2016, pp.162-163; Trial Transcript 3/29/2017, p.78).

When payment was not forthcoming, Mr. Boss sent demand for same by certified mail (Plaintiff's Exhibit 22). This stated a total project cost of $517,355.57 less payments made of $191,000.00. The grand total due was now $326,355.57. (Trial Transcript 12/6/2016, pp.164-168).

Mr. Boss said that he had numerous phone calls with Mr. Cleary during August and September 2007. During those conversations, Mr. Cleary acknowledged transferring money into a joint bank account in order to make a partial payment of $150,000.00. Most specifically, Mr. Cleary said he had transferred money to Mr. Kohler and was surprised Plaintiff hadn't been paid in full (Trial Transcript 3/29/17 pp.122-124). Mr. Boss also had email communications with the Defendants regarding when he would receive the $150,000.00 payment (Plaintiff's Exhibit 29). (Trial Transcript 4/26/2017, pp.253-258).

During Mr. Boss' testimony, the Plaintiff submitted invoices for materials, supplies, and equipment which Mr. Boss claims was used for installation at Eleven Ocean Walk (Plaintiff's Exhibits 34 through 52). Mr. Boss testified as to the authenticity of each invoice and that he had paid for them. They had been used by him to determine cost estimates for the project (Trial Transcript 2/23/17, pp.5-95, and pp.122-146; 3/29/17, pp.1-80). Copies of checks indicating payment were introduced (Exhibit 53). (Trial Transcript 3/29/17, pp.80-95).

Mr. Boss also proffered a DVD (Plaintiff's Exhibit 57), (filmed July 31st 2014) of Eleven Ocean Walk. Mr. Boss narrated what work he performed during the playing of same (Trial Transcript 2/23/17, pp.96-114).

The Defendants point out certain portions of Mr. Boss' testimony.

A subcontractor, Arthur Nelsen Electricians Inc., had performed work at the *locus in quo*. Mr. Boss stated that he had paid its bill.

> "Q. Mr. Boss, did you pay the Arthur Nelson (sic) bill, the balance of it?
> A. Yes.
> Q. Was that in one check or more than one check?
> A. Multiple checks.
> Q. And do you have copies of those checks?
> A. I don't know.
> Q. And I'm going to direct your attention back to that last page of Plaintiff s Exhibit 34. What was the total amount that you paid Arthur Nelsen, licensed electrician?
> A. I'd have to refer to something that did his billing. I have no idea.
> Q. But you're sure you paid it in full?
> A. Yes. (Trial Testimony, March 30, 2017 at page 41, line 23 to page 42, line 11).

Later in his testimony, Mr. Boss reiterated this position.

> "Q. Mr. Boss, it's your testimony that you paid the electrician in full, is that correct?
> A. Yes.

> Q. Do you have any proof of paying the electrician in full?
> A. There was no lien on the property. That's my best way to respond to you.
> Q. Mr. Boss, do you have any checks to the electrician reflecting payment for work the electrician Arthur Nelsen did at Eleven Ocean Walk?
> A. There are some checks that show some payment.
> Q. Where are those checks, Mr. Boss?
> A. They're probably not in the...I don't know where they are because I don't know.
> Q. Do you have a receipt from Mr. Nelsen or Arthur Nelsen Electric that says that the Invoice is paid in full?
> A. I believe Mr. Snead provided you documents that showed everything paid in full from the individual Invoices for the individual subcontractors. That's the only thing I have." (Trial Transcript March 30th, 2017 page 82, line 24 to page 83, line 25).

Mr. Boss also testified concerning a spiral staircase ordered for Eleven Ocean Walk.

> "Q. So Mr. Boss, you included in your February 16th, 2007 estimate an estimate for a spiral staircase when the quote date you got for the staircase was almost a month later?
> A. Yeah. So?" (Trial Testimony, March 30th, 2017 at p.44, lines 20-23).

Mr. Boss testified with respect to missing Invoices from other vendors that he added to the estimate for the Defendants. Included in those missing Invoices was a bill from Jimmy's Hardwood Floors (Trial Testimony, March 30th, 2007, p.45, line 15 to p.46, line 19); and the furnace for the house. (Trial Testimony, March 30, 2017, p.47, lines 2 to 12).

Mr. Boss was questioned regarding the charge for the windows:

> "Q. And Mr. Boss, I'm going to direct your attention to line six of Plaintiff's Exhibit 7.
> A. Okay.
> Q. It says, windows, doors and insulation?
> A. Okay.

Q. And there's a figure there of $52,400.00?
A. Yes.
Q. Do you recall yesterday in your Direct Examination that you testified that you had given Mr. Kohler choices of windows to order based upon your recommendation and that he made the choices and it was only after he made the choices that you ordered the windows?
A. Yes.
Q. And do you also recall testifying yesterday that you created how much the total cost of the windows would be based upon the choices that Mr. Kohler made?
A. Yes.
Q. And do you recall also testifying yesterday that you took that one final number for the windows and you made it part of your estimate?
A. Yes.
Q. And is that part of Plaintiffs Exhibit 7?
A. Yes.
Q. And do you recall also testifying yesterday that you did the same thing with the plumbing and the electrical and everything?
A. Yes.
Q. Do you have any of those documents that you shared with Mr. Kohler when you explained to him what the individual costs would be that are broken down on Plaintiffs Exhibit 7?
A. I do not.
Q. And did you ever have any of those documents?
A. When I developed the project.
Q. And what happened with those documents?
A. Once we agreed to what we were using, I destroyed them.
Q. And is that your common practice?
A. Yes.
Q. Did you have Mr. Kohler sign off on any of those documents?
A. No.
Q. Did you give Mr. Kohler a copy of any of those documents?
A. The final copies. The final...the plans and stuff, when they were all done.
Q. Not the plans. I'm talking about how you developed the line items on Plaintiffs Exhibit 7. Did you give Mr. Kohler a copy

of any of those documents?
A. I did not.
Q. Did you give Mr. Jones a copy of any of those documents?
A. Mr. Jones was never part of this project. It was only Mr. Kohler. Although he was an owner.
Q. Mr. Boss, my question was: Did you give Mr. Jones any of those documents?
A. No, I did not.
Q. Did you give Mr. Cleary any of those documents?
A. I did not." (Trial Testimony, March 30th, 2017, p.51, line 4 to p.53, line 10).

Mr. Boss' testimony also indicated that a check he made payable to Port Lumber (Plaintiff's Exhibit 53) does not relate to the bill from Port Lumber referenced in Plaintiff's Exhibit 48. (Trial Testimony, March 30th, 2017, pp.56, lines 1-18).

Mr. Boss' testimony also indicated that checks to made payable WindowRama (Plaintiff's Exhibit 53) may be for Invoices not included in bills from that Company (Plaintiffs Exhibit 52). (Trial Testimony, March 30th, 2017, p.57, line 23 to p.58 line 1 and p.59, line 15 to p.60, line 13).

Mr. Boss acknowledged that the Defendants asked for detailed bills from him on August 16th, 2007 (Trial Transcript, March 30th, 2017 p.66, line 19 to p. 69, line 9).

Plaintiff admitted that the railing system Mr. Boss had installed at the property was not up to the standards of applicable building codes. (Trial Testimony March 30th, 2017 at page 71, line 24, to page 72, line 2 and page 72, line 3, to page 72, line 16).

Mr. Boss testified that while he billed $18,000.00 for "Freight and Deliveries" he never presented any bills for same to the Defendants (Trial Testimony March 30th, 2017 p.75, line 13, to p.76, line 3). Mr. Boss further testified with respect to the inconsistent amounts contained in the "Down to the Last Detail" Invoice and the correct amount of that Invoice (Trial Transcript. March 30th, 2017 p.79, line 18, to p.81, line 2).

Mr. Boss was questioned regarding the funds provided by the Defendants prior to commencing the of renovation of Eleven Ocean Walk.

"Q. Mr. Boss, when you were starting some of the renovation work at the house, you purchased material, isn't that correct?
A. Yes.
Q. Would you be surprised if I told you that you purchased approximately $40,000.00 worth of material for this house before January 31, 2007?
A. No, I wouldn't be surprised.
Q. Would you think it was more than $40,000.00?
A. I don't know.
Q. Do you recall testifying before lunch that you had some of your employees working at the house and you had paid them for work that was done on the house in November and December 2006 and January 2007?
A. Yes.
Q. And do you recall testifying before lunch that you received payments totaling $26,000.00 from the Defendants prior to January 31, 2007?
A. Yes.
Q. Is it your practice to layout money for customers to buy materials and/or pay your employees before they pay you?
A. Under this situation yes.
Q. And other than this situation, have you done it in any other situations?
A. Yes.
Q. And would that be on one or more than one occasion?
A. I don't remember." (Trial Transcript March 30th, 2017, pp.82-87).

The Defendants point out the discrepancies in Mr. Boss' testimony *vis-à-vis* documentary proof. Plaintiff's Invoices and estimates are for 13 different amounts:

Plaintiff's Exhibit 1: November 21st, 2006-$7,200.00;

Plaintiff's Exhibit 7: February 16th, 2007-$498,680.00;

Plaintiff's Exhibit 9: February 16th, 2007, revised April 7th, 2007-$501,180.00 with $464,075.00 written under it;

Plaintiff's Exhibit 10: February 16th, 2007, revised March 26th, 2007, delivered April 7th, 2007-$501,180.00 with $464,075.00 typed under it:

Plaintiff's Exhibit 11: February 16th, 2007, revision from April 7th meeting-on page one, $501,180.00 with $464,075.00 typed under it and $470,830.00, $497,195.00, $499,695.00 and $500.00, 195.00 written next to it and on page two, $7,800.00 and $500,195.00;

Plaintiff's Exhibit 12: April 29th, 2007-$7,800.00;

Plaintiff's Exhibit: February 16th, 2007, revision from April 7th meeting-has the same numbers as page one of Plaintiff's Exhibit 11;

Plaintiff's Exhibit 17: August 2nd, 2007-$508,095.00;

Plaintiff's Exhibit 18: August 2nd, 2007-$508,095.00;

Plaintiff's Exhibit 19: August 2nd, 2007-$508,095.00; then a credit for $185,000 in Defendants' payments leaving a balance of $323,095.00;

Plaintiff's Exhibit 20: $508,095.00;

Plaintiff's Exhibit 21: $2,060.57; and

Finally, Plaintiff's Exhibit 22 is an Invoice for the $517,355.57 total alleged at pages 3-4, paragraphs 12 and 14 of Plaintiffs Verified Complaint and gives credit for $191,000.00 in Defendants' payments and a balance due in the same amount as sued for, $326,355.57.

Mr. Walter Kohler was called both by the Plaintiff and the Defense.

Mr. Kohler admitted that he told Mr. Boss he was the agent for the owners of the property and was in charge of the construction project (Trial Transcript 12/8/16, pp.498, 502-503).

Although the discussion concerning the project was originally for piling work, this expanded to the hiring of Boss Inc. to repair the east side and first floor of Eleven Ocean Walk (Trial Transcript 12/8/16, p.519).

In response to Mr. Snead's questioning regarding Mr. Kohler's activities, the following testimony was elicited:

> "Q. ... if he told you something needed to be done, would you make a decision about whether to do it, or not?
> A. With the agreement of my partners.
> Q. [W]as it fair to say that there was a continuing dialogue between you and Mr. Boss, about what needed to be done?
> A. Yes.
> Q. And is it fair to say that there was a continuing dialogue from you to your partners, about what needed to be done?
> A. Yes.
> Q. And in regard to these dialogues, would your partners then authorize you to do the work?
> A. Yes." (Trial Transcript, 12/8/16, at 533-534).

Mr. Kohler then related how he became involved with the details of the construction:

> "Q. With regard to the first floor of the property that was ultimately built, did you authorize Mr. Boss to put in all of the work?
> A. Yes. To the first floor.
> Q. Four bedrooms?
> A. Fix everything on the first floor?
> Q. Yes?
> A. Yes.
> Q. And so, with regard to four bathrooms [en] suite; is that fair to say?
> A. Yes.
> Q. .... With regard to the upper floor, did you give Mr. Boss direction about how the upper floor was to be designed?
> A. Yes.
> Q. Did you approve the layout of the second floor? Where the kitchen was to go? Where the dining room was?
> A. Yes." (Trial Transcript 12/8/16, at 534-536).

Mr. Kohler then told, in detail, of his other interactions with Mr. Boss during the construction (Trial Transcript 12/8/2016, pp.536-539). He characterized this by saying they "periodically checked on the work" (Trial Transcript 12/8/16, p.540).

Mr. Kohler's testimony contained portions where it repudiated itself. He initially listed items to be performed as including "...the layout of the hallway closet...hot water heater...heating...laundry area...the direction of the stairs...showers in the bathrooms" when the query was made by Mr. Snead. (Trial Transcript 12/8/16, p.541).

In response to a question by Ms. Blair, however, during later direct examination: "Was Walter Boss hired to do any other work after he replaced the pilings?" Mr. Kohler answered: "No." (Trial Transcript 4/25/17, p.128).

Nowhere is Mr. Kohler's recantation more evident than in the following testimony elicited by Ms. Blair:

> "Q. And, Mr, Kohler, if you could please redirect your attention to Plaintiff's Exhibit Twenty?
> A. Okay.
> Q. Okay, and if you could look at...there's certain paragraph, or numbers on the documents; one, two, three. Do you see what I'm talking about, on the left side?
> A. Yes. I see numerical items.
> Q. So, beginning with Item Number One, demolition, can you read the amount on that Invoice for demolition?
> A. Fifteen thousand dollars.
> Q. Was there ever an agreement between you and Mr. Boss for demolition in the sum of fifteen thousand dollars?
> A. No.
> Q. And number two, could you read that, please?
> A. Pilings and girders.
> Q. And wants the amount?
> A. Twenty nine thousand dollars.
> Q. Was there ever an agreement between yourself and Mr. Boss with respect to cost for pilings and girders?
> A. No.
> Q. Number three, please?
> A. Framing and sheathing.

Q. And the amount?
A. Forty-five thousand dollars.
Q. Was there ever an agreement between yourself and Mr. Boss with respect to the cost for framing and sheathing?
A. No.
Q. And number four, please?
A. Siding.
Q. And the amount?
A. Thirty nine thousand, seven hundred dollars.
Q. Was here ever an agreement between yourself and Mr. Boss with respect to the cost of the siding?
A. No.
Q. And number five, please?
A. Roofing.
Q. And the amount?
A. Eighty eight hundred dollars.
Q. And was here ever an agreement between yourself and Mr. Boss with respect to the cost of the roofing?
A. No.
Q. And number six, please?
A. Windows, doors, and insulation... in parentheses, exterior.
Q. And the amount?
A. Fifty two thousand, four hundred.
Q. Was here ever an agreement between yourself and Mr. Boss with respect to the cost of the windows, doors, and insulation?
A. No.
Q. Number seven, please?
A. Plumbing and fixtures... parentheses...credit for plumbing fixtures, toilets, sinks, etcetera, four thousand. Add O/S shower, seven fifty.
Q. And the amount, please?
A. Thirty six thousand. seven hundred and fifty dollars.
Q. Was here ever an agreement between yourself and Mr. Boss with respect to the cost of the plumbing and fixtures?
A. No.
Q. And number eight, please?
A. Electrical.
Q. And the amount?
A. It says electrical revised. And it's forty nine thousand, five

hundred seventy five dollars.
Q. Was here ever an agreement between yourself and Mr. Boss with respect to the amount for electrical?
A. No.
Q. Number nine, please?
A. First and second floor decking with rails.
Q. And the amount?
A. Nineteen thousand, two hundred dollars.
Q. And was there ever an agreement between yourself and Mr. Boss with respect to the cost for the first and second floor decking with rails?
A. No.
Q. Number ten, please?
A. Roof deck with rails, revised.
Q. And the amount, please?
A. Twelve thousand, nine hundred dollars.
Q. And was there ever an agreement between yourself and Mr. Boss with respect to the cost of the roof deck with rails?
A. No.
Q. With respect to these items: fourteen through thirty one, did you ever have an agreement with Mr. Boss for the cost of any of these items?
A. No.
Q. And, Mr. Kohler, could you please flip the...Plaintiffs Exhibit Twenty over? And there's several more item numbers on that page; is that correct?
A. Yes, Ma'am.
Q. And it begins at thirty two?
A. Yes, Ma'am.
Q. And it ends at forty three?
A. Yes, Ma'am.
Q. And could you please look those over carefully, too?
A. Okay.
Q. Was there ever an agreement between yourself and Mr. Boss with respect to items numbers thirty two through forty three...?
A. No.
Q. For the cost thereof?
A. No.
Q. Thank you, Mr. Kohler." (Trial Testimony April 25, 2017, pp.146-152).

Despite this emphatic denial of authorizing the project undertaken by Boss Inc., Mr. Kohler also admitted that he approved some of the items on Plaintiff's Exhibit 20 (Trial Transcript 4/25/17, pp.173-175).

Mr. Kohler also denied receiving an estimate, invoice or account until August of 2007. He also stated that he did not receive the "Phantom Door" invoice or the invoice/summary payments dated 9/10/2007. (Exhibit 22). (Trial Transcript 4/28/17, pp.137-138).

Mr. Kohler also indicated that a April 6th, 2007 payment of $50,000.00 to Mr. Boss was considered by him to be the final payment for the project. (Trial Transcript 4/25/17, p.166). It must be noted that Defense Exhibit (R-1) shows a $10,000.00 payment from Defendants' joint account on April 30th, 2007.

Mr. Kohler also spoke of the poor quality of Boss Inc.'s work product. This required numerous repairs to the: railings, spiral staircase, ceilings, sliding glass doors, stairways, insulation, interior doors and leaking windows, among other in the house. (Trial Testimony April 25th, 2017, pp.158-160).

The essence of Mr. Kohler's testimony is that there was no contract between himself, the co-Defendants and Mr. Boss. (Trial Transcript, April 25th, 2017 at p.128, line 22 to p.129, line 1). Additionally he averred that he did not receive (or even see) Boss Inc.'s invoices. (Plaintiffs Exhibits 7, 9, 10, 11, 12, 13, 17, 18, 19, 20, 21 and 22) until the instant litigation had commenced (Trial Testimony April 25th, 2017 pp.129- 135, pp.137-138).

The Court also heard the testimony of Mr. Jay Cleary. He indicated that it was his intention for the property to be reconstructed as a structure consisting of four bedrooms downstairs, with a kitchen, living room and dining room upstairs surmounted by a roof deck. (Trial Transcript 4/25/17, pp.213-24). Mr. Cleary also stated that Mr. Kohler discussed "punch lists" with him. The goal of the partnership was to have tenants in by May. This was successful although he never discussed the project personally with Mr. Boss prior to the tenants moving in (Trial Transcript 4/25/17, pp.217-218).

During his testimony, it was pointed out that Mr. Cleary admitted in a deposition Trial Transcript that the money placed in the joint checking account was put there for payment to Boss Inc.. (Trial Transcript 8/29/2013, pp.38-39).

Mr. Cleary's testimony was somewhat contradictory but ultimately established that the $130,000.00 deposited in the joint account after April 6th, 2007 (actually made on July 11th, 2007) was for the purposes of paying for construction. This is substantiated by a letter from Cleary to Jones and Kohler dated May 20th, 2008 (Exhibit 78-A) in which he plainly states this. Defense Counsel, argues that this evidence can be construed as setting aside this money for construction in general and not Mr. Boss, in particular.

Mr. Cleary stated that he did not receive any estimates from Mr. Boss prior to the August 2007 meeting at the ferry dock. This is corroborated by Mr. Boss' testimony (Trial Testimony, March 30, 2017, pp.51-53, line 10).

During Mr. Cleary's testimony, Plaintiff also offered as evidence a schedule of payment (computer printout) by Mr. Cleary stating a $130,000.00 payment from a HELOC on 7/11/2007 was "Payment for Walter Boss and Misc. Expenses." (Exhibit, 78-B). (Trial Transcript 4/27/17, p.487).

Mr. Edward Jones's testified. He acknowledged receipt of one of the invoices that was dated in August of 2007, but also said that he had not received any of the estimates or revised invoices prepared by Mr. Boss before that date. (Trial Testimony, 4/28/ 2017, at pp.526-542).

Mr. Jones informed the Court that he was given Plaintiff's Exhibit 20 or something very similar to it on or about August 9th, 2017, but he did not agree to pay the line by line amounts attributed to each item (Trial Transcript 4/28/2017, pp.542-553).

Mr. Jones testified with respect to the poor workmanship at the property. He narrated a video of Eleven Ocean Walk (which was admitted into evidence as Plaintiff's Exhibit 57 without sound) that had been taken by Plaintiff's Attorney. Mr. Jones was present at the time the video was made. Mr. Jones went through multiple issues regarding the house, including

items that had to be repaired at the cost and expense of the Defendants, and items that had to be replaced or redone because they were not up to Town Code and a Certificate of Occupancy would not be issued (Trial Testimony 4/28/2017, pp.577-594).

Mr. Jones also spoke of payments to other vendors to correct or repair work performed by the Plaintiff:

> "Q. Mr. Jones, do you know if you, or Mr. Kohler, or Mr. Cleary had to hire an architect to draw plans for Eleven Ocean?
> A. Yes.
> Q. And do you recall what architect your hired?
> A. Um, something about Ingenuity, or something.
> Q. Do you know how much you paid Ingenuity?
> A. It was about forty-five hundred dollars." (Trial Testimony 4/28/2017, p.573).

Mr. Jones testified that the railing installed by Mr. Boss had to be replaced because it was not installed according to the Brookhaven Town Building Code (Trial Testimony 4/28/2017, pp.568-569). He also indicated that the Defendants paid Mr. Matt Sullivan $25,000.00 to do the sheet-rock work at Eleven Ocean Walk (Trial Testimony p.551, lines 12-23).

Ms. Michele Quatrale also testified. She is the owner of a building permit expediting company and was retained by the Defendants to obtain a Building Permit for the proposed construction at Eleven Ocean Walk. She was paid the sum of $3,861.93 by the Defendants for this task (Defendants Exhibit R-2). Ms. Quatrale stated that even though she requested construction plans from Mr. Boss, he never provided her with same. These plans are a necessary prerequisite for a Building Permit (Trial Transcript, 4/27/2017, pp.18-19, 23). The construction plans were from Mr. Jim Ingenito, the Architect retained by the Defendants Kohler and Jones. Finally Ms. Quatrale testified that she did not get the approval for the

plans until December of 2007, after work had improperly commenced. (Trial Transcript 4/27/2017 pp.20-21).

Mr. Arthur Nelsen was called to the stand. He is the owner of Arthur Nelsen Licensed Electrician, Inc.. Mr. Nelsen indicated that he is owed the sum of $6,135.00 from Walter Boss, Inc. for work done at Eleven Ocean Walk. During his testimony, the Defense offered a document as evidence (Defendant's Exhibit AA). This is a printout of the amount still due Arthur Nelsen Electrician, Inc., for the work done at the *locus in quo*. Mr. Nelsen testified that this amount has never been paid and is currently outstanding (Trial Transcript 4/28/2017 p.513).

In addition to the testimony, the Court received documentary exhibits from the Plaintiff and the Defendants. Plaintiff's Exhibits 25, 26, 74, 78-A and 78-B, were admitted for limited purposes. In reaching the ultimate conclusion, the Court considered these exhibits in light of its rulings during the trial.

Based on the forgoing testimony and accompanying exhibits, The Plaintiff contends that it has proven its various causes of actions. The Defendants dispute this assertion and aver that the submitted proof sustains the counterclaim.

The Court will analyze the specifics of these arguments *ad seriatim*.

Prior to discussing the applicable law, it is incumbent on the Court to decide the questions of fact in this matter. Since the critical testimony often differed, the Court must separate the gold from the dross. "[T]he appropriate standard for evaluating [a] weight of the evidence argument is the same, regardless of whether the fact finder was a judge or jury" (***People v. Rojas***, 80 A.D.3d 782, 782, 915 N.Y.S.2d 602 [2nd Dept 2011]. In assessing the credibility of the witnesses, the Court is obliged to apply the same criteria as a lay person jury of six. This includes the physical demeanor of the witness on the stand ***(People v. Ya-ko Chi***, 72 A.D.3d 709, 710, 898 N.Y.S.2d 619, 621 [2nd Dept. 2010]; *citing* ***People v. Mateo***, 2

N.Y.3d 383, 410, 779 N.Y.S.2d 399, 811 N.E.2d 1053, *cert. denied* 542 U.S. 946, 124 S.Ct. 2929; ***People v. Bleakley***, 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672]).

In short, the Court applies to itself the criteria with which every lay jury is instructed:

> "The interest or lack of interest of any witness in the outcome of this case, the bias or prejudice of a witness, if there be any, the age, the appearance, the manner in which the witness gives testimony on the stand, the opportunity that the witness had to observe the facts about which he or she testifies, the probability or improbability of the witness' testimony when considered in the light of all of the other evidence in the case, are all items to be considered by you in deciding how much weight, if any, you will give to that witness' testimony. If it appears that there is a conflict in the evidence, you will have to consider whether the apparent conflict can be reconciled by fitting the different versions together. If, however, that is not possible, you will have to decided which of the conflicting versions you will accept.'" (N.Y. Pattern Jury Instr.-Civil 1:8)

Invoking the aforementioned Rule, this Court finds that Mr. Boss testified credibly. Ms. Quatrale and Mr. Nelsen also spoke with veracity but the ambit of their speech was limited in scope. We note that Mr. Boss' and Mr. Nelsen's statements did not agree. In that instance, however, the Court concludes that Mr. Boss, given the passage of time and the extensive nature of the project, was honestly mistaken as to the outstanding bill. Conversely, the testimony of Mr. Kohler, Mr. Cleary and Mr. Jones was less than persuasive. In the case of Mr. Kohler, his testimony was marked by so many contradictions and inconsistencies that we consider his words to have been entirely without utility. It is in this light that the proof has been analyzed by the Court.

Since the lion's share of interaction was between Mr. Kohler and Mr. Boss, the potential liability of Mr. Cleary and Mr. Jones must be addressed. It is uncontroverted that the three Defendants were business partners in the operation of Eleven Ocean Walk. As stated in the case of ***Beizer v. Bunsis***, 38 A.D.3d 813, 833 N.Y.S.2d 154, (2nd Dept. 2007) "Partnerships are governed by the laws of agency [*see* Partnership Law § 4 [3]). "A partner

is the agent of the partnership and his acts may be adopted and enforced by the partnership as its own" (***Bennett Dairy v. Putney***, 46 A.D.2d 1010, 362 N.Y.S.2d 93). However, "it is only when it can be seen that a partner is, in fact, acting as an agent of his copartners, that he binds them" (***Bienenstok v. Ammidown***, 155 N.Y. 47, 58, 49 N.E. 321)." ***(Id.*** at 814). Even if Mr. Kohler's actions were duplicitous, his authority to bind his fellow partners is undiminished since they charged him with overseeing the management of the construction project. Indeed the law provides that a principal can still be obliged to answer for the "...the fraudulent acts of its agent if the agent is acting within the scope of his actual or apparent authority" ***Heine v. Colton, Hartnick, Yamin & Sheresky***, 786 F. Supp. 360, 368 (S.D.N.Y.1992), *citing* ***Herbert Constr. Co. v. Continental Ins. Co.***, 931 F.2d 989, 993 (2d Cir.1991); ***Citibank, N.A. v. Nyland (CF8) Ltd.***, 878 F.2d 620, 623-24 [2d Cir.1989]). Accordingly, any act on the part of Mr. Kohler which this Court finds advances the claims of the Plaintiff, is attributable to the remaining Defendants.

The Court will first determine the claim of Breach of Contract.

As discussed below, the case law used by the Court in its decision making process is often quite recent. The Law itself, however, has a venerable lineage. In his *Commentaries on the Laws of England*, the immortal Sir William Blackstone observed principles which guide us today:

> "THIS contract or agreement may be either express or implied. Express contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten load of timber, or to pay a stated price for certain goods. Implied are such as reason and justice dictate, and which therefore the law perfumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work; the law implies that I undertook or contracted, to pay him as much as his labor deserves. If I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value." (Blackstone Book 2 Chapter 30).

The Plaintiff urges the Court to view:

> "...the various estimates and Invoices submitted by Boss to Kohler and the other defendants during the construction of the Eleven Ocean Walk project (Exhibits "1," "7," "9," "10,","11," "12," "13," "17," "18," "19," "20," "21," "22")...[as] a binding written agreement between the parties."

Notwithstanding this, it is the Plaintiff's position that the lack of a writing is not fatal and cites to the following authority: ***Flores v. Lower E. Side Sendee Ctr., Inc.***, 4 N.Y.3d 363, 369 (2005); ***Gallagher v. Long Island Plastic Surgical Gp. P.C.***, 113 A.D.3d 652, 653 [2d Dept., 2014]; ***Geha v. 55 Orchard Street, LLC***, 29 A.D.3d 735, 736 [2d Dept., 2006]). The parties intent, argues Counsel, can be indicated by their conduct alone, (*see*, PJI Civil, Div. 4:1, at 6; ***S. Kornblum Metals Co. v. Intsel Corp.***, 38 N.Y.2d 376, 380 [1976]; ***Miller v. Schloss***, 218 N.Y. 400, 407-08 [1916]).

The Defendant's collective argument is that there was no meeting of the minds and hence, no contract which could form the basis of a claim for breach. In support of this argument, Defense Counsel relies on ***Silber v. New York Life Ins. Co.,*** 92 A.D.3d 436, 938 N.Y.S.2d 46 (1st Dept. 2012); ***Paz v. Singer Co.***, 151 A.D.2d 234, 235, 542 N.Y.S.2d 10 [1989]; ***Matter of Express Indus. & Term. Corn, v. New York State Dept, of Transp.***, 93 N.Y.2d 584, 589, 693 N.Y.S.2d 857, 715 N.E.2d 1050 [1999]).

The various invoices presented by Mr. Boss to Mr. Kohler are unsigned by the latter. Standing alone, if this matter was governed by the Statute of Frauds, an essential element would be missing, namely the signature of a party to be charged (*see* ***Am. Comm. for Weizmann Inst. of Sci. v. Dunn***, 10 N.Y.3d 82, 92, 883 N.E.2d 996, 1002 [2008]; ***Crabtree v. Elizabeth Arden Sales Corp.***, 305 N.Y. 48, 56, 110 N.E.2d 551, 554 [1953]; GOL § 5-701]).

The Court agrees with Plaintiff's contention that the provisions of General Business Law § 771 requiring home improvement contracts to be in writing is inapplicable to this case.

The facts proven at trial demonstrate that the purpose of the construction was to create a rental property. This brings the transaction outside of the strictures found within GBL § 771 (*see* GBL, §§ 770 (3) (a); 770 [7]).

Unless it violates the Statute of Frauds or some other statutory/regulatory requirement, an oral contract "...is as enforceable as a written one" (***Charles Hyman, Inc. v. Olsen Indus., Inc.***, 227 A.D.2d 270, 275, 642 N.Y.S.2d 306, 309 [1st Dept. 1996]). As opined by the Court in ***Saul v. Cahan***, 153 A.D.3d 947, 61 N.Y.S.3d 265 (2nd Dept. 2017), "[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, 181-182, 919 N.Y.S.2d 465, 944 N.E.2d 1104, quoting ***American-European Art Assoc. v. Trend Galleries***, 227 A.D.2d 170, 171, 641 N.Y.S.2d 835). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" ***(Matter of Express Indus. & Term. Corp. v. New York State Dept. of Transp***. *supra* at 589; *see* ***2004 McDonald Ave. Realty, LLC v. 2004 McDonald Ave. Corp.***, 50 A.D.3d 1021, 1021-1022, 858 N.Y.S.2d 203 [2nd Dept. 2008]; ***Mainline Elec. Corp. v. Pav-Lak Indus., Inc.***, 40 A.D.3d 939, 939, 836 N.Y.S.2d 294 [2nd Dept. 2007]; ***Miranco Contr., Inc. v. Perel***, 29 A.D.3d 873, 873, 816 N.Y.S.2d 516 [2nd Dept. 2006])." (***Id.*** at 950).

"[C]ourts look to the basic elements of the offer and the acceptance to determine whether there is an objective meeting of the minds sufficient to give rise to a binding and enforceable contract" (***Metro. Lofts of NY, LLC v. Metroeb Realty 1, LLC***, 160 A.D.3d 632, 635-36, 75 N.Y.S.3d 271, 274-75 [2nd Dept. 2018], quoting ***Matter of Express Indus. & Term. Corp. v. New York State Dept. of Transp.***, *supra* at 589. In the case before us we have the testimony of Mr. Boss and portions of Mr. Kohler's testimony as well as the submitted invoices which all confirm an objective intent to perform the work in question.

Assuming, *arguendo* that Mr. Boss and the Defendants intended to memorialize the construction project at a later time, this does not preclude the creation of a contract before then. "[E]ven where the parties "anticipat[e] that a more formal contract will be executed later, the contract is enforceable if it embodies all the essential terms of the agreement" (***Metro. Lofts of NY, LLC v. Metroeb Realty 1, LLC***, *supra* at 635-636, quoting ***Wronka v. GEM Community Mgt.***, 49 A.D.3d 869, 871, 854 N.Y.S.2d 474 [2nd Dept. 2008]; *see* ***Maccioni v. Guzman***, 145 A.D.2d 415, 416, 535 N.Y.S.2d 96 [2nd Dept. 2008]).

The subject matter of the agreement between the Plaintiff and the Defendants is not governed by any of the prohibitions of the Statute of Frauds since by its terms it was to be completed within one year (***Halpern v. Shafran***, 131 A.D.2d 434, 435, 516 N.Y.S.2d 83, 84 [2nd Dept. 1987]; GOL § 5-701 [a][1]).

In her scholarly Brief, Ms. Blair quotes, at length, the holding in ***Silber v. New York Life Ins. Co.***, 92 A.D.3d 436, 938 N.Y.S.2d 46 (1st Dept. 2012). The ***Silber*** Court found that since the Plaintiff had failed to prove the existence of a contract "...there was no "meeting of the minds" constituting the formation of a contract between the parties. It is axiomatic that a party seeking to recover under a breach of contract theory must prove that a binding agreement was made as to all essential terms (***Paz v. Singer Co.***, *supra*). We agree with Counsel that the legal principles discussed above are beyond peradventure.

Defense Counsel follows this recitation of law with the contention:

> "...although contracts can sometimes be created by an assimilation of documents that does not exist here. Plaintiff cannot prove that any of the documents other than the one that Defendants admit to receiving (Plaintiff's Exhibit 20) were exchanged between the parties." (Brief of Ms. Blair).

The Defendants argument can only find purchase if the Court accepts the credibility of their testimony. We do not. Mr. Boss' honest testimony with accompanying documentary

evidence satisfies the rule in ***Silber***. Thus, the carefully crafted arguments of Ms. Blair and Mr. Schlimbaum fall before the truth revealed at trial.

In addition to the proof listed above, the Defendants claims of the lack of a contract are contradicted by the house itself. As the days turned into weeks, into months, it slowly took its present form under the watchful gaze of the Defendant Kohler. As Mr. Boss and his employees toiled in erecting the edifice, Mr. Kohler was present, observing and, most critically, consenting to the work. Mr. Kohler's protestations to the contrary, the Court finds that he was presented with specific invoices detailing materials provided and services rendered (Plaintiff's Exhibits 7, 8, 9, 10, 11, 12, 17, 18, 19 and 21). We draw Defendants' attention to the November 21st, 2006 Invoice for $7,200.00 (Plaintiff's Exhibit 1); the August 2nd, 2007 invoice for $508,095.00 (Plaintiff's Exhibit 19); and the September 5th, 2007 invoice for $2,060.57 (Plaintiff's Exhibit 21). They do not stand alone but are buttressed by supporting documents and the credible testimony of Mr. Boss. There is no other logical explanation to Mr. Boss' continued efforts which resulted in a "tenant ready" home in May of 2007 aside from the existence of a contract to perform the work.

Accordingly, the Court finds that the credible proof establishes that the Plaintiff has proven, by a fair preponderance of the evidence, its claim that it entered into a contract with the Defendants and performed its obligations under same. The Defendants, however, breached said contract by failing to pay the sums outstanding under the contract.

We now turn to Plaintiff's cause of action for an account stated:

> "An account stated is an agreement, express or implied, between the parties to an account based upon prior transactions between them with respect to the correctness of account items and a specific balance due on them" which is 'independent of the original obligation'" (***Episcopal Health Servs., Inc. v. Pom Recoveries, Inc.***, 138 A.D.3d 917, 919, 31 N.Y.S.3d 113, 114-15 [2nd Dept. 2016], quoting ***Citibank [S.D.] v. Cutler***, 112 A.D.3d 573, 573-574, 976 N.Y.S.2d 196 [2nd Dept. 2013]).

Although it is a separate and distinct theory of recovery, it necessarily arises from the same circumstances which bestow the right to sue for breach of contract (***Id.*** 114-115 *citing* ***A. Montilli Plumbing & Heating Corp. v. Valentino***, 90 A.D.3d 961, 962, 935 N.Y.S.2d 647 [2nd Dept.2011]).

Mr. Boss' testimony and supporting documentation demonstrates that the following chronology of relevant events occurred: On 02/16/2007, Mr. Boss gave an estimate to Mr. Kohler (Plaintiff's Exhibit 7). On 03/26/2007, a meeting with Mr. Kohler resulted in the preparation of a new invoice being presented to him on 04/07/2007. This invoice reflected an agreed upon price of $501,180.00 which was received without objection (Plaintiff's Exhibits 8, 9 and 10). Another invoice was prepared and given to Mr. Kohler on 04/29/2007, with a price of $507,995.00 (Plaintiff's Exhibits 11 and 12). Again, no objection was made to Mr. Boss' demands at that time. Ultimately, Mr. Boss prepared, and delivered, a final invoice which indicated "adjustments on the as-built structure" (Brief of Mr. Snead, Plaintiff's Exhibits 17, 18, 19, and 20). This was in August of 2007. It was at this time that the Defendants bestirred themselves to object *via* an email Mr. Kohler sent to Mr. Boss on August 16th, 2007. (Exhibit A). We note this objection was posed only after the conversation of Mr. Boss and Mr. Cleary at the Fire Island Pines ferry dock in August of 2007 (Trial Transcript 3/30/2007, p.129).

"An essential element of an account stated is that the parties came to an agreement with respect to the amount due" (***Episcopal Health Servs.***, *supra* at 919, *citing* ***Raytone Plumbing Specialities, Inc. v. Sano Constr. Corp.***, 92 A.D.3d 855, 856, 939 N.Y.S.2d 116).

Following the General Rule of Contracts, silence alone cannot be deemed as agreement. In some circumstances, however, "in the absence of an objection made within a reasonable time, an implied account stated may be found" (***Episcopal Health Servs.*** *supra, citing* ***Interman Inds. Prods. v. R.S.M. Electron Power***, 37 N.Y.2d 151, 154, 371 N.Y.S.2d

675, 332 N.E.2d 859). As stated in the case of ***Branch Servs., Inc. v. Cooper***, 102 A.D.3d 645, 646, 961 N.Y.S.2d 170, 173 (2nd Dept. 2013):

> "An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time or makes partial payment on the account." (***Id.*** at 646) *citing* ***American Express Centurion Bank v. Cutler***, 81 A.D.3d at 762, 916 N.Y.S.2d 622; *see* ***Landau v. Weissman***, 78 A.D.3d 661, 662, 913 N.Y.S.2d 107.

In opposition to Plaintiff's claim, the Defendants rely on the holding in ***M & A Const. Corp. v. McTague***, 21 A.D.3d 610, 611-12, 800 N.Y.S.2d 235 (3rd Dept. 2005). In that case, the Court reasoned:

> "Where either no account has been presented or there is any dispute regarding the correctness of the account, the cause of action fails (*see* ***Abbott, Duncan & Wiener v Ragusa***, 214 AD2d 412, 413 [1995]). Here, the Supreme Court found that Defendants disputed aspects of the accounts and informed Plaintiff that payment was being withheld because certain work had not been completed. Moreover, Plaintiff admitted that at least one of the accounts was not correct." (***Id.*** at 611-612).

We find the Defendants' reliance on ***M & A Const.*** (and its like) to be misplaced. Once again, this argument presumes the Court giving credence to the testimony of the Defendants. To the contrary, this Court gives full credit to Mr. Boss' sworn statements at trial.

The Defendants' partial payments tendered to Boss Inc. are also a factor which we must consider. The Court in ***Jaffe v. Brown-Jaffe***, 98 A.D.3d 898, 951 N.Y.S.2d 142 (1st Dept. 2012) stated "...either retention of bills without objection or partial payment may give rise to an account stated" (***Id.*** at 899), quoting ***Morrison Cohen Singer & Weinstein, LLP v. Waters,*** 13 A.D.3d 51, 52, 786 N.Y.S.2d 155 [1st Dept.2004]).

Under these circumstances, the facts at trial, with one exception, are governed by the rule in ***Bay Ridge Lumber Co. v. Summit Renovation Corp.***, 271 A.D.2d 559, 706 N.Y.S.2d 155 (2nd Dept. 2000) where the Court stated that since "...the defendant did not object to the Invoices it received within a reasonable period of time, its retention of them without objection gave rise to an enforceable account stated." (***Id.*** at 560), *citing* ***Peterson v. IBJ Schroder Bank & Trust Co.***, 172 A.D.2d 165, 166, 567 N.Y.S.2d 704; ***Chemical Bank v. Kaufman***, 142 A.D.2d 526, 527, 530 N.Y.S.2d 582; ***Marino v. Watkins***, 112 A.D.2d 511, 490 N.Y.S.2d 917; ***Rosenman Colin Freund Lewis & Cohen v. Neuman***, 93 A.D.2d 745, 461 N.Y.S.2d 297; *see* ***Nebraskaland, Inc. v. Best Selections, Inc.***, 303 A.D.2d 662, 664, 757 N.Y.S.2d 94, 96 [2nd Dept. 2003]).

The final, and determinative, question as to whether Plaintiff has proven an account stated concerns the timeliness of Mr. Kohler's objection. As noted by Mr. Snead: "The retention of invoices for a period of several months without dispute has been found sufficient to substantiate an account stated" *see* ***Jim-Mar Corp. v. Aquatic Const., Ltd.***, 195 A.D.2d 868, 870 (3d Dept., 1993) (6 months); ***Marino v. Watkins***, 112 A.D.2d 511, 513 (3d Dept., 1985) (3 months).

The transaction in ***Jim-Mar*** was a single invoice submitted over five months prior to the objection (***Id.*** at 869). The Court in ***Marino*** addressed a scenario where the Defendant "retained [multiple] bills for the unpaid services without objection for several months" (***Id.*** at 513).

In addition to the above case law provided by Counsel, the Court is guided by the Decision in ***Herrick, Feinstein, LLP v. Stamm***, 297 A.D.2d 477, 746 N.Y.S.2d 712 (1st Dept. 2002). The Appellate Court held that an objection sufficient to defeat a claim for an account stated had been made by the Defendant. The Court specified that the reason for the objection being timely was that the first objection had been made "approximately two months after receipt of the first of the invoices." (***Id.*** at 478).

Applying the rationale of ***Herrick*** to the instant case, Mr. Kohler's first objection, for the purposes of the case, is not measured against the last invoice. Instead it is set against the invoices of 02/16/2007 and 04/07/2007. In either event, his objection came too late to be considered timely.

We now turn to the question of whether the facts sustain the Plaintiff's cause of action seeking to foreclose upon a mechanics lien.

The Plaintiff contends that the proof entitles it to a judgment of foreclosure on the lien filed against the *locus in quo* (Lien Law §3); ***West-Fair Elec. Contrs. v. Aetna Cas. & Sur. Co.***, 87 N.Y.2d 148, 157, 638 N.Y.S.2d 394, 661 N.E.2d 967; ***Sky-Materials Corp. v. Frog Hollow Industries, Inc.***, 125 A.D.3d 751, 752 [2d Dept., 2015] 4 N.Y.S. 3d 91; ***Interstate Home Builders, Inc. v. D 'Andrea Constr., Inc.***, 2001 N.Y. Slip. Op. 40515 [U], 2001 WL 1682795 [Sup. Ct., Bronx Co. 2001] [not. rep.]).

The Defendants, however, contend that the liens should be dismissed based upon: the failure to join necessary parties, for being willfully exaggerated and for being otherwise defective (Lien Law Sec.44).

N.Y. Lien Law § 39 states:

> "In any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon."

Regarding Lien Law Sec. 39, a plain reading of this Statute indicates that "willful" requires proof of an intentional, deliberate act (***Garrison v. All Phase Structure Corp.***, 33 A.D.3d 661, 662, 821 N.Y.S.2d 898, 899 [2nd Dept. 2006], *citing* ***Fidelity N.Y. v. Kensington-Johnson Corp.***, 234 A.D.2d 263, 651 N.Y.S.2d 86 [2nd Dept.1996]; ***Perma Pave Contr. Corp. v. Paerdegat Boat & Racquet Club***, 156 A.D.2d 550, 552, 549 N.Y.S.2d

57 [2nd Dept.1989]; ***Minelli Constr. Co, v. Arben Corp***., 1 A.D.3d 580, 581, 768 N.Y.S.2d 227 [2nd Dept.2003]). It clearly does not contemplate "an exaggerated amount due to honest mistake" (***Goodman v. Del-Sa-Co Foods, Inc***., 15 N.Y.2d 191, 257 N.Y.S.2d 142 [1965]).

Applying this standard it is apparent that the credible evidence does not support the view that Mr. Boss willfully exaggerated the amount of the lien on the Defendants' property.

The Defendants' argument relating to the failure to join necessary parties (Lien Law Sec.44) is similarly unpersuasive. Relying on authority such as ***Admiral Transit Mix Corn, v. Sagg-Bridgehampton Corn.***, 56 Misc.2d 47, 51, 287 N.Y.S.2d 751 (Sup. Ct. Suffolk Cty. 1968), Defense Counsel contend that the omission of Mr. John O'Connor and mortgage holders MERS, Citibank and National City Bank from the notice of lien requires dismissal. We disagree.

Plaintiff's Counsel asserts that prior mortgagees are not necessary parties to a mechanic's lien foreclosure proceeding. In support of this position Mr. Snead cites to the authority found in ***Robert Allen Assoc's. Inc. v. Carver Fed. Sav. & Loan Ass'n.***, 66 Misc.2d 202, 203 (App. Term, 1st Dept., 1971); ***Admiral Transit Mix Corp. v. Sagg-Bridgehampton Mix Corp***., *supra*; ***Brown v. Danforth***, 37 A.D. 321, 322-23 [4th Dept., 1899]; ***Alyea v. Citizens Sav. Bank***, 12 A.D. 574, 577 [1st Dept., 1896]; and ***H.M. Hughes Co. v. Carmania New York, N.V.***,1989 WL 63109, *1 [S.D.N.Y., 1989], unreported on F. Supp.)].

Both Plaintiff and Defendants reliance on ***Admiral Transit Mix*** is most telling though we find it to favor the Plaintiffs' cause. The Court in ***Admiral*** specified that the notice requirement did not apply to prior mortgagees. (***Id.*** at 51). Moreover, the Court also declared "even as to persons who are necessary parties, it is they who have not been served who may complain, not those who have been served" (***Id.*** at 51), quoting ***W. J. Plander Block, Inc. v. Mussler***, 27 Misc. 2d 591, 592 212 N.Y.S.2d 558 [Sup. Ct. Nassau Co.1961]).

The Court will now consider Defendants arguments concerning the multiplicity of lien notices and their purported deficits.

Plaintiff claims that this argument has been waived since it was not the subject of a motion to dismiss or fashioned as an affirmative defense (relying on the authority in 2 N. Y. Prac., Com. Litig. in New York State Courts § 2:31 (2d Ed.) Siegel, N.Y. Prac. § 113 (4th ed.), McKinney's CPLR Rule 320. (***Ramos v. 145 Bleeker Street Corp.***, 26 Misc.3d 1237 [A], *3 [Sup. Ct., Kings Co., 2010] [Unrep. Dec]).

We are persuaded, however, by the Defendants contention that it is not an affirmative defense to oblige a Plaintiff to prove that their lien is in conformance with statute. As pointed out by Defense Counsel, instead of a single lien, there are a series of five notices of lien filed against Eleven Ocean Walk (Plaintiff's Exhibits 59 and 76 and Defendants' Exhibits W, X and Y). Defense Counsel directs the Court to the portions of each notice that indicate the date Mr. Boss started working at Eleven Ocean Walk. In Plaintiff's Exhibit 76, the effective date is "on or about October 2006."

Defendants' Exhibit W, has a work date of "on or about October 12th, 2006." Plaintiff's Exhibit 59 and Defendants' Exhibits X and Y, state a date of "on or about October 26th, 2006." The discrepancies do not end there.

One notice of mechanic's lien, contains language wherein the Plaintiff swears that the sum due is $464,075.00. It refers to an attachment styled "Exhibit A." This document, however, is in the amount of $501,180.00. (Plaintiff's Exhibit 59 and Defendants' Exhibit W). Another notice lists a price of $464,075.00. The attachments do not reflect this. Instead "Exhibit A" consists of an 08/02/2007 invoice for $508,095.00, a 11/21/2006 invoice for $7,200.00, a 09/05/2007 Invoice for $2,060.57 and a 09/10/2007 invoice summary in the amount of $517,355.57 (Plaintiff's Exhibit 76). Finally, two notices of a mechanic's lien refer to an attached "agreed upon estimate" and a "final bill with approved extras." Neither of these documents is attached to the notice (Defendants' Exhibits X and Y).

Lien Law Sec. 23 states:

> "[t]his article is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same."

The question presented by the above mentioned factual deviations between the Notices of Lien is whether they rise to the level of prejudice.

Instances where a mistaken name was applied to the property owner have been held to be of no consequence (***Marshall Const. Co. v. Brookdale Hosp. Ctr.***, 68 Misc. 2d 20, 21, 324 N.Y.S.2d 806, 808 [Sup. Ct. Kings Co. 1971]). A notice of lien which indicates the wrong property, however, has been found to be prejudicial (***Hudson Demolition Co. v. Ismor Realty Corp.***, 62 A.D.2d 980, 980, 403 N.Y.S.2d 327, 328 [2nd Dept. 1978]). The reason for this is that "...a party examining the pertinent part of the notice would not be able to identify the premises intended to be described with reasonable certainty, to the exclusion of all others." (***Id.*** at 980), *citing* ***Hurley v. Tucker***, 128 App. Div. 580, 112 N.Y.S. 980 [1st Dept. 1908]; ***Roshirt, Inc. v. Rosenstock***, 138 Misc. 515, 247 N.Y.S. 420 [Supreme Ct. Albany Co. 1930).

Lien Law § 9 requires that a notice of lien contain a description of, *inter alia:*

> "4. The labor performed or materials furnished and the agreed price or value thereof, or materials actually manufactured for but not delivered to the real property and the agreed price or value thereof.
> 5. The amount unpaid to the lienor for such labor or materials.
> 6. The time when the first and last items of work were performed and materials were furnished."

The absence of these items have been held to render a notice of lien to be fatally defective (***Empire Pile Driving Corp. v. Hylan Sanitary Serv.***, 32 A.D.2d 563, 563, 300 N.Y.S.2d 434, 435 [2nd Dept. 1969], *citing* ***Riley v. Durfey***, 145 App.Div. 583, 586, 130

N.Y.S. 297, 299 [2nd Dept.1911); *cf.* ***Fenichel v. Zicherman***, 154 App.Div. 471, 139 N.Y.S. 118 [1st Dept.1913]).

In the case at bar, the Court finds that the multiple dates, varying amounts of sums owed and inconsistent supporting documentation make it difficult to determine "[t]he labor performed or materials furnished and the agreed price or value thereof, as required by Lien Law § 9 (4)" (***Sullivan Contracting, Inc. v. Turner Const.*** Co., 60 A.D.3d 1315, 1316, 875 N.Y.S.2d 695, 696-97 [4th Dept. 2009] *citing* ***Brescia Constr. Co., Inc. v. Walart Constr. Co., Inc.***, 249 App.Div. 151, 152, 291 N.Y.S. 960 [1st Dept. 1936], *affd.* 273 N.Y. 648, 8 N.E.2d 330; ***Flaum v. Picarreto***, 226 N.Y. 468, 471-472, 123 N.E. 739; ***Fanning v. Belle Terre***, 152 App.Div. 718, 722-723, 137 N.Y.S. 595 [2nd Dept. 1912]; *see also* ***Empire Pile Driving Corp. v. Hylan Sanitary Serv.***, *supra*]).

Based on the forgoing, the Court finds that the notices of mechanic's lien are fatally defective. The Cause of Action seeking a foreclosure of those liens shall be dismissed.

The Court will address the Plaintiff's claims sounding in equity, namely: unjust enrichment and *quantum meruit*.

Concerning the equitable claim for unjust enrichment, Plaintiff refers the Court to the authority found in (***Georgia Malone & Co., Inc. v. Reider***, 19 N.Y.3d 511,517 [2012]; ***Mtr. of Estate of Whitbeck,*** 245 A.D.2d 848, 850 [3d Dept., 1997]; ***Goldman v. Simon Property*** *Gp.*, Inc., 58 A.D.3d 208, 220 [2d Dept., 2008]; ***L&L Auto Distributors & Suppliers v. Auto Collection, Inc.***, 23 Misc.3d 1139 [A], 2009 WL 1652852, *5, [Sup. Ct., Kings Co., 2009]; ***Pappas v. Tzolis***, 20 N.Y.3d 228, 234 958 N.Y.S. 2D 656 [2012]; ***McGrath v. Hilding***, 41 N.Y.2d 625, 629, 394, N.Y.S. 2d 603 [1977]; and ***Mayer v. Bishop***, 158 A.D.2d 878, 880, 551 N.Y.S. 2D 673 [3d Dept., 1990]).

In furtherance of his claim that Plaintiff has proven the necessary prerequisites for *quantum meruit*, Plaintiff's Counsel cites to ***Thompson v. Horowitz***, 141 A.D.3d 642, 37 N.Y.S3d 266 (2d Dept., 2016); ***Miranco Contracting, Inc. v. Perel***, 57 A.D.3d 956, 871

N.Y.S. 2d 310 [2d Dept., 2008], ***Evans-Freke v. Showcase Contracting Corp.***, 85 A.D.3d 961, 926 N.Y.S. 2d 140 [2d Dept., 2011]; ***Johnson v. Robertson,*** 131 A.D.3d 670, 15 N.Y.S.3d 457 [2d Dept., 2015]; ***Caribbean Direct, Inc. v. Dubset, LLC***, 100 A.D.3d 510, 954 N.Y.S.2 66 [2d Dept., 2012]; ***Brennan Beer Gorman/Architects, LLP v. Cappelli Enterprises, Inc.***, 85 A.D.3d 482, 9250, N.Y.S.2d 25 [1st Dept., 2011]; as well as PJI Civil, Div. 4:2)].

Defendants, however, contend that the authority found in ***Precision Founds v. Ives***, 4 A.D.3d 589,772 N.Y.S.2d 116 (3rd Dept. 2004); ***Crown Construction Builders v. Chavez***, 130 A.D.3d 969, 15 N.Y.S.3d 114 [2d Dept. 2015]; ***Stephan B. Gleich & Assoc, v. Gritsipis***. 87 A.D.3d 216, N.Y.S.2d 349 [2d Dept. 2011]; *see* ***JSO Assoc., Inc, v. Price***, 104 A.D.3d 737, 738, 961 N.Y.S.2d 245 [2nd Dept. 2013]; ***AHAA Sales, Inc, v. Creative Bath Prods., Inc.***, 58 AD3d 6, 867 N.Y.S.2d 169 [2d Dept 2008]; *see* ***Nemeroff v. Colby Group***, 54 A.D.3d 649, 651, 864 N.Y.S.2d 25; ***Geraldi v. Melamid***, 212 A.D.2d 575, 622 N.Y.S.2d 742 [2nd Dept. 1995]) mandate a dismissal of these claims.

The Defendants also contend that the Plaintiff may not make an equitable claim because he lacks clean hands.

The doctrine of clean hands was poetically expressed as "He that hath committed inequity, shall not have equity" (Maxims of Equity, Richard Francis, 1728, Maxim II; Pomeroy § 398).

In the case of ***Columbo v. Columbo***, 50 A.D.3d 617, 619, 856 N.Y.S.2d 159 (2nd Dept. 2008), cited by Ms. Blair, the Court expounded on this principle.

> "The doctrine of unclean hands applies when the complaining party shows that the offending party is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct." (***Id.*** at 619), *citing* ***Kopsidas v. Krokos***, 294 A.D.2d 406, 407, 742 N.Y.S.2d 342 [2nd Dept. 2002]).

Defendants claim of the Plaintiff lacking clean hands is based on his purported lack of veracity at trial. This is insufficient and in any event the Court has found Mr. Boss to be a credible witness.

It is beyond cavil that in order to prove unjust enrichment:

> "[a] plaintiff must [demonstrate] 'that (1) the other party was enriched; (2) at that party's expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered'" (***Georgia Malone & Co. v. Rieder***, 19 N.Y.3d 511, 516, 950 N.Y.S.2d 333, 973 N.E.2d 743 [2012], quoting ***Mandarin Trading Ltd.***, **(SUPRA?)** 16 N.Y.3d at 182, 919 N.Y.S.2d 465, 944 N.E.2d 1104 [2011]).

Privity is not a prerequisite. A party moving forward with a claim for unjust enrichment, however, bears the burden of showing that "assert a connection between the parties that [is] not too attenuated" (***Philips Int'l Investments, LLC v. Pektor***, 117 A.D.3d 1, 7, 982 N.Y.S.2d 98, 102 [1st Dept. 2014], quoting ***Georgia Malone***, *supra* at 517]).

"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; [citations omitted]; (3) expectation of compensation therefore; and (4) reasonable value of the services rendered" ***Home Const. Corp. v. Beaury***, 149 A.D.3d 699, 702, 50 N.Y.S.3d 530, 533 [2nd Dept. 2017]).

Comparing these two theories of equity, it is apparent that although their elements are different, unjust enrichment and *quantum meruit* are frequent companions and liability for both can arise from the same facts.

The Defendants argue that:

> "There is also no undisputed trial evidence setting forth that the defendants ever agreed to having certain work done at their house. Acceptance of the work by defendants does not prove that plaintiff is able to recover, for there was no value attached to that work, much less an agreed value." (Brief of Ms. Blair, p.41).

Although Counsel puts this forth with expected eloquence, the Court's finding of fact casts this argument down. Once again, Mr. Boss' testimony establishes that the Defendants did agree to the construction at Eleven Ocean Walk. The value for the work is found in the invoices referred to herein.

Indeed, the Plaintiff has proven that all of the elements of unjust enrichment and *quantum meruit* have been met. Based upon the representations of the Plaintiff, Boss Inc. performed the construction in good faith and in the time specified. The work was accepted by the Defendants. As evidenced by credible testimony and exhibits (*i.e.*, the invoices) the work was performed with the reasonable expectation of payment. The reasonable value of the services is found in the invoices themselves. The Defendants were enriched by the construction of a four bedroom house which immediately began generating revenue for the Defendants, $35,000.00 for the first summer (Plaintiff's Exhibit 30). The Plaintiff has suffered the loss of income for its services. Under these circumstances, "equity and good conscience" mandate that the Defendants reimburse the Plaintiff for its loss.

There is, however, an impediment to Plaintiff's recovery in equity. The venerable maxim *aequitas sequitur legem** reminds us of the limitations of pleading in equity (***Ryback v. Lomenzo***, 38 A.D.2d 915, 916, 330 N.Y.S.2d 76, 79 [1st Dept. 1972]). As noted in the case of ***Thompson v. Horowitz***, *supra* at 642, cited by Plaintiff, *quantum meruit* is "...an alternative to breach of contract [emphasis ours]." (***Id.*** at 646. (Citations omitted).

Since this Court has found that Plaintiff has proved its cause of action for breach of contract and has satisfied the criteria for an account stated, its claims sounding in equity, namely *quantum meruit* and unjust enrichment, become untenable. As the Court held in ***Russo v. Heller***, 80 A.D.3d 531, 532, 915 N.Y.S.2d 268, 270 (1st Dept. 2011) "a party may not recover in *quantum meruit* or unjust enrichment where the parties have entered into a contract that governs the subject matter" (***Id.*** at 532, quoting ***Cox v. NAP Constr. Co., Inc.***,

10 N.Y.3d 592, 607, 861 N.Y.S.2d 238, 891 N.E.2d 271 [2008]; *see* ***Clark–Fitzpatrick, Inc. v. Long Is. R.R. Co.***, 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653, 516 N.E.2d 190 [1987]).

Accordingly, the Plaintiffs claims sounding in equity, though proven, must be dismissed since they have been subsumed by the Plaintiff's success in prevailing on the question of breach of contract.

The Court will now address the Defendants (Mr. Jones and Mr. Kohler) counterclaim for repair work and other expenses purportedly caused by Boss Inc.'s failure to perform its duty in a workmanlike manner. As noted above, Mr. Jones testified that a railing had to be replaced at a cost of $9,025.00. (Trial Testimony 4/28/2017) pp.568-569, Defendants Exhibit S). Additionally, Mr. Jones also indicated that the Defendants were forced to pay $25,000.00 to Mr. Matt Sullivan for sheet-rock work at Eleven Ocean Walk (Trial Testimony p.551, lines 12-23).

Mr. Kohler testified that he gave Mr. Boss approximately $30,000.00-$35,000.00 in cash (Trial Testimony pp.163-164). Additionally, he averred that the Defendants were obliged to: replace the wire railing systems ($9,025.00); pay Michele Quatrale to obtain a building permit ($3,861.93); pay Mr. Matt Sullivan to install sheet-rock ($25,000.00); and make cash payments to Mr. Boss that were not accounted for ($30,000.00 to $35,000.00). Mr. Jones indicated that he and/or Mr. Kohler were constrained to retain an architect and obtain plans for $4,500.00. (Trial Testimony p.573, lines 2-12). The Defendants also claim that Mr. Boss did not acknowledge a check payment in the amount of $10,000.00 by Defendants. Defense Counsel contends that these expenses on the part of the Defendants total $94,386.93.

It is well settled to the point of being a truism, that a defendant must prove their counterclaim by the same standard of proof as if they were a plaintiff (***Am. Oil Co. v. Coughlin***, 261 A.D. 852, 852, 24 N.Y.S.2d 731, 731 (3rd Dept. 1941); ***James K. Thomson Co. v. Int'l Compositions Co.***, 191 A.D. 553, 556, 181 N.Y.S. 637, 639 (1st Dept. 1920).

In light of the Court's finding that the Defendants testified less than credibly, the only manner in which the counterclaim can succeed is if it based on unequivocal documentary evidence. Winnowing the Defendants evidence in this fashion, their counterclaim is significantly diminished.

The testimony of cash payments to Mr. Boss is discounted and stands unproven.

Defendants Exhibit S is not a receipt. It is a copy of an e-mail from Mr. Jones to his prior Attorney in which he claimed he made two payments to Coastline Freight for repairs to the railing system installed by Plaintiff.

Defendant's Exhibit R-2 is a copy of their check payable to Michelle Quatrale in the sum of $3,861.93. Since the Court credits Mr. Boss' testimony concerning Ms. Quatrale's being hired by the Defendants, this bill cannot be assessed against the Plaintiff.

Regarding the Defendants claims arising from alleged defective work, no expert testified to inferior workmanship nor were invoices for materials produced at trial. It was admitted by Mr. Boss, however, that the railing system he had installed at the property was not up to the standards of applicable building codes. (Trial Testimony 03/30/2017 at page 71, line 24 to page 72, line 2 and page 72, line 3 to page 72, line 16). This corroborates Defendants claim to have paid $9,025.00 for its repair.

The testimony of Mr. Nelsen, whom the Court considered to be a forthright witness, provides the corroboration for the Defendants otherwise unreliable proof. Defendant's Exhibit AA is a printout of a bill for the work done at Eleven Ocean Walk. It is in the amount of $6,135.00. Mr. Nelsen's testimony on 04/28/2017 demonstrates that this is still due. (Trial Transcript 04/28/2017 p.513).

Defendants also submitted a copy of a check, check number 1280 dated 04/30/2007 (Defendants' Exhibit R-l). This check was in the sum of $10,000.00 and it is not reflected on an invoice submitted by Plaintiff at trial.

Accordingly, this Court finds that the only aspects of the Defendants' counterclaim that has been proven by the fair preponderance of the credible evidence is the uncredited check for $10,000.00 (Exhibit R-1), the expenses of repairing the railing ($9,025.00) and the electrician's bill for Mr. Nelsen ($6,135.00) (Exhibit AA). The Defendants will be awarded the sum of $25,160.00 on their counterclaim. It shall be applied as set-off against the Judgment awarded to the Plaintiff.

Liability having been established in favor of the Plaintiff and against the Defendants on the issue of liability for breach of contract, the Court will now consider damages for same. Damages for an account stated would of necessity be redundant and that theory of liability will not be further considered.

The measure of damages for breach of contract is to give to the non-offending party the benefit of the bargain, namely place them "...in same situation as if contract had been fully performed" (***Carecore Nat., LLC v. New York State Ass'n of Med. Imaging Providers, Inc.***, 24 A.D.3d 488, 490, 808 N.Y.S.2d 238, 239 [2nd Dept. 2005]; *citing* ***Brown v. Lockwood***, 76 A.D.2d 721, 432 N.Y.S.2d 186 [2nd Dept. 1980]; *see* ***Process Am., Inc. v. Cynergy Holdings, LLC***, 839 F.3d 125, 143 [2d Cir. 2016]).

The Defendants argue that the Plaintiffs' claims must be dismissed because Boss Inc. failed to provide expert witnesses on the question of damages *citing* ***Home Constr. Corp v. Beaury***, *supra*; ***Blinds to Go, Inc. v. Times Plaza Devel., L.P.***, 88 A.D.3d 838 [2d Dept., 2011]; ***Evans-Freke, v. Showcase Contracting Corp***., *supra*. We disagree. Contrary to the Defense's assertions, the lack of an expert witness as to the value of Boss Inc.'s services does not bar recovery. The Rule stated in the case of ***Even-Freke v. Showcase Contracting Corn***., cited by Defendants, noted the use of hourly labor rates etc. which "...were supported by the invoices admitted at trial." (***Id.*** at 963). Although useful, an experts testimony is not necessary to establish damages when they can be established *via* reliable lay testimony, invoices and other specific *indicia* of loss (***S.J. Kula, Inc. v. Carrier,*** 107 A.D.3d 1541,

1542-43, 967 N.Y.S.2d 804, 806 (4th Dept. 2013), *citing* ***Reed Paving v. Glen Ave. Bldrs.***, 148 A.D.2d 934, 935, 539 N.Y.S.2d 173 [4th Dept. 1989]; *see* ***CNP Mech., Inc. v. Allied Bldrs., Inc.***, 84 A.D.3d 1748, 1749, 922 N.Y.S.2d 688]).

In addition to Mr. Boss' testimony, Plaintiff has offered invoices, punch lists, canceled checks and estimates which detail the amount of work it performed. The materials expended, the payment which was agreed upon for same, the partial payments to credit the Defendants and the final amount of due and owing from the Defendants were all set forth. Totaling these items less credits for payments made, the Court agrees that the Plaintiff has proven damages in an initial amount of $326,355.57. After deducting the Defendants award on the counterclaim ($25,160.00), the total amount of Plaintiff's damages is $301,195.57.

Pursuant to CPLR § 5001(a) (b), Plaintiff shall be awarded statutory interest (CPLR 5004) as of September 10th, 2007 the date Plaintiff demanded final payment via certified mail (Plaintiff's Exhibit 22). (***Yellow Book of New York, L.P. v. Cataldo***, 81 A.D.3d 638, 917 N.Y.S.2d 215[2nd Dept. 2011]).

Settle Judgment.

The foregoing constitutes the decision and Order of the Court.

DATED: NOVEMBER 1st, 2018
RIVERHEAD, NY

HON. JAMES HUDSON
Acting Justice of the Supreme Court

* Equity follows the law