STATE OF NEW YORK
SUPREME COURT ULSTER COUNTY

LAPENNA CONTRACTING, LTD,

Plaintiff,

DECISION AFTER BENCH TRIAL

- against -

Index No.: 17-1379
RJI No.: 55-17-0891

DAVID L. MULLEN, LYNN M. VELUTA-MULLEN, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR PRIMELENDING, A PLAINSCAPITAL COMPANY, PRIMELENDING, A PLAINSCAPITAL COMPANY, "JOHN DOE" AND "JANE DOE", said names being fictitious, it being the intention of Plaintiff to designate any and all occupants or premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

PRESENT: HON. LISA M. FISHER:

APPEARANCES: Frank A. Lombardi, Esq.
Counsel for Plaintiff
38 Jordan Lane
Middletown, New York 10940

Christopher J. Smith, Esq.
Counsel for Defendants,
David L. Mullen and Lynn M. Veluta-Mullen
517 East Main Street, P.O. Box 3016
Middletown, New York 10940

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Nina Postupack
Ulster County Clerk

FISHER, J.:

This is a construction breach of contract case between Plaintiff LaPenna Contracting, LTD. (hereinafter "Plaintiff) and Defendant David L. Mullen (hereinafter "David") and Defendant Lynn M. Veluta-Mullen (hereinafter "Lynn"; collectively "Defendants")[1] arising from an allegedly negligent construction of a residential addition and the failure to pay for same. There is also a defamation claim asserted by Plaintiff against Defendant Lynn, and a fraudulent misrepresentation

[1] Defendants' first names are used to avoid confusion.

and willful exaggeration of a mechanic's lien asserted by Defendants against Plaintiff. The general facts are that Plaintiff and Defendants entered into a construction contract for an addition to Defendants' existing home. Plaintiff began the work but alleges events beyond his control significantly delayed his progress. Defendants became concerned about the delays from Plaintiff, as well as several alleged mistakes, and ultimately terminated Plaintiff and hired one of the Plaintiff's subcontractors to complete Defendants' addition. Thereafter, Defendant Lynn posted comments on her Facebook wall regarding the alleged improprieties of Plaintiff and its owner, James LaPenna. Plaintiff seeks compensation for a breach of contract and for additional non-contract work that was allegedly performed at the request of Defendants but not paid for. Plaintiff also seeks punitive damages against Defendant Lynn for defamation. Defendants counterclaim for a breach of contract against Plaintiff and further allege a claim for fraudulent misrepresentation and a willful exaggerated of a mechanic's lien.

This action was commenced on or about May 4, 2017 via summons and complaint. The verified complaint asserted three causes of action. The first cause of action demands $33,870.00 on the grounds of breach of contract. The second cause of action demands $33,870.00 on the grounds of *quantum meruit*. The third cause of action demands $33,870.00 on the grounds of unjust enrichment. The fourth cause of action demands actual damages to be determined at trial, plus $250,000 in punitive damages on the grounds of defamation (libel) against Defendant Lynn only. Plaintiff also filed a mechanic's lien over the recorded mortgage and seeks to collect on the mechanic's lien.

Defendants joined issue via verified answer on or about July 22, 2017 and August 28, 2017.[2] Defendants asserted two counterclaims. The first counterclaim seeks $50,000.00 on four grounds for a breach of contract. The second counterclaim seeks $50,000.00 on the grounds of fraudulent misrepresentation. Defendants also counterclaimed generally that Plaintiff willfully exaggerated the lien amount, and therefore Defendants also sought $37,530.00 in damages which constitute 1) the difference between the amount Plaintiff alleges it is owed in the Notice of Lien and the amount it is actually owed, and 2) $3,750.00 in attorney's fees.

[2] There are two index numbers of 17-1379 and 17-1085. This Court is the trial court and not the IAS court. Neither party developed the procedural history of this matter other than the fact that the IAS court consolidated both matters on December 12, 2017 under the 17-1379 index number.

The matter was tried in a bench trial on September 12, 2018, September 13, 2018, and September 19, 2018. The parties presented several witnesses and experts, along with relevant exhibits.

Trial Contentions

Plaintiff argues it is entitled to a judgment against Defendants for a breach of contract in the amount of $25,400.00 for labor and materials for the work that was completed under the contract but not paid, for either *quantum meruit* or unjust enrichment in the amount of $8,470.00 for non-contract work that was completed, for punitive damages in the amount of $250,000 and actual damages in an amount to be determined by the Court. No amount of actual damages were proffered. The total sought on the alleged breach of contract and *quantum meruit*/unjust enrichment claims is $33,870.00.

Defendants argue they are entitled to a judgment against Plaintiff for the sum of $50,000.00 on their counterclaim for a breach of contract, for the sum of $50,000.00 on their counterclaim for fraudulent misrepresentation, and for the difference between the lien amount and the actual amount owed with attorney's fees, plus the referral of Plaintiff to the district attorney's office for prosecution. Defendants also request that all relief sought by Plaintiff be denied, and the mechanic's lien vacated and dismissed, as no grounds exist for same.

Findings of Fact and Trial Testimony

As the finder of fact and assessor of credibility, the Court makes certain findings as to the credibility of the parties and applied to the alleged facts. Such findings are premised on the conduct at trial, including the Court's personal observations of the witness testifying, body language, tone, and relevant demeanor, as well as the believability of certain allegations against the established facts.

Trial Testimony of Jill O'Connor

Plaintiff's first witness was Jill O'Connor. On direct examination, Ms. O'Connor testified that she lives in Pennsylvania and is a Facebook[3] user. Even though Plaintiff is from Middletown, New York, she saw the Facebook posts by Defendant Lynn. She identified several Facebook posts from Defendant Lynn regarding LaPenna contracting in early 2017 (February and March). She

[3] It was apparent that the parties and their respected counsel were unfamiliar with Facebook and the terminology. The Court is aware of and knows how Facebook works, and explained as much at trial.

saw these posts on her Facebook, which were "shared" by a friend and appeared on her Facebook newsfeed. She testified that the posts "concerned" her because Plaintiff had "just" completed work for her parents' house. She testified that she messaged Plaintiff's owner about the posts and "figured that [she] should find out what was going on so any future work [she] would feel comfortable with [Plaintiff] doing that." Her parents live in Middletown, New York, and she was happy with the work that Plaintiff did for her parents' house. She testified that Mr. LaPenna, responded with the "story" of what happened with Defendants.

Ms. O'Connor further testified that her reaction to the posts was that she was "concerned" and "worried for" the work that Plaintiff performed and whether she "should [] hire him back." When asked if the posts led her to question her decision to hire Plaintiff, she responded "[y]eah, a little bit." Ms. O'Connor read the Facebook post by Defendant Lynn and testified that, if she was a prospective customer, she would be "less likely to hire him . . . "[b]ecause of the negative nature of the post" by Defendant Lynn. Ms. O'Connor testified that the last time she read these posts were the morning of her testimony, as they were still on Facebook.

There was no cross-examination by Defendants.

The Court finds Ms. O'Connor's testimony mostly credible but limited as to the issues at trial. Her testimony was somewhat cautious, tailored and noticeably coached to a degree which appeared transparent. This included visiting the subject Facebook posts which were posted a year and a half before trial, meaning that Ms. O'Connor would have to scroll through a year and a half of her other friend's posts as well as advertisements to find them.

Trial Testimony of James LaPenna

Plaintiff's second witness was James LaPenna. On direct examination, Mr. LePenna testified that he was president of Plaintiff since the business was created approximately 12 years ago. Plaintiff is a general contracting company with 45 years of experienced in "virtually all facets of the construction industry." He testified that Plaintiff has done "[h]undreds" of construction projects and one of the projects was with Defendants. Mr. LaPenna testified he was contacted by Defendants to build a 16 x 32 foot addition on their existing home. There was a contract depicting the scope of work which was drafted by Mr. LaPenna and signed by himself and Defendant David for $84,750, which constituted the material and labor for a 16 x 32 addition.

Mr. LaPenna testified the problems at the start of the Defendants' project were due to large amounts of continual rain for several days and an "abnormal amount of rock underground." This

resulted in additional machine time and labor time, as Plaintiff could not work consistently due to mud and water. The project was started in mid to late November. The amount of water and the fact that it was winter meant that the concrete used for the footings and foundation took longer to cure. He testified that Defendants did not understand why there was a delay and what was taking so long, and that Defendant David would contact Mr. LaPenna "daily" about the project, and Defendant Lynn would send text messages between 12 midnight and 2AM which "started to get pretty accusatory and raw."

Mr. LaPenna testified that he hired subcontractor Michael Smith of MC Construction Management to perform the framing. He testified that there were "[a]bsolutely" issues when the framing began which were not depicted on the architectural drawings/blueprint drawings by Gregg Wantje. Mr. LaPenna introduced Mr. Wantje to Defendants, and he claims Defendants subsequently hired him. Mr. LaPenna testified that Defendant David changed the layout of the plans by having Plaintiff's mason make alterations without Mr. LaPenna being present. He claims that these changes resulted in structural support issues. Mr. LaPenna testified that he discovered several changes which caused problems, and when he told Defendant David he responded that it was Plaintiff's problems. Mr. LaPenna then brought it to Mr. Wantje's attention, who also told Plaintiff to handle it. Mr. LaPenna alleged that he made the changes with Mr. Smith which were subsequently approved by the building inspector, but Mr. Wantje did not get involved.

During excavation, Mr. LaPenna testified that Plaintiff hit the Defendants' waterline with an excavator and broke it. He claims that the waterline was not marked and typically it would have been marked or there would have been sand buried around it which would have indicated that something was buried there. He testified Plaintiff repaired the broken waterline in 30 minutes. Thereafter in a separate incident, Mr. LaPenna also testified that Plaintiff broke Defendants' septic pipe while operating an excavator. He alleged that this was because Defendant David asked Plaintiff to remove two trees.

Regarding finances, Mr. LaPenna testified that Defendants were financed by PrimeLending and that Plaintiff could take a "draw" which was a request to the bank to inspect and to pay a portion of what work had been completed to the contractor. He testified that he made the first two draws. The first draw was a "mobilization" draw which is the commencement of a project to bring in machinery, dumpsters, and starting materials. He testified that this draw was approximately $14,000. He testified that the second draw, of approximately $22,000, was requested and paid

after the foundation was completed. He testified that there were no other draws taken because, when the framing was done, Mr. LaPenna alleges that the relationship with Defendants began to "really deteriorate" even though Plaintiff was prepared to begin other installations. Mr. LaPenna testified that Plaintiff only received the two draws from the bank. He also stated that Defendants paid out-of-pocket for additional items outside of the construction project for items done prior to commencement.

When questioned by the Court, Mr. LaPenna stated that he did not know the amount of the third draw from the bank. He testified that he did not get the third inspection from the bank for the third draw because of the situation between Plaintiff and Defendants, namely that Defendant David was "threatening" because he would refer to himself as a police officer which did not make Mr. LaPenna feel safe. He theorized that Defendants were "going behind my back talking to my subcontractor" to get him to finish the project.

Mr. LaPenna testified that he was fired on March 15, 2017 by Defendant David. He testified that Defendants said to him "[y]ou're a joke." Mr. LaPenna testified that he intended to finish the project, but he was forced to leave. He stated that the remaining unfinished items under the contract included "the interior finish, siding, roofing, finish grade, and finish electric." He estimated that the project was 65% complete when he was fired. Mr. LaPenna testified that, after Plaintiff was fired, he noticed his subcontractor's vehicles at the job site and it appeared the exterior work had been completed.

Mr. LaPenna testified that he filed the mechanic's lien because Defendants still owed him money and they refused to pay him. Mr. LaPenna also testified there were additional expenses that were not reduced to writing but agreed to by both parties. He testified that normally when additional costs are outside a contract, Plaintiff would write up the additional work authorization, detail the work scope, present it to the owner for signature and then Mr. LaPenna would sign it. If a deposit was required, it would be paid and the project would move forward. One additional cost sought by Plaintiff is a stone wall that Mr. LaPenna avers Defendant David orally agreed to but Defendants did not sign the paperwork, give a deposit, or pay anything for the project. Mr. LaPenna testified that Plaintiff completed each of the additional work items listed in the mechanic's lien, requested payment, and Defendant David "became very defense, very loud, threatening, and told [Mr. LaPenna] you're not getting a penny."

As for the Facebook posts, Mr. LaPenna was shown several exhibits depicting the posts and comments. He testified that he learned of the Facebook posts from Ms. O'Connor. He testified he read them and "I was sick to my stomach." He claimed the posts were "[h]orrible, totally not true, disgusting." He speculated that people who saw the posts "must" have negative thoughts about Plaintiff, including that "[h]e's a criminal, he's dishonest, he's a joke, inexperienced, he's a thief." He testified that "[n]ot one thing" is true in the posts.

On cross-examination, Mr. LaPenna testified that PrimeLending asked him for a breakdown to substantiate the mobilization payment and they inspected it, but Plaintiff did not request the money at the start. Mr. LaPenna testified there was a Fannie Mae Home Style HomePath contract which required that contractor to submit to the owner an estimated progress schedule indicating the starting and completion date of the project. He testified that he did not provide this estimate, but also testified that "it wasn't in my contract. This isn't my contract. My contract with the [Defendants] is not this contract." When asked by the Court if he signed the agreement as his signature is on the Fannie Mae contract he stated "[n]o. That is not my signature, Your Honor." Mr. LaPenna testified that "Defendant's Exhibit M" is an e-mail to PrimeLending and the Defendants enclosing the contract. He claims that the signatures on the financial contract are not his, not even the initials, and "[m]y contract is all that I care about." When asked who signed the Fannie Mae contract, he said "I don't know" and that it was "[a]bsolutely not" him who signed the contract.

Mr. LaPenna testified that he is "[v]aguely at best" familiar with New York General Business Law article 36A which requires specific requirements for home improvement. After an objection by Plaintiff's counsel on the grounds that Mr. LaPenna is not a lawyer and cannot be expected to know what this law is, the Court questioned Mr. LaPenna on his understanding of the law as it applied to business owners and general contractors and allowed the questioning to continue. Counsel resumed cross-examination that General Business Law section 771 requires approximate dates or estimated dates for the start and end dates of a construction project, Mr. LaPenna testified that his proposal and contract did not contain such dates. Mr. LaPenna also testified that he did not have a provision in his contract notifying property owners that moneys not paid for goods or services may be enforced against the property in accordance with the applicable lien laws.

Mr. LaPenna was shown a payment made out-of-pocket by Defendant David for $2,000 on September 12, 2016 "for plans and permits" to the house addition. He was questioned that his sworn interrogatory question 10 ("Defendant's Exhibit K") explaining how the first draw was paid already included $700 to the architect. When asked what the $2,368 was for on the interrogatory, Mr. LaPenna provided it was for preparation and associated administration costs which were not disclosed to Defendants or included in the contract.

As for the mechanic's lien, Mr. LaPenna was asked what he believed he was owed from Defendants and testified he received $14,300 plus $22,000 from the draws, and he would have received another $33,870 if the Defendants finished paying him. This is a total value of the work (materials and labor) under the contract was $57,300. Mr. LaPenna testified that Plaintiff is still owed the $33,870 from Defendants. Mr. LaPenna was questioned on the interrogatories and he admitted that the breakdown of how the first draw for $14,350 were for fees and services not included in the written contract with Defendants. He was further questioned on the issue of double billing pursuant to what was written in the interrogatories and what checks were paid by Defendants.

As for the services performed on the contract, Mr. LaPenna testified that he did not replace the existing roof per the contract, but alleged Defendant David was responsible for determining if the skylights were to be removed and the size of the "dormer" he wanted. He was asked if he performed plumbing work, which he responded that he ran lines for the supply and return lines for the heating system, as well as for hot and cold water. As for the other work, Mr. LaPenna testified he did not do any electrical, sheetrock or drywall in the interior, insulation, the garage floor, hardwood flooring, siding, windows and trim, and he only started the roof for the addition, but did not complete same. Mr. LaPenna testified that he does 100% of the supervision but only 10% of the physical labor for Plaintiff.

As for the Facebook posts, Mr. LaPenna claimed that there was no truth in the posts and that he was "very diligent" in working for the Defendants. He acknowledged that he received a deposit from Defendants in July of 2016 but did not put that deposit in an escrow account pursuant to the lien law. He also admitted to not putting the two draws and the $2,000 check from Defendant David into an escrow account. He testified this money was used to pay expenses. He had no substantiation of these figures or the figures in the mechanic's lien but thought he had them at his

office and did not know he needed them for trial. There was a police report wherein Defendants claimed that Mr. LaPenna was harassing them by patrolling up and down their street.

On redirect, Mr. LaPenna testified that neither party had an attorney represent them regarding the drafting of the contract. He testified the Defendants did not ask for a timeline. He confirmed that he does not have receipts to substantiate all of the charges in the mechanic's lien with him at trial, but back at his office.

There was no re-cross examination. Plaintiff rested.

The Court finds Mr. LaPenna's testimony not credible and he was the least credible of all witnesses. While his testimony started well, possible from coaching, it ended poorly, likely from hubris. Mr. LaPenna was condescending and arrogant throughout most of his testimony, and at times argumentative with opposing counsel and even the Court. It became clear that everything that went wrong was someone else's fault, and he was quick to blame everyone else for problems, delays and errors. For instance, he blamed Defendants for not marking the waterline before Plaintiff began excavation and severed it. When Plaintiff broke the septic pipe, Mr. LaPenna testified it was Defendant David's fault for asking him to remove trees. Even though Plaintiff received payment for an architect in the first draw, and a separate $2,000 check directly from Defendants, it was still the architect's fault for not developing the drawings the way Plaintiff and Defendants discussed. When the local police department contacted Mr. LaPenna for possible harassment when he was seen multiple times driving up and down Defendants' road by their house, Mr. LaPenna blamed the police encounter on Mr. Smith as a former police officer from that department and Defendant David who is a state trooper. When the testimony shifted to the Facebook posts, Mr. LaPenna's testimony became incredulously exaggerated and his demeanor changed from piercing cynic to a woeful victim. As the questioning became more difficult, Mr. LaPenna's distain for opposing counsel grew commensurate with such difficulty. His frustration was evident, and his body language was not indicative of someone being truthful as he was closed, fidgety, arms folded for the majority of cross-examination, and easily agitated—especially when challenged.

Trial Testimony of James Farr, P.E.

Defendants' first witness was James Farr. On direct examination, Mr. Farr testified he is a professional engineer with 32 years of experience. He has been involved with Defendants' property for over a year and a half. He provided a report in January of 2017 and an updated report

in March 2017. He testified that Defendants should not be responsible for certain costs such as the stone wall which was included in the contract, or the extra charges for the broken waterline and septic pipe. He averred that the bid was a lump sum bid, meaning one price for full completion and not an itemized project. Mr. Farr testified that the extra costs for backfill were unjustified and should not have been paid by Defendants. He testified that the Defendants should be entitled to a credit of $1,312.50, plus the cost of the extra excavation work, broken waterline, and broken septic pipe, for a total credit of $5,202.98. He estimated that the total amount of worked performed at Defendants' house was approximately $36,350, of which $16,600 was for the excavation and foundation.

Regarding the mobilization fee, Mr. Farr testified that there was no documentation regarding the mobilization fee and no line item for the charge. He testified that mobilization charges are not standard per industry practices for small residential projects as such charges are typically used for bigger projects above $500,000 involving large commercial or municipality construction.

On cross-examination, Mr. Farr testified that his specialty is civil engineering and he is a New York State certified building inspector and code enforcement officer. When questions over his qualification to review a contractor's contract, he responded that he has over 30 years of experience with residential and commercial construction, including working with building departments and completes inspections for both commercial and residential construction. He was hired and paid by Defendants to testify and did not contact Plaintiff.

Regarding the broken sewer pipe and waterline, Mr. Farr could not give a specific breakdown of the costs because Plaintiff did not break down the costs; it was one lump sum. The fact that the line was repaired within 30 minutes did not affect his estimate because it did not affect what Plaintiff charged the Defendants. He testified that Plaintiff should have called a markout company before excavating to determine where the waterline and septic pipe were located before excavating. It was his opinion that a contractor should have had the expertise and knowledge to do this, and that this was not the responsibility of the homeowners. When questioned regarding the rocks that Plaintiff encountered during excavation, Mr. Farr testified that the rocks he observed were "readily removable by the equipment" that Plaintiff had on site and were less than one cubic yard.

Mr. Farr was questioned about his opinion that the contract required Plaintiff to replace a stone wall with a more expensive concrete wall, but Plaintiff built a rock wall instead. Counsel told Mr. Farr that this was already explained by Mr. LaPenna to be a different wall and location when Mr. Farr was out of the courtroom and asked if that would change his opinion. Mr. Farr responded no because the contract required Plaintiff to install a concrete retaining wall in that same location, but Plaintiff did not do so. When told that the wall in the contract and the wall in the additional work from the mechanic's lien were the same, Mr. Farr replied that they are one in the same wall and not two separate walls at Defendants' residence as the Plaintiff is contending.

Regarding the mobilization draw, Mr. Farr testified that there was a difference between a material draw and a mobilization draw, wherein a material draw was for specific materials that needed to be documented and a mobilization draw would be used for "soft costs[.]" He was pressed further by counsel who believed it was semantics, but Mr. Farr replied they are two different draws that require different paperwork from the bank and a contractor would not use either a materials draw or a mobilization draw to pre-pay subcontractors.

There was no re-direct.

The Court finds Mr. Farr's testimony to be mostly credible. While he was knowledgeable, it appears he had less-than-full information regarding the facts and circumstances surrounding this dispute. It also appears that Mr. Farr's scope of review was rather limited despite his credentials. Notwithstanding, Mr. Farr handled the "surprise" line of questioning regarding the first draw very well, which served to bolster his credibility by demonstrating he can receive new facts and apply them to his knowledge in a spontaneous and rather stressful (cross-examination) situation.

Trial Testimony of Michael Smith

Defendants' second witness was Michael Smith. On direct examination, Mr. Smith testified that he is a general contractor and worked for Plaintiff on Defendants' house as a subcontractor to do framing. He was hired in January to begin and was paid by Plaintiff. He constructed the frame, sheeted it, and framed the interior walls, exterior walls, and roof. He reviewed the building plans and testified there were no stairs in the new garage in the plans. However, Mr. Smith testified that the Defendants wanted stairs in the garage leading into the house. Mr. Smith testified that he had this discussion with Mr. LaPenna when he was doing a material list for the build-out. Mr. Smith testified that he told Mr. LaPenna about the missing stairs in the plans, and the two of them went to Defendants' house to discuss the issue. He testified that

Mr. LaPenna decided the new stairs would go under the existing stairs from the main part of the house. Mr. Smith was shown a photograph marked as "Defendant's Exhibit CC" and he identified that as Defendants' garage. He testified that there were stairs going up over the top of where the car would be which is "not typical" for an addition. He said the decision for the stairs was between Plaintiff and Defendants. Mr. Smith testified that Mr. LaPenna told Defendants that it would cost too much to move the stairs.

As for other structural work, Mr. Smith testified that there was a problem with walls of the addition supporting the roof because the existing structure was a modular home and had "scissor trusses" in the roof with studs going all the way up. He testified that this meant there was "no structural strength going laterally to set the rafters on to create the roof line." He testified that this meant he had to do restructuring with box beams to run along the existing wall for the new walls, and then they had to build a wall on top of it with a header across the top so the wall would structurally carry the roof load and the upstairs deck load. When asked by the Court if this is something that should have been anticipated, Mr. Smith testified that it should have been by a general contractor.

After Plaintiff was terminated, Mr. Smith testified that he was retained by Defendants. He testified that he started to perform the work for Defendants at the end of March or beginning of April. The price to complete the project was $81,910.43 which is what he charged to Defendants. He testified that Defendants paid him in full. The total price did not include materials, which Mr. Smith testified that Defendants paid for out-of-pocket; Mr. Smith only did labor. He testified that, after Defendants fired Plaintiff, that Defendants asked him to submit a bid which he did and he was subsequently hired. Before bidding, Mr. Smith told Defendants to stay with Plaintiff because it would cost them more money to go with him but they decided to do that anyway. Mr. Smith stated that he believed the project could have been completed more quickly by Plaintiff.

On cross-examination, Mr. Smith testified that he built the stairs depicted in "Defendant's Exhibit CC" and it was not the ideal way to build those stairs, but he was directed by Mr. LaPenna to do it. Mr. Smith recounted that Plaintiff, Defendant David, and himself were talking outside on a "cold day" regarding the stairs and Mr. Smith's idea to have the stairs come up to an "L" shape with a landing, but that was rejected for "a whole other litany of things and I walked away." Thereafter it was Plaintiff and Defendant David that decided on the stairs. Mr. Smith testified that Defendants said they did not like the stairs there while he was building them, but Mr. Smith said

he was Plaintiff's subcontractor and it was not for him to decide. When questioned about the extra support for the roof that he testified on direct, Mr. Smith testified that it would be "impossible" to build the roof without this extra support because there was nowhere to place the rafters. He testified that this was the responsibility of the architect if the architect was on the site, but if the architect as an "absentee architect, then it would be on the builder."

There was no re-direct.

The Court finds Mr. Smith's testimony to be the most credible of all witnesses presented at the entire trial. He was honest and knowledgeable, and presented very positively with the tone of his voice and body language. He provided thorough answers and explanations which drew largely on the facts as well as his experience as a contractor. His explanations were also thorough, and his rendition of what occurred were very specific down to details such as the parties were outside discussing the stairwell on a very cold night. These very specific facts lead to an aura of truthfulness not present in any other witness.

Trial Testimony of Brent Kunis

Defendants' third witness was Brent Kunis. Plaintiff objected to Mr. Kunis' testimony on the grounds of relevancy and lack of knowledge of the instant facts. Defendants' counsel argues that they have a counterclaim for fraudulent misrepresentation and that similar acts or occurrences can be used to show intent and a pattern of conduct that resulted in the fraud. The Court accepted the testimony and, given that it is a bench trial, will access and weigh the testimony as appropriate.

On direct examination, Mr. Kunis testified that he is half-owner of Orange County Bagel and hired Plaintiff in May of 2013 to perform renovations including demolition, putting up new walls, electric work, plumbing work, building, and other general renovations. The work performed initially costed approximately $13–14,000, however there were "add-ons" by Plaintiff that ended up costing $18–19,000. As Plaintiff did the work, it turned out to be "an absolute disaster" and Plaintiff did not show up when he said he would, there were a lot of disagreements because he was "never showing up" but continued to ask for more payments, that Mr. LaPenna would e-mail Mr. Kunis at the business late at night, and they could not deal with Plaintiff anymore and they fired him. The bagel shop had to hire a new contractor to come and finish the work which ended up costing them "so much more money" than Plaintiff's estimate. They then found out that Mr. LaPenna was not licensed to do plumbing in the City of Middletown. Mr. Kunis again testified that it was "just an absolute disaster. It was a nightmare."

Mr. Kunis explained that he and his partners own 23 other stores and have dealt with numerous contractors before, and this was the first time he had to go to court after Plaintiff and he won. He testified that, because of all of Mr. LaPenna's e-mails, they had a record of all of his excuses why he could not perform the work and the delays. Mr. Kunis testified that Plaintiff's bid "didn't make sense at all" and that he could not discern what Mr. LaPenna's motivation was, but it was "just not accurate" because when they fired him for the job, other people came in to do the work and found the material cost alone to be more than the total work estimated by Plaintiff.

On cross-examination, Mr. Kunis testified that Mr. LaPenna told them he was a licensed plumber multiple times even though he was not. When asked if he knew that Plaintiff was going to use Pinkham Plumbing, Mr. Kunis responded no and this was the first time he is hearing that and he already has been through litigation against Plaintiff.

The Court found Mr. Kunis' testimony very credible and sincere. He had no objectives or motives to testify as his complaints against Plaintiff have been resolved in other litigation. He was confident, knowledgeable, and exercised positive body language.

Trial Testimony of David Mullen

Defendants' fourth witness was Defendant David Mullen. On direct examination, Defendant David testified they solicited bids from multiple contractors in summer of 2016. He received a bid from Plaintiff for about $84,000, which was lower than all of the other bids which ranged between $105,000 and $140,000. He testified that he gave rough sketches to Mr. LaPenna who obtained the architect to do the plans. When he received the finished plans, Defendant David testified that there "were several problems with them" including no stairs from the garage up to the main floor, there was no closet in the office, and a standard size doorway. He communicated his concerns to Mr. LaPenna who came over in the end of August to go over the plans. Mr. LaPenna told them to submit the plans to the building department for a permit and he assured Defendants they can address the issues when they are framing. He testified that he never met the architect, whom "never" came to the house.

Defendant David testified that Plaintiff began work in November, and Defendants were concerned from the beginning because the construction loan closed in the beginning of October. He testified that PrimeLending imposed requirements on the contractor such as having documentation and a timeline. There was a requirement for the work to be completed in 180 days, which Defendant David testified it was "absolutely not" possible the way Plaintiff was progressing

with the work because there were "almost 30 days" at the start where Plaintiff did not work. There was also two weeks to dig the foundation and another 45 days after that before the framing started. He testified that it only rained twice during the foundation dig and it was a "very minimal amount of rain." He testified that Plaintiff would use every "excuse under the book why he wasn't there, from weather to the suppliers[.]"

In late December or early January, Defendant David testified he reached out to legal counsel because they had paid Plaintiff over $40,000 and they only had a foundation and Plaintiff's excuses as to why he was not there completing the job. He testified that the house was not framed until the end of February. In March of 2017, Defendants fired Plaintiff because it was "absolutely a nightmare" and there were text messages, e-mails, and other "completely disrespectful" communications. He testified that whenever the Defendants tried to communicate with Mr. LaPenna, he would get "arrogant and nasty" and dealing with him was a "complete nightmare." When counsel got involved for both parties, Mr. LaPenna provided a proposed timeline for the remaining work. Defendant David thought the whole thing was "a joke" because it was on a handwritten piece of paper, no letterhead, nothing professional, and it was like Mr. LaPenna did not even care.

After terminating Plaintiff, Defendants consulted with other contractors. They ultimately chose Mr. Smith because other contractors were not available until the end of August and Defendants did not want to continue with the delays. The contract price with Mr. Smith was approximately another $82,000 plus materials which totaled approximately $30,000. Defendant David opined that, based on his contract with Mr. Smith and the materials, and considering what Mr. LaPenna already did (excavation, foundation, started framing), there was no way that Defendants' plans could have been completed within Defendants' bid. Defendant David testified Defendants have spent over $140,000 on the additional project.

As to the fraudulent misrepresentation claim, Defendant David testified he believes he was "absolutely" defrauded by Mr. LaPenna. He testified that Mr. LaPenna told him he does not subcontract anything out and he has his own crew of workers, plus he does the work himself which is why his contract is lower than other contractors which was important to Defendants because they wanted a "hands-on contractor." However, Defendant David testified that Mr. LaPenna was "[a]bsolutely not" a hands-on contractor, and he and his crew were present about 10% of the time which would be a "generous" estimate. He believes Plaintiff "low-balled his contract" to get the

job, and then began to stack extra charges to make up the difference. He testified that, as a police officer with 23 years of experience, he has spent his life documenting and reporting facts which is what he and his wife did while the construction was occurring because it was a very big life event for them. They took daily notes of what was happening or not happening and knew that the excavator had not been moved for days despite Plaintiff seeking an additional $3,800 for extra excavation expenses. Defendant David testified Defendants had reservations to pay the extra expenses that Plaintiff requested, but they still paid. He testified when he reviewed the interrogatories, he saw double billing by Plaintiff.

Now going through the contract between Defendants and Plaintiff, Defendant David testified that Plaintiff only removed half of the existing rock and retaining wall. He testified that Plaintiff completed some parts of the contract focused on excavation and pouring the footings and foundation, but largely did not complete the remaining items regarding the interior and major roof work. As for the retaining wall, that was done but with material from Defendants' property and it was the same length as the prior wall.

In reviewing interrogatory question 10 ("Defendant's Exhibit K"), Defendant David testified he did not authorize Plaintiff to take a mobilization draw for $6,500, as he already paid the architect out-of-pocket and the $500 charge to meet with the architect and $700 for architect drawings were unjustified was a duplicate fee, and he was "[a]bsolutely not" told about a preparation and administrative fee of $2,360 which is not in the contract. Defendant David also testified that after the contract was signed, Plaintiff told him he was only responsible for 15 feet of retaining wall and Defendants had to pay for anything beyond that, which that was nowhere in the contract. He testified that he told Mr. LaPenna that one of the first things that he wanted done was the repairing the existing roof because there were rotted boards, but when Plaintiff was fired in March the old roof was still not repaired. Defendant David testified that Mr. LaPenna "never listened to me whatsoever" and Mr. LaPenna refused to provide documents how the $40,000 was spent because Defendants only had a foundation. Defendant David testified that Plaintiff charged extra for the closet that was missing in the plans and Mr. LaPenna said they would fix once the framing started.

Defendant David testified that Defendants paid Plaintiff out-of-pocket $500 in July 2016 for a deposit, $2,000 in September 2016 for architect plans, $500 in September 2016 for building

permits, $3,890.48 on December 10, 2016 for excavation overages and breaking the water line, and $2,625 on December 15, 2016 for dirt fill.

As for the police report, Defendant David testified that Mr. LaPenna had been seen driving past the house on three occasions with video cameras and one time with another vehicle following him. Defendant David testified that one time around 4 pm, about when his son gets home from school, he observed Mr. LaPenna's truck turn onto Defendants' street and then park. Defendant David testified he pulled up alongside Mr. LaPenna's vehicle and told him to leave because he did not have a legitimate reason to be there. He called the police who contacted Mr. LaPenna.

On cross-examination, Defendant David testified his Better Business Bureau complaint was dropped against Plaintiff. As for harassment, he testified that his road is a public road but it is "completely out of the way of everything" and you need a legitimate reason to be there. He was questioned on the contract and the alleged breaches, which were part of a "verbal agreement" and not written in the contract. He testified that after the last draw was issued, Plaintiff continued to work and eventually requested another draw. However, Defendant David testified that he did not allow the third draw because he wanted to ensure that Plaintiff committed to the project and there were concerns that he had been paid a substantial amount of money and not much had progressed. He testified that the extra excavation costs were not because Plaintiff found boulders that had to be removed because they were all smaller rocks.

As for the additional costs in the mechanic's lien, Defendant David testified that the half bathroom framing was requested and he agreed to pay for that, but not the closet framing which was on the original plans, the pocket framing, the structural girders, laminated beams, support walls, stone wall, and the additional length and slate stairs. He testified that he received work orders after the lawyers spoke in March, but he refused to sign them. He testified he would have paid Mr. LaPenna had he finished the work, but he did not because he was terminated. He testified that Plaintiff never requested payment from what Defendants did agree to pay, and instead a mechanic's lien was filed. Defendant David testified that he believed Plaintiff was bound by the terms of the contract by PrimeLending because that was how Plaintiff was getting paid, and if he wanted the draws he had to comply with the financial institution's rules. He testified that he believed that Mr. LaPenna did not physically sign the financing contract, but he may have electronically signed it because Defendants had to "sign a lot of online documents" from the

application. He acknowledged that the financing contract required completion within six months of the loan closing, and Plaintiff was terminated three weeks before the six months expired.

On re-direct examination, Defendant David testified that the first draw was not accurate to what was already completed. He testified that the contract did not contain anything close to a mobilization fee, and many of the items on the $14,350 draw were paid out-of-pocket by Defendants to Plaintiff. When questioned by the Court how long it took Mr. Smith to complete the work after Plaintiff was terminated, Defendant David testified that it took three months from working morning until late at night to finish on a Monday through Friday schedule, including some Sundays.

The Court finds Defendant David's testimony mostly credible. While it is clear that he has a strong grasp of the factual background, including very specific details which give an aura of credibility and truthfulness, it is also clear by the way he testified that Defendant David was heated over the issues. Defendant David's body language, tone, and the manner at which he spoke demonstrated that he was intense, enraged, frustrated, and even short-fused which ends up validating some of Mr. LaPenna's testimony that Defendant David was aggressive or intimidating. But overall, Defendant David's testimony was credible and significantly more credible than Mr. LaPenna.

Trial Testimony of Lynn Mullen

Defendants' fifth witness was Defendant Lynn Mullen. On direct examination, she testified that she was present during "99%" of the daytime hours in fall 2016 and winter 2017 because she worked from home. She was able to observe what was happening outside daily. She admitted to posting the Facebook post, and believed they were true that Mr. LaPenna was negligent and engaged in law violations. She described the back of Defendants' deck that Plaintiff "cut the back of our deck" and just put caution tape near the edge of the ten-foot drop. She testified Defendants have two children and a dog, and that this condition was left like that for weeks without repair. She testified that it was her opinion and review of Plaintiff's business, and she did not believe anything was untrue about the posts.

As for the physical presence on the jobsite, Defendant Lynn testified that Plaintiff did not come for a month after he received the first draw. She documented when he was at the jobsite on a calendar from minute-to-minute and what was being done. She noted that Plaintiff's presence was "very sporadic" when the project started. Her log had Plaintiff on the job approximately eight

hours before he requested and received the second draw. She testified that Defendants were justified in terminating Plaintiff and that Mr. LaPenna had been "overpaid, if anything." She testified that she believes Plaintiff defrauded Defendants. She testified that Plaintiff promised it would repair the old roof first, and he did not do that. She testified that Mr. LaPenna "was very arrogant and threatening to a certain degree" and that she did not trust him. She observed him driving past the house "continually" and videotaping the Defendant's house.

On cross-examination, Defendant Lynn testified that she deleted the posts and, while she heard the testimony yesterday that the posts were still online, she did not know where they were, how there were online, and she has searched and could not find them. She believed her Facebook post was freedom of speech.

There was no re-direct. Defendants rested.

The Court finds Defendant Lynn's testimony to be mostly credible, but her testimony was limited based on the questioning. Her body language and tone of her voice demonstrated someone who was a little nervous, but she had good command of the facts.

Trial Testimony of Brent Dewitt

Plaintiff's first rebuttal witness was Brent Dewitt. On direct examination, Mr. Dewitt testified that he is a general contractor and has been for 13 years. He testified that he "briefly" reviewed the contract between Plaintiff and Defendants and opines that Plaintiff could have completed all of that work for $84,750. He opined that it was not common to have a private marking company come to mark the waterline, but rather in a private residence to "just observe the house." He testified that he "never" had a private waterline marked.

There was no cross-examination.

The Court finds Mr. Dewitt's testimony mostly credible, but unremarkable, quite limited, and unexplained as to his conclusions. Neither counsel had Mr. Dewitt explain his answers which leaves a lot unaddressed, open, and somewhat unhelpful.

Trial Testimony of James LaPenna

Plaintiff's second rebuttal witness was Plaintiff James LaPenna. The tone of Mr. LaPenna's rebuttal testimony solidified for the Court how credibility decisions would be determined. Whatever scintilla of credibility Mr. LaPenna had up and until this point was withered away in rather arrogant, condescending, and frankly unacceptable banter. He lost his own case.

On direct examination, which opened with "[w]hat comments do you have regarding [Brent Kunis'] testimony[,]" Mr. LaPenna responded that it was "[a]bsolutely ridiculous" because he did not do plumbing for Mr. Kunis, but still does plumbing work for his father and brother. As for Mr. Farr's testimony, Mr. LaPenna testified that the testimony "was wrong" that Plaintiff should have called a markout. As for Mr. Smith's testimony and asked whether it was reasonable for Mr. Smith to charge $81,000 to Defendants, Mr. LaPenna testified that "[i]t is a joke" that "there has never been anything entered into this whole case about any receipts, any checks, any invoices or anything for any material." He testified that he would have finished the job for the contract price.

When asked about Defendants' testimony, *after initially laughing* and interrupting his counsel's question, Mr. LaPenna testified that it was "[a] bad play put on by good actors." He testified that Defendant David did not tell him where the waterline was. He testified that, even though Defendant David testified that there was only two days of rain, Mr. LaPenna said according to the national weather website for the Pine Bush region there was a nor'easter that dumped almost a foot-and-a-half of snow in the beginning of February, and there was more than nine inches of rain in Defendants' driveway which "would fill what was being dug to prove a footing, a foundation and a building." Mr. LaPenna testified that he did tell Defendants that he would have the project done by Christmas, but the weather was a "huge factor" as it affected the job. He testified that he did drive by twice to confirm that his subcontractor was working there, but he never stopped or videotaped the Defendants and was not harassing them. As for the testimony of the back deck, Mr. LaPenna testified that Defendant Lynn's testimony was "[a]bsolutely not true" and the deck was intact, the stairs were intact, and there are photographs to prove it. Mr. LaPenna went through the contract and explained what he believed was done, not done, or partially done.

When asked by the Court how Mr. LaPenna came up with the total figure of $84,750 because the contract only has a lump sum with a long list of items, Mr. LaPenna testified that this was not a complete contract and the full contract had "all the individual line items broken out into prices." The contract drafted by Mr. LaPenna contained a footer indicating that the contract consisted of 5 pages.

There was no cross-examination. Plaintiff rested rebuttal.

The Court found Mr. LaPenna even less credible on rebuttal, only this time marred with disrespect. Even though he did sound knowledgeable as to expenses, he proved uncontrollably omnificent.

Trial Testimony of David Mullen

Defendants' first rebuttal witness was Defendant David Mullen. On direct examination, he testified that Mr. LaPenna did not perform any electrical work and performed limited plumbing services without any connection. There was no cross-examination. Defendants rested their rebuttal. Defendant David's credibility was similarly credible.

Conclusions of Law/Legal Analysis

The findings of fact and credibility are assessed and weighed against the legal claims asserted in this matter. The Court considers the causes of action as asserted in each party's respective pleading. Since the gravamen of both parties' claims against the other is a breach of contract, the Court finds it appropriate to consider these claims first.

Plaintiff contends it substantially performed under the contract and Defendants have breached the contract by terminating Plaintiff and failing to pay. Whereas Defendants contend Plaintiff failed to perform its obligations under the contract due to excess delays and negligent work, and as a result of Plaintiff's delays and poor workmanship, they were forced to incur additional construction expenses by entering into another contract with another builder. Defendants also claim that General Business Law § 771 invalidates the contract and the mechanic's lien. Plaintiff rejects this defense and claims that he has nonetheless substantially performed and is entitled to compensation under the contract.

Required provisions for a home improvement contract are governed by General Business Law § 771, and provide under subdivision (1) (b) that "[e]very home improvement contract . . . be evidenced by a writing . . . [which] shall contain . . . [t]he approximate dates, or estimated dates, when the work will begin and be substantially completed, including a statement of any contingencies that would materially change the approximate or estimated completion date." Here, there is no question that Plaintiff's contract failed to contain this provision, as well as the lien law notice of section 771 (1) (d). While Mr. LaPenna touted that he has 45 years of experience in this field of business which he repeated during his examination several times, when asked about the requirements of GBL § 771 he was quick to snip back that he is not a lawyer and did not know about these requirements applicable to home improvement projects. The Court is not amused by this. In addition, he testified on rebuttal that the contract the parties have stipulated into evidence is not the complete contract, which he did little to explain where the complete contract was or to

provide it or introduce it into evidence. Therefore, Plaintiff's cause of action for a breach of contract against Defendants is **DENIED** and all claims are **DISMISSED**. (*See Precision Foundations v Ives*, 4 AD3d 589, 591 [3d Dept 2004] [dismissing contractor's breach of contract claim for failing to comply with one requirement of General Business Law § 771 because such violation "bars plaintiff's recovery based upon breach of contract."].)

Plaintiff's post-trial submissions argue that a contractor who has substantially performed notwithstanding a General Business Law § 771 violation can still recover. (*see Island Wide Heating & A.C. v Sachs*, 189 Misc.2d 355 [App Term 2d 2001]). "A contractor can recover on a theory of substantial performance only where the failure of performance is relatively slight" (*A-1 Gen. Contracting Inc. v River Market Commodities Inc.*, 212 AD2d 897 [3d Dept 1995]) and "occurs in good faith" (*Callanan Indus. v Smiroldo*, 100 AD2d 717, 718 [3d Dept 1984]). While it has long been said that what constitutes substantial performance is frequently the source of litigation, "[t]he rule is that whether a builder has in good faith intended to comply with the contract, and has substantially complied with it, although there may be slight defects caused by the inadvertence or unintentional omissions, he may recover the contract price, less the damages on account of such defect" (*Cassino v Yacevich*, 261 AD 685 [3d Dept 1941]).

Here, Plaintiff did not substantially perform the contract to entitle him to usurp the General Business Law violations and recover the full contract price. He admitted on rebuttal, while on an irrelevant rant, that he *did* tell the Defendants that he would have them in their new addition by Christmas of 2016, but the weather was a "huge factor" in causing the delays. Mr. LaPenna then testified that the national weather service search for the area of the house revealed over a foot and a half of snow in February and nine inches of rain. This is, of course, *after* Christmas and cannot be an excess for not delivering the home in December. Nor does the February snow and rain matter for the excavation and foundation, as the foundation was completed in December as testified to and evinced in Plaintiff's interrogatory explaining how the second draw of December 6, 2016, as testified by Defendant David, and as admitted to by Mr. LaPenna on his direct examination. This is just another example of bait and switch by Mr. LaPenna which the Court sees right through.

Moreover, the work that Plaintiff did perform was subpar. The photograph of the garage with the stairwell cutting directly into the vehicle bay ("Defendant's Exhibit CC") was against Defendants' wishes and, quite frankly, illogical and should be embarrassing to Mr. LaPenna. This is not an acceptable standard of work, and the testimony of Defendants and Mr. Smith made it

clear that it was Mr. LaPenna's desire to do it this way. As for the roofing, the Court fully credits Defendants' testimony that Plaintiff agreed he would first repair the damaged roofing which he never did by the time he was terminated in the five months after the contract was signed. The Court also credits Mr. Smith's testimony in full that, as for the addition, the roofing that Plaintiff was about to do was improper in that it was a modular home and there needed to be additional and significant re-framing and supports placed which Plaintiff had not done at the time he was terminated and should have.

Further, the breaking of both the waterline and septic pipe demonstrate the reckless conduct by Plaintiff, particularly the septic pipe because it occurred after the waterline was broken and it did not occur to the Plaintiff to consider locating and marking the septic pipe before excavating. Not only is this common sense, Mr. Farr testified it was against the industry custom. While Mr. Dewitt was a credible rebuttal witness, Mr. Dewitt testified that a contractor would look at the residence to make this determination rather than hire a mark it out; there is no evidence Plaintiff did this. In addition, Mr. Dewitt was not offered on the case-in-chief but rather used as damage control to rebut the testimony of Mr. Farr, demonstrates Plaintiff was scrambling to mitigate its losses. The fact that Mr. LaPenna then charged the Defendants for the repairs to the septic pipe and waterline are, as the expression of this trial, "a joke." In addition, the contract provides that Plaintiff was to install a concrete retaining wall extension to the foundation, and the fact that he built a stonewall from materials on Defendants' property also does not constitute "substantial compliance." Furthermore, regarding the damage to the deck and the fact that Plaintiff left it unguarded for weeks, the Court credits Defendants' testimony in full and finds Mr. LaPenna's rendition of facts not credible as to the deck.

It must additionally be noted that they theory of substantial performance permits recovery on a contract only where such failure is "relative slight and *occurs in good faith*" (*see Callanan, supra*, 100 AD2d at 718). Mr. LaPenna's cavalier testimony and laughing on rebuttal about what he thought of Defendants' testimony was fatal to his credibility. From Defendant Lynn's calendar, which was stipulated into evidence, it is clear that Plaintiff's efforts were few and far between.

As such, in considering the testimony of what was completed, not completed, partially completed, and which was improperly completed and needed to be redone, resolving any contradictions in the testimony between Mr. LaPenna and Defendants against Mr. LaPenna, and further considering the other issues arising in the attempted performance of the contract as noted

above, the Court finds no substantial compliance with the contract to entitle Plaintiff to any further damages under the contract. Considering the fact that Plaintiff's contract provides that "All Work Shall Be Neat And Professional[,]" and the renditions above demonstrate the unjustified delays, reckless conduct, and other numerous errors, the Court finds that it was Plaintiff who breached the contract and forced Defendants' to mitigate their losses by hiring another contractor.

However, while the violation of General Business Law § 771 bars Plaintiff's recovery based upon a breach of contract, this "does not bar recovery in quantum meruit" (*Precision*, *supra*, 4 AD3d at 591). "To prevail on that cause of action, a party must prove '(1) performance of services in good faith, (2) acceptance of the services by the person for whom they were rendered, (3) an expectation of compensation, and (4) the reasonable value of the services performed'" (*Id.*, quoting *Clark v Torian*, 214 AD2d 939, 939 [3d Dept 1995]). Here, the additional (non-contract) work of the mechanic's lien was testified to at length by all parties. In considering the testimony of the parties and finding Mr. LaPenna's testimony not credible as compared to Defendants, Mr. Farr, and Mr. Smith, the Court finds that the only claims he is entitled to under his unjust enrichment and *quantum meruit* claims are the half bathroom framing for $360.00 and pocket door framing of $285.00 which Defendant David admitted he agreed to and testified he was going to pay Mr. LaPenna for such services before the parties had a breakdown in relations.

The other claims for additional non-contract work sought in the mechanic's lien and in the complaint for *quantum meruit* are without merit. The fact that Mr. LaPenna is seeking $225.00 for the closet framing is frivolous, as this was part of the contract which was mistakenly omitted from the building plans, called to Mr. LaPenna's attention, and he told Defendants to get the plans to the building department anyway and that they could work in the closet framing once the project started. The other additional costs depart from what Mr. LaPenna testified were his normal practice, which he testified would have been for him to write up the additional work authorization, detail the work scope, present it to the owner to sign, and then he would sign it before the project would take a deposit and move forward. Here, no evidence of that occurred even though Mr. LaPenna provided a rather detailed explanation of what he would normally do. Thus, the remaining claims not admitted by Defendants are rejected. Moreover, the structural girders, laminated beams, and support walls are also what was supposed to be part of the addition and should have been included therewith. The stone wall and stone wall additional length and slate steps were a sharply contested ("Achilles heel") issue. However, Mr. Farr and Defendant David

testified the wall which Plaintiff built was the same one in the contract, only with stone from the Defendants' property rather than from a concrete pour as provided in the contract. This is a breach of contract. The fact that Mr. LaPenna tried to claim the built stone wall was not what was considered in the contract, and further Defendant David's testimony that Mr. LaPenna told Defendants the contract only afforded 15 feet of wall and the Defendants had to pay the rest, is simply incredible. As such, the Court finds that these services to build the stone wall were not "additional work" but included within the contract and not recoverable, therefore the elements for performance of services, acceptance of these services, and the reasonable value of the services allegedly performed do not satisfy the requirements of *quantum meruit*. Nor does the Court find it necessary to discuss the other requirement of "good faith" at this point in this Decision. Therefore, Plaintiff's cause of action for *quantum meruit* is **GRANTED**, in part, and Plaintiff is awarded a judgment in the amount of $645.00 against Defendants, and all other claims under this cause of action are **DENIED** and **DISMISSED**.

Similarly, Plaintiff's cause of action under unjust enrichment also fails. "The elements of an unjust enrichment claim are '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'" (*Delaware County v Leatherstocking Healthcare, LLC*, 110 AD3d 1211, 1213 [3d Dept 2013], quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citation omitted]). Here, it cannot be said that Defendants were enriched by Plaintiff's additional non-contract work which was either included in the original contract and double billed in the mechanic's lien, or simply hyperbole by Mr. LaPenna. Given a totality of the circumstances, it also cannot be said that it would be against equity and good conscience for Defendants to keep what they had already paid for under the contract or did not receive what they were supposed to, *i.e.*, the concrete poured retaining wall. As such, Plaintiff's cause of action for unjust enrichment is **DENIED** and **DISMISSED.**

Turning to Plaintiff's cause of action for recovery under the mechanic's lien, Plaintiff seeks $25,400.00 for contract work and $8,470.00 for additional non-contract work. Initially, the non-contract work is resolved and Mr. LaPenna was awarded $645.00. As for the remaining contract claims, as Mr. LaPenna candidly testified on the last day of trial that "there has never been anything entered into this whole case about any receipts, any checks, any invoices or anything for any material." Yet, he testified on the first day of trial that he had all the invoices, receipts, and other

documentation and his office and did not bring it to trial. There was a week recess of the trial, and when he was called on the stand as a rebuttal he still failed to provide these documents into evidence or testify to them. As the Plaintiff, it is *his* burden to demonstrate his expenses under the mechanic's lien. He has utterly failed to do so other than by his testimony. His testimony and conduct has demonstrated he is incapable of being trustworthy. As a trier of fact, the Court declines to consider his claim without corroboration. In addition, Plaintiff failed to include the required General Business Law § 771 (1) (d) lien law notice. Therefore, Plaintiff's cause of action under the mechanic's lien is **DENIED** and all claims are **DISMISSED**.

As for Plaintiff's last cause of action, libel is a form of defamation which is the publication of a statement about an individual that is both false and defamatory. (*Brian v Richardson*, 87 NY2d 46, 51 [1995].) "[I]n order to state a cause of action for libel, the complaint must set forth 'allege[d] false, defamatory statements of *fact* rather than mere nonactionable statements of *opinion*'" (*Loder v Nied*, 89 AD3d 1197, 1199 [3d Dept 2011], quoting *Bonanni v Hearst Communications, Inc.*, 58 AD3d 1091, 1092 [3d Dept 2009] [quotations omitted; emphasis preserved]). "Since falsity is a necessary element of a defamation cause of action, and only 'facts' are capable of being proven false, . . . 'only statements alleging facts can properly be the subject of a defamation action'" (*Davis v Boehiem*, 24 NY3d 262, 268 [2014], quoting *Gross v New York Times Co.*, 82 NY2d 146, 152–53 [1993]). Thus, truth is an affirmative defense (*Fregoe v Fregoe*, 33 AD3d 1182, 1183 [3d Dept 2006]) and "defamation actions can only be premised on assertions of fact, not opinion" (*Gentile v Grand St. Med. Assoc.*, 79 AD3d 1351, 1352 [3d Dept 2010], quoting *Hassig v FitzRandolph*, 8 AD3d 930, 931 [3d Dept 2004]; *see Davis*, 24 NY3d at 269 ["A defamatory statement of fact is in contrast to 'pure opinion' which under our laws is not actionable because '[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be subject of an action for defamation.'"] [quotations omitted]; *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 380 [1977], *cert. denied* 434 US 969 [1977] ["Opinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth."]).

"Whether a particular statement constitutes an opinion or an objective fact is a question of law" (*Mann v Abel*, 10 NY3d 271, 276 [2008]; *accord Hassig*, 9 AD3d at 931). To make such determination, the court should consider "(1) whether the language of the challenged statements has 'a precise meaning which is readily understood; (2) whether the statements are capable of

being proven true or false'; and (3) whether, considering the context in which the statements were made, readers are likely to understand the statements to be opinion, rather than fact" (*Bonanni*, 58 AD3d at 1092, quoting *Gross*, 82 NY2d at 153; *accord Gentile*, 79 AD3d at 1352; *see Steinhilber v Alphonse*, 68 NY2d 283, 290 [1986] ["There is no definitive test of set of criteria. The essential task is to decide whether the words complained of, considered in the context of the entire communication and of the circumstances in which they were spoken or written, may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion."]).

Thus, the "inquiry distills to whether a reasonable reader would believe that the [allegedly libelous statement] was conveying facts about plaintiff" (*Gentile*, 79 AD3d at 1352; *see Brain*, 87 NY2d at 51; *Gross*, 82 NY2d at 153; *600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 139 [1992], *cert. denied* 508 US 910 [1993]; *see also Steinhilber*, 68 NY2d at 290 ["The question is one of law for the court and one which must be answered on the basis of what the average person hearing or reading the communication would take it to mean."]). "The language will be given a fair reading and the court will not strain to place a particular interpretation on the published words." (*James v Gannett Co., Inc.*, 40 NY2d 415, at 419–20 [1976]). Further, "the courts will not strain to interpret [the words] in their mildest and most inoffensive sense to hold them nonlibelous" (*Mencher v Chesley*, 297 NY 94, 99 [1947]).

Here, Plaintiff's post-trial submissions harp on Defendant Lynn's Facebook post as defamatory because they are "disparaging, insulting and untrue remarks on Facebook that repeatedly attacked [Plaintiff] by name and accused my client of unprofessional conduct." The specific statements are that Defendant Lynn wrote that Plaintiff "is nothing short of a joke" and "has taken me and my family in so many aspects, including law violations, financial upset and outright negligence." In reviewing the post against the well-establish common law noted above, this cause of action is **DENIED,** and all claims are **DISMISSED**.

First, truth is a defense and Plaintiff did violate the law in at least two subdivisions under General Business Law § 771, as noted above. Second, breaking the waterline and septic pipe were testified to by Mr. Farr as improper and not industry custom which is enough to satisfy the Court that Defendant Lynn's comment that Plaintiff was negligent is also true. But if that were not enough, the fact that Plaintiff damaged Defendants' deck, left a 10 foot drop blocked off by only caution tape, and took weeks to fix it, is reckless and below the standard of care. Further, Mr. Smith's testimony how Plaintiff was preparing to have the roof built when Defendants had a

modular home and it would have failed because of inadequate support is also reckless, careless, and possibly negligent. Third, the Court does not have a "precise meaning" of what the statement Plaintiff "has taken me and my family in so many aspects," but the mere fact that Mr. LaPenna told Defendants he would get them in the house by Christmas and he just had the foundation and some framing started would seem to satisfy this statement as also true, at least as how the Court understand what this statement means. Fourth, it is clear that Plaintiff caused Defendants' financial upset pursuant to both of their testimony that it cost them significant more money to complete the project. Fifth and last, the fact that Mr. LaPenna decided to commence this action against *Defendants* is, after considering the causes of action, assessing the credibility, and upon due diligence, in fact "a joke." It should also be noted that Plaintiff made no effort to prove damages, and only referred in the post-trial submissions as what was proved at Court—which was nothing. A claim for just punitive damages is inappropriate here given the conduct aforementioned.

Regarding to "financial upset," the Court turns now to Defendants' counterclaims which seek $50,000 against Plaintiff for a breach of contract. As noted above, the Plaintiff failed to substantially perform the contract and is deemed to have been in breach. "As a general rule, 'the proper measure of damages in cases involving the breach of a construction contract is the difference between the amount due on the contract and the amount necessary to properly complete the job or to replace the defective construction, whichever is appropriate" (*Thompson v. McCarthy*, 289 AD2d 663, 664 [3d Dept 2001], quoting *Lyon v Belosky Const. Inc.*, 247 AD2d 730, 731 [3d Dept 1998] [internal citation and quotation omitted]). Here, Defendants had to hire another contractor to complete the project after Plaintiff's breach. Mr. Smith was hired and charged an additional $81,910.43. Defendants' contract with Plaintiff was $84,750 which is what they could expect to have paid for the project had Plaintiff not breached. Defendants paid $14,350 for the first draw, and $22,000 for the second draw, and out-of-pocket paid $500 for a deposit, $2,000 for architect plans, $500 for building permits, $3,890.48 for excavation overages and breaking the waterline, and $2,625 for dirt fill. The total amount paid by Defendants to Plaintiff is $45,865.48.

However, Defendants allege that Plaintiff "double billed" for certain expenses pursuant to Plaintiff's response interrogatories explaining how the first and second draw were utilized. Defendants also allege that Plaintiff included fees that were not included on the contract, not disclosed or approved by them, and were unreasonable or should have already been included in

the contract. Some of these were admitted by Mr. LaPenna on cross-examination. The Court agrees with Defendants as to these transgressions.

On the first draw, the "mobilization" charge of $6,500 was not included in the contract, not disclosed to Defendants, and Mr. Farr testified was inappropriate and not industry custom for small residential projects. The "meeting with owner and architect" for $500 and "owner selected and accepted architect drawings" for $700 are also inappropriate as Defendants already paid out-of-pocket for the architect. There was no testimony that these fees were extra or necessary, and this is double billing. The "building permit application preparation" for $550 is inappropriate as Defendants paid $500 to Plaintiff for this, there is no proof Plaintiff paid this to the Town, there was no testimony that these fees were extra or necessary, and this is double billing. The "preparation and associated administration costs" of $2,360 were not disclosed to Defendants, not provided on the contract, and are inappropriate. These amounts totaling $10,610 must be returned to Defendants on the first draw.

As for Plaintiff charging $3,890.48 for excavation overages and for breaking the waterline, as testified by Mr. Farr, Plaintiff should have marked out the water and septic line and the charge for dirt fill was "unjustified." While Mr. Dewitt believed marking the waterline and septic pipe was not common practice, his testimony was limited, and he did not address the other contentions by Mr. Farr. Mr. Farr testified that Defendants should receive $5,202.98 as a credit for the backfill, being charged for the broken waterline, and the "extra" excavation costs. The Court, in considering Mr. Farr's credible testimony but also Mr. Dewitt's credible testimony as to the marking of waterlines, awards only $2,625 for the dirt fill which Mr. Farr believed was "unjustified."

Therefore, the total amount that the Court finds Plaintiff to have double billed, inappropriately or unjustifiably charged the Defendants is $13,235.00. This must be returned to Defendants on the breach of contract claim.

This figure also lowers the amount properly paid to Plaintiff from $45,865.48 to $32,630.48. This means there was $52,119.52 due on the contract had Plaintiff completed it. Defendants paid Mr. Smith $81,910.43 which was necessary to complete the job. The difference of this is $29,790.91 which Plaintiff is liable to Defendants. Therefore, Defendants' counterclaim for a breach of contract is **GRANTED**, and Defendants are awarded against Plaintiff the sum of $13,235.00 as a credit plus $29,790.91 as the difference, totaling $43,025.91.

Defendants' also counterclaim for fraudulent misrepresentation. "In order to prevail on [a] cause of action for fraudulent misrepresentation, [the claimant] must prove that [the alleged tortfeasor] made a knowing misrepresentation of fact for the purpose of inducing plaintiff to act or refrain from acting in reliance thereon and that plaintiff was damaged by such reliance" (*Burke v Owen*, 168 AD2d 722, 723 [3d Dept 1990]). Here, Defendants' failed to make the requisite showing. While Mr. Kunis' testimony was credible, there was a distinct lack of evidence which could have been easily proffered and used to corroborate his claim. No judgment, photographs, testimony, or other evidence were provided. The claims that there were other customers who were similarly aggrieved by low bids from Plaintiff is also unsupported. Even though Mr. LaPenna was extremely lacking in credibility, Defendants do not meet this heavy burden of establishing a fraud claim without actual evidence. Moreover, Defendants fail to even attempt to establish damages besides seeking $50,000. Given that Plaintiff's conduct does not raise to the level of punitive damages, and further that Defendants have been compensated on their breach of contract counterclaim what they would have been compensated had they proved their fraudulent misrepresentation claim, it is unnecessary to further discuss this cause of action which has not been sufficiently proven. Therefore, Defendants' counterclaim for fraudulent misrepresentation is **DENIED** and **DISMISSED**.

Defendants' remaining counterclaim regard the mechanic's lien. Initially, the Court is not an investigative agency and is not directly rendering a criminal culpability, charging a larceny crime, or finding guilt against Plaintiff and Mr. LaPenna—this is a civil action. Nor is the Court referring the matter to the district attorney's office as counsel is just as capable of doing so, and Defendant David is a law enforcement officer who is *more* than capable of doing so. There also does not appear to be a private right of action for a lien law violation, at least not as established by Defendants or the Court could find, nor did Defendants establish any enhanced damages as a result of the lien law violations. Rather, Defendants were able to use such violations as a partial aegis to Plaintiff's breach of contract claim which the Court deems sufficient.

Defendants also allege that Plaintiff's mechanic's lien was willfully exaggerated pursuant to Lien Law §§ 39 and 39-a. A mechanic's lien which is found to be willfully exaggerated "shall be declared to be void and no recovery shall be had thereon" (Lien Law § 39). Where a lien has been declared to be willfully exaggerated, "the person filing such notice of lien shall be liable in damages to the owner" (Lien Law § 39-a). "The damages which said owner . . . shall be entitled

to recover, shall include . . . reasonable attorney's fees for services in securing the discharge of the lien, and an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon" (*Id.*).

Here, Plaintiff's mechanic's lien sought $33,870.00 which constituted $25,400 additional contract work and $8,470 additional non-contract work. During trial, Plaintiff failed to demonstrate any of the contract work costs which were alleged to be $10,160.00 in labor and $15,240 in materials. Mr. LaPenna rather confidentially testified he had all the receipts and evidence for materials back at his office, which was not believable to the Court, and he ultimately failed to provide any of this documentation on rebuttal despite having a week to compile same. On post-trial submissions, Plaintiff utterly failed to raise a defense to this claim which was omitted from the proposed findings of fact/conclusions of law. Mr. Farr testified that Plaintiff's work on Defendant's house was approximately worth $36,350. Pursuant to the testimony and evidence, Plaintiff had been paid $45,865.48[4]. While this figure was adjusted in this Decision After Bench Trial to $32,630.48, the Court still uses the higher figure of what Plaintiff had already been paid. This is because at the time of filing the mechanic's lien this is what Plaintiff knew he had been already paid but still boldly asserted a mechanic's lien for an additional $33,870.00. This simply does not make sense to the Court, considering the original contract price was for $84,750 and he testified he was approximately 65% completed, but was paid $45,865.48 and now wants $33,870 which totals $79,735.48, or 94% of the contract price. The Court factors in that Plaintiff did receive $645 from his non-contract claim above.

As such, the Court finds the entire mechanic's lien has been willfully exaggerated by $33,870 minus $645, which totals $33,225. It appears that Plaintiff exaggerated the lien in an attempt to coerce the Defendants to acquiesce to Plaintiff's unreasonable and fictious demands. The Court finds the mechanic's lien to not be an honest difference of opinion as to the amounts due or inaccuracy in the amount of the lien. The Court finds the exaggeration of the lien was intentional. Therefore, Defendants' counterclaim for a willful exaggeration of the mechanic's lien is **GRANTED**, and Defendants are entitled to a judgment of $33,225, plus reasonable attorney's fees of $3,750.00 which were requested, plus costs and disbursements against Plaintiff.

[4] This figure was adjusted in this Decision After Bench Trial to $32,630.48 for double billing and inappropriately or unjustifiably charges. The Court still uses the actual figure of $45,865.48 because at the time of filing

Costs and disbursements are awarded pursuant to CPLR § 8101, CPLR § 8105, and CPLR § 8301. The amount of costs shall be CPLR § 8201 (3).

Defendants' counsel is directed to draft and submit a proposed judgment, on notice to Plaintiff, which is not inconsistent with this Decision After Bench Trial. This Decision After Bench Trial shall be filed with the County Clerk's Office and attached as Exhibit "A" to the proposed judgment. Applicable interest shall be applied therein by Defendants.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit or rendered academic.

This constitutes the Decision and Order of the Court.

Please note that a copy of this Decision After Bench Trial along with the original motion papers are being filed by Chambers with the County Clerk. The original Decision After Bench Trial is being returned to the prevailing party, to comply with CPLR R. 2220. Counsel is not relieved from the applicable provisions of this Rule with regard to filing, entry and Notice of Entry.

IT IS SO ORDERED.

DATED: January 23, 2019
Catskill, New York

E N T E R :

HON. LISA M. FISHER
SUPREME COURT JUSTICE

Papers Considered: The Court considered all submitted papers and trial exhibits, including the trial transcript, testimony of the witness, duly weighing objections, both parties' written summations, both parties' findings of fact and conclusions of law, and Defendants' letter update sent correcting a typo on his submissions.

FILED
10 H 20 M
FEB 04 2019
Nina Postupack
Ulster County Clerk