NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
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MILAGROS ESCABI,

Plaintiff(s),

- **against** -

TWINS CONTRACTING, LLC AKA TWINS CONSTRUCTION LLC, YVETTE PALERMO, KIRK ORTEGA, WILLIAM ORTEGA, SR., MCCULLOUGH STUDIO ARCHITECTURE, PC, AND HAYWOOD MCCULLOUGH,

Defendant(s).

Index No. **22211/20E**

Hon. **FIDEL E. GOMEZ**
Justice

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The following papers numbered 1 to 3, Read on plaintiff's motion noticed on 3/17/22, and duly submitted as no. 1 on the Motion Calendar of 3/17/22, plaintiff's cross-motion noticed on 3/17/22, and duly submitted as No. 2 on the Motion Calendar os 3/17/22, and defendants' motion noticed on 3/17/22 and duly submitted as no. 2. on the Motion Calendar os 3/17/22.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1-2	
Answering Affidavit and Exhibits	4	
Replying Affidavit and Exhibits	5	
Notice of Cross-Motion - Affidavits and Exhibits	3	
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers-Order of Reference		
Memorandum of Law	6-11	

Motion by Alberto Torres, the receiver, is decided in accordance with the Decision and Order annexed hereto.

Dated: 5/25/2022

Hon. _____
FIDEL E. GOMEZ, AJSC

1.CHECK ONE ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION #1 IS X DENIED
MOTION #2 IS X GRANTED IN PART
CROSS-MOTION IS X GRANTED IN PART

3. CHECK IF APPROPRIATE.
☐ SETTLE ORDER
☐ SUBMIT ORDER
☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT
☐ REFEREE APPOINTMENT
☐ NEXT APPEARANCE DATE July 11, 2022 @12:30pm

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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MILAGROS ESCABI,

DECISION AND ORDER

Plaintiff(s),

Index No: 22211/20E

- against -

TWINS CONTRACTING, LLC AKA TWINS CONSTRUCTION LLC, YVETTE PALERMO, KIRK ORTEGA, WILLIAM ORTEGA, SR., MCCULLOUGH STUDIO ARCHITECTURE, PC, AND HAYWOOD MCCULLOUGH,

Defendant(s).

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In this action for, *inter alia,* breach of contract, plaintiff moves for an order granting her summary judgment on all seven causes of action in the first amended verified complaint. Saliently, plaintiff contends that the record demonstrates that defendants TWINS CONTRACTING, LLC AKA TWINS CONSTRUCTION LLC (Twins), YVETTE PALERMO (Palermo), and KIRK ORTEGA (KO) breached the contract between them and plaintiff - which required them to repair her home after it was damaged by a fire. With regard to defendant WILLIAM ORTEGA, SR. (WO), plaintiff contends that the record demonstrates that funds earmarked for home repairs, conveyed by her for that purpose to Twins, were fraudulently conveyed to WO, who then used them for personal purposes such that disgorgement and return of said funds is warranted. Lastly, plaintiff saliently

contends that the record demonstrates that defendants MCCULLOUGH STUDIO ARCHITECTURE, PC (MSA) and HAYWOOD MCCULLOUGH (HA) breached the agreement between them and plaintiff - requiring the drafting of architectural plans for the repair of her home - said breach causing the New York City Department of Buildings (NYCDOB) to stop the repair work at her home. Plaintiff also cross-moves[1] for an order dismissing defendants' seven counterclaims, saliently asserting that to the extent that Twins was not licensed to perform work in New York City - a fact not disclosed to plaintiff - it cannot recover any sums under the agreement between the parties such that its counterclaims for breach of contract, promissory estoppel and *quantum meruit* must be dismissed.

Defendants oppose plaintiff's motion for summary judgment and her cross-motion for dismissal of their counterclaims. Defendants saliently aver that Twins did not breach the contract between the parties and instead, it was plaintiff who breached the same by failing to tender the down payment required thereunder and then, by terminating Twins. Defendants also move seeking an order granting

[1] It is hard to fathom why plaintiff did not move for dismissal of defendants' counterclaims within her application for summary judgment. This is especially true here, where she makes arguments in support of dismissal of the counterclaims in her memorandum of law seeking summary judgment. Notably, despite characterizing her cross-motion as one for dismissal of the counterclaims, her arguments in support thereof coupled with her wholesale failure reference CPLR § 3211 in support of her motion, evinces that what she seeks is summary judgment with respect to defendants' counterclaims.

them summary judgment and dismissal of the causes of action in the first amended complaint, seeking such relief for the same reasons they oppose plaintiff's motion for summary judgment. Plaintiff opposes defendants' motion for summary judgment by reiterating her arguments in support of her motion seeking identical relief.

For the reasons that follow hereinafter, plaintiff's motion is denied, her cross-motion is granted, in part, and defendant's motion is granted, in part.

The instant action is for breach of contract, breach of fiduciary duty and misappropriation under NYS Lien Law Article 3A and General Business Law § 770 et seq., architectural malpractice, violations of General Business Law § 349, unjust enrichment, conversion, and fraudulent conveyance pursuant to NY Debtor creditor law § 270, et seq. The first amended verified complaint alleges the following. On October 20, 2016, plaintiff's home, located at 1732 St. Peters Avenue, Bronx, NY (1732), was damaged by a fire. 1732 was insured by State Farm Fire and Casualty Company (State Farm). On January 27, 2017, pursuant to a written contract, plaintiff retained Twins, a general contractor owned by Palermo and owned and/or managed by KO, to repair the damage to 1732. The amount of the foregoing repairs, which was to be paid by State Farm, was $76,555.14, and pursuant to the contract, the work would be completed within eight months. On February 14, 2017, relying on Twins' representation that it was licensed to perform home

restoration work in New York City, State Farm, through OCWEN Loan Servicing, LLC (OCWEN), the bank that held the mortgage encumbering 1732, paid Twins $40,000 to begin the repairs. On September 27, 2017, State Farm, again through OCWEN, paid Twins $11,875 for architectural work and plans, which Twins then paid to MSA and HM. It is alleged that Twins retained MSA, an architectural firm and HM, MSA's principal. It is alleged that Twins was not licensed in New York City to perform work as a residential architectural, construction, restoration and/or home improvement entity, that neither Twins, Palermo, KO, or WO[2] deposited the funds paid to them on behalf of plaintiff into an escrow account, that as of May 2018, Twins' invoice reflected that it had not performed any repairs at 1732, and that in July 2018, plaintiff terminated Twins because it failed to perform any work at 1732 and because it failed to provide an account of the funds it had been paid. Despite a request that Twins, Palermo, KO and WO return $51,875 - the sums paid to it by State Farm through OCWEN, they refused.

Based on the foregoing, plaintiff's first cause of action against Twins, Palermo, KO, and WO is for breach of contract, restitution, and rescission. Specifically, it is alleged that the foregoing defendants breached the agreement between the parties by

[2] The complaint is bereft of any facts detailing WO's relationship to Twins, Palermo or KO. To the extent that it is alleged that funds were diverted to WO and that plaintiff asked him about the status of the repairs, it is clear that he is alleged that he is Twins' employee and/or agent.

failing to perform the repairs required thereunder, failing to return the sums paid to them under the agreement, failing to put the funds paid to them in escrow pursuant to NYS Lien Law Article 3A, and failing to be licensed to work in New York City pursuant to General Business Law § 770 et seq. and the NYC Administrative Code. Plaintiff's second cause of action against Twins, Palermo, and KO is for breach of fiduciary duty and misappropriation under NYS Lien Law 3A and General Business Law § 770 et seq. Specifically, plaintiff alleges that insofar as the foregoing defendants did not possess a license to perform general contracting work in New York City and did not deposit the funds paid by plaintiff into an escrow account, they violated the foregoing statutes and are not entitled to keep the foregoing funds. Plaintiff's third cause of action against Twins, MSA and HM is for architectural malpractice. Specifically, it is alleged that Twins retained MSA and HM to draft architectural plans for the restoration of 1732, that a reasonable architect would have drafted plans, which included plumbing and electrical work, that MSA and HM's plans omitted such work, that in omitting plans for plumbing and electrical work, MSA and HM failed to perform reasonably, and that the foregoing conduct resulted in fees, costs and delays. Plaintiff's fourth[3] cause of action against all defendants is for violations of General Business Law §

[3] The complaint mistakenly denominates the fourth cause of action as the fifth, and the fifth cause of action as the sixth.

349 et seq. Specifically, it is alleged defendants were not licensed to perform home improvement work in New York City, that plaintiff, State Farm, and OCWEN relied on defendant's misrepresentation that they were so licensed, and that as a result, the NYCDOB issued an order stopping the work at 1732. As a result of the foregoing, plaintiff alleges that she suffered damages - the sums paid to defendants - and consequential damages - sums incurred because she was unable to use 1732. Plaintiff's fifth cause of action against all defendants is for unjust enrichment. Specifically, it is alleged that defendants have been unjustly enriched by the funds paid to them to repair 1732 because they never performed any work at all. Plaintiff's sixth cause of action against all defendants is for conversion. Specifically, it is alleged that plaintiff suffered mental anguish when despite her request after the termination of the contract between the parties, defendants failed to return the money plaintiff paid them. Plaintiff's seventh cause of action against all defendants is for fraudulent conveyance pursuant to NY Debtor Creditor Law § 270 et seq. Specifically, it is alleged that plaintiff, defendants' creditor, paid defendants $51,000, which should have been held in escrow, but was instead conveyed to relatives for personal use.

Within their answer, with regard to their seven counterclaims, defendants allege the following. After plaintiff's home had been severely damaged by a fire on October 20, 2016, plaintiff contacted

WO to inquire whether Twins could help with the restoration of 1732. At the time, plaintiff knew WO because her daughter was living with WO's son. In January 2017, Twins entered into an agreement to restore and repair 1732 for $76,555.14. Because plaintiff submitted a claim for the fire damage to State Farm, her insurer, no work could begin absent approval from State Farm and OCWEN, plaintiff's mortgagee. Because plaintiff represented that she lacked the experience necessary to successfully secure payment from State Farm, she agreed to additionally compensate Twins to help her. Although KO and WO spent at least 205 hours acting on plaintiff's behalf to secure payment from State Farm, plaintiff never compensated Twins for their time. In February 2017, per agreement, State Farm, through OCWEN, paid Twins $40,000. In September 2017, State Farm paid Twins an additional $11,850, $8,400 of which would be paid to MSA and HM for architectural work. On February 5, 2018, after 1732 was inspected, it was discovered that 1732's electrical system did not meet the standards required by the NYCDOB. Pursuant to a request by Twins, KO and WO, State Farm authorized an additional $23,000 to the original claim for changes to the electrical system at 1732. MSA and HM modified its architectural plans to reflect the changes and after the same were rejected by State Farm, on May 25, 2018, the NYCDOB nevertheless issued a permit authorizing Twins to begin its work at 1732. On July 4, 2018, after Twins had worked for six weeks, plaintiff

changed the locks at 1732, denied Twins access, allowed others to work at 1732, thereby resulting in a stop work order issued by the NYCDOB.

Based on the foregoing, defendants interpose seven counterclaims. The first and second counterclaims for breach of contract allege that by barring Twins from 1732 on July 4, 2018, and paying another contractor to complete the work at 1732, plaintiff breached the agreement between the parties. It is also alleged that by failing to pay Twins for its work in assisting plaintiff with securing funds from State Farm, plaintiff breached that agreement as well. The third counterclaim for promissory estoppel alleges that by promising to pay Twins for its work in assisting plaintiff with securing funds from State Farm, plaintiff induced Twins to engage in the forgoing assistance and then refused to pay Twins. The fourth counterclaim for unjust enrichment alleges that Twins assisted plaintiff with securing funds from State Farm, such that plaintiff derived a substantial benefit and equity requires that Twins be compensated. The fifth counterclaim for quantum meruit alleges that Twins assisted plaintiff with securing funds from State Farm, such that plaintiff derived a substantial benefit and that therefore, Twins is entitled to the reasonable value of its services. The sixth counterclaim for conversion alleges that after Twins was locked out of 1732, they were unable to retrieve tools worth $11,000 and that therefore,

plaintiff converted the same. The seventh counterclaim for defamation alleges that plaintiff made statements, orally and in writing, accusing Twins of theft, that such statements were false, and that these statements harmed Twins' professional reputation.

STANDARD OF REVIEW

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]). Notably, the court can consider otherwise inadmissible evidence when the opponent fails to object to its admissibility and instead relies on the same *(Niagara Frontier Tr. Metro Sys. v County of Erie*, 212 AD2d 1027, 1028 [4th Dept 1995]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence he must proffer an

excuse for failing to submit evidence in admissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

When deciding a summary judgment motion, the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> [s]upreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding, not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE CLAIMS IN HER FIRST AMENDED COMPLAINT

Plaintiff's motion for summary judgment is denied insofar as she fails to establish prima facie entitlement to summary judgment on all of the causes of action in the first amended complaint. Significantly, as discussed below, plaintiff's evidence either fails to establish prima facie entitlement to summary judgment because no portion of it satisfies the requisite elements of her causes of action or because collectively, the evidence raises issues of fact as to all of her claims.

In support of her motion and cross-motion, plaintiff submits[4] Palermo's deposition transcript, wherein Palermo testifies, in pertinent part, as follows. Since 2015, Palermo has been the owner, president and sole shareholder of Twins, a contracting company, which prior to 2018 was only licensed by New York State. Twins has no permanent employees, and instead hires or subcontracts with employees, such as carpenters, plumbers, and electricians as needed. In November 2016, after plaintiff's home was damaged by a fire caused by a roofer, pursuant to a verbal agreement, plaintiff retained Twins to help her procure insurance proceeds from State Farm - plaintiff's insurer - to repair her home. To that end, KO

[4] While the Court reviewed all the evidence submitted by the parties with the three applications before it, the Court shall not endeavor to discuss every piece of evidence submitted and will instead limit its discussion to those most relevant to this Court's decision.

was to be paid $1,300 per month for the foregoing work. Thereafter, in January 2017, pursuant to a written contract, plaintiff retained Twins to repair 1732 pursuant to State Farm's scope of work. The contract required a $40,000 down payment, which was paid to Twins by check in two installments - the first installment was in the amount of $18,331.04 and paid on February 14, 2017, and the second was in the amount of $21,668.96 and paid on February 24, 2017. The foregoing checks were deposited into Twins' Capital One Bank business account. Once the checks cleared, Twins, using cash, bought all of the materials required for the renovation pursuant to the scope of work, such as paint, sheetrock, plywood, and screws from a store called Modern Paint. The materials were then delivered to 1732 and stored in the garage. Twins also assigned WO, Palermo's brother-in-law, whose son also lived with plaintiff's daughter, and who sometimes worked for Twins, to work on the plaintiff's project. WO had performed work on this project since November 2016, inasmuch as he created the estimate for the project as well as the proposal and contract. WO reported to 1732 daily and installed a wooden beam after the permit for the project was issued. WO was paid his salary from Twins' business account and the same was paid directly to his creditors. As such, Twins paid his rent, his Netflix membership and even his daughter's school tuition. Because architectural plans for the renovations were necessary for the issuance of a permit, and

because absent the issuance of a permit, no work could begin, in August 2017, plaintiff and Twins hired MSA and HM to prepare the plans. Plaintiff paid Twins an additional $11,850 for the plans and to retain an expediter. MSA and HM had to continually make changes to the plans because plaintiff lodged objections to the same. On May 18, 2018, after the NYCDOB approved the architectural plans, it issued a permit. On that same date, Twins began to perform repairs, and installed a temporary wooden beam between the dining room and living room. While the beam was not listed in the scope of work, it was necessary to prevent the second floor from collapsing onto the first. Beyond the installation of the beam, Twins could not perform any additional work because it was discovered that the electrical system at 1732 did not meet code. Hence, a change order was issued by State Farm approving the work and the funds for the requisite electrical work. However, plaintiff refused to pay for said work. On June 27, 2018, plaintiff changed the locks at 1732, barring Twins from entering. Palermo testified that all of its clients' funds were deposited into its business accounts, from which Twins paid its business obligations, such as insurance and salaries. Because it never got an opportunity, Twins never did any work to the roof at 1732. However, after the fire, the roof had been patched up by a roofer and sprayed with a substance to prevent mold. With regard to the pipes at 1732, Twins never worked on and/or cut the same. In an

effort to winterize 1732, Twins did ensure that all the pipes were drained of water so they would not freeze and burst. Twins did not heat 1732, because it was empty. Palermo testified that at some point, an attempt to be certified by the MTA was denied. Palermo testified that the same was denied because someone named Mari, possibly plaintiff's daughter, made damaging comments on a website which reviews contractors called BuildZoom[5]. Specifically, Palermo states that the comment accused Twins of stealing $50,000.

Plaintiff submits several documents about which Palermo testified at her deposition. The first document is titled State Farm Scope of Work and dated November 3, 2016. The document lists all repairs and activities related thereto, which were to be performed at 1732 by Twins, along with dates of anticipated completion. Per the document, the work was to be completed within 90 days, beginning on January 27, 2017, and ending on May 28, 2017. Additionally, it was anticipated that the architect's work, as well as the NYCDOB's approval of the same, would be completed in 25 days or no later than March 2, 2017. The second document is another State Farm Scope of Work. The same is undated, but indicates that electrical work was added to the list of repairs, that the project was anticipated to take 89 days, with an anticipated completion date of August 16, 2018. The third document are copies of

[5] While Palermo testified that the website is Building Zoom, the record evinces that it is called BuildZoom.

cancelled checks. One check is from plaintiff to Twins, dated August 18, 2017, for $11,850. Said check was deposited into a Capital One Bank account. Two other checks are from OCWEN to Twins - one for $18,331.04 dated February 14, 2017, and the other for $21,668 dated February 24, 2017. Both checks evince that they were deposited into a Capital One Bank account. The fourth document is an architectural drawing by MSA. It indicates that it is for the restoration of the fire damage to 1732 and lists Twins as the contractor. The drawing also depicts the existing floor plan, listing three garages and that it is for the restoration of the first and second floors, including the kitchen, bathrooms, the roof and the three garages. The fifth document is another architectural drawing, dated August 9, 2017, by CS, which is substantially similar to MSA's drawing. The sixth document is a statement for Twins' Capital One Bank account for the period of August 1, 2017, through August 31, 2017. The invoice statement multiple payments, including one to Hulu and another to Netflix. The seventh document is a series of invoices from Modern Paint & Hardware New Rochelle (Modern Paint). The invoices evince purchases made by Twins for construction materials, which were shipped to 1732. They also indicate that payment for each invoice was made in cash. The invoices dated between February and April 2017 total $28,256.82. The seventh document is a lien waiver dated February 1, 2017, issued by OCWEN, executed by Palermo on behalf of Twins, wherein

Palermo asserts that Twins is licensed under applicable laws and regulations. The eighth document is a report dated March 1, 2018, by Paul J. Angelides (Angelides), an engineer retained by State Farm to evaluate whether code upgrades claimed by HM were mandated to restore 1732 following the fire. The report states that KO, WO and HM were present at 1732 on the date of the inspection and that HM's drawings sought an additional $98,094 on top of the $76,555.14 already authorized by State Farm. The additional costs were pursuant to invoices by a plumbing contractor and another by an electrical contractor. Upon his inspection, Angelides concluded that only a portion of the upgrades were required. Specifically, Angelides concluded that to restore 1732 in a code-compliant manner, as opposed to upgrading and/or repairing items afflicted with wear and tear, only "firestopping; installation of smoke and carbon monoxide detectors; electrical system and outlet spacing; installation of thermal insulation where none existed, and; installation of a new egress window in the exterior wall of the second floor right rear bedroom" was required. The ninth document is a review from BuildZoom, memorializing a review from "Mari," dated January 6, 2019, which alleges that Twins took $50,00o from her and did not perform any of the work they agreed to perform, lied about being licensed in New York City, and that KO and WO have many civil suits against them. The tenth document is a series of invoices - 16 in total- sent to plaintiff by Twins, each for

$13,000. There invoices are for the period beginning on December 5, 2016 through July 2, 2018, and total $20,800. The eleventh document is a multi-page application for payment. It is by Twins and indicates that the original contract for repairs was for a total of $76,555.14 and that there was a change order authorizing an additional $33,199.82 for repairs, which now included electrical work, rafters, and insulation. Thus, the document lists the total contract price as $109,754.96. The document further indicates that Twins had been paid $40,000 as of May 1, 2018, and that $14,877.48 was due and owing. Lastly, the document indicates that $38,277.57 had been spent by Twins and zero percent of the work had been completed.

Plaintiff submits Linford Grant's (Grant) deposition transcript, who testified, in pertinent part, as follows. Grant owns Grant Construction, a company possessing both New York City and New York State home improvement licenses, which performs carpentry and home renovation. Grant did not perform any electrical or plumbing work himself and would hire the same if a project required it. In 2018, Grant was hired by plaintiff to perform work at 1732 and entered into a contact for said work. When he first saw 1732, he noted that it was in poor condition and in need of work. Grant observed that parts of the roof were missing and uncovered. He also noticed burst pipes, requiring plumbing work to repair. Upon entering into the contract with

plaintiff, Grant purchased materials to repair the roof and repaired the same. Although 1732 also needed repairs to the electrical and plumbing systems, Grant first repaired the roof and installed a steel beam, replacing the wooden beam that was there. The reason he installed a steel beam was because the architectural drawings required it. Said drawings were not MSA or MH's drawings, but were created by Peter Klein, another architect. Grant also noticed mold on the second floor. In relation to the work at 1732, Grant asked plaintiff to purchase roofing materials, sheet rock, and lumber, which she promptly did. With regard to tools, Grant used his own. Grant completed the work at 1732 in four months. Grant recalls attending a meeting with defendants and their counsel, where he was told that he would be provided with an affidavit. He recalls telling defendants that upon first going to 1732 he saw a few rolls of roofing paper and electrical boxes. He denies ever seeing any sheet rock. In addition to installing the steel beam at 1732, Grant also testified that he removed the gas meter and gas lines from the first floor of 1732.

Plaintiff submits Stephen Rice's (Rice) deposition transcript, wherein he testified, in pertinent part, as follows. Rice is a Claims Representative for State Farm, whose duties include investigating a loss to determine whether the same is covered by a State Farm policy. If a loss is covered, Rice would provide a valuation of the damages underlying the loss and would then arrange

for State Farm to issue payment. With regard to plaintiff's claim regarding 1732, the same arose from a fire occurring on October 20, 2016. Rice was not assigned to the claim until 2018, after Michael Berlin (Berlin), the initial claims representative, became ill. With respect to the handling of a fire related claim by State Farm, Rice testified that once a claim is filed, State Farm contacts the insured or his/her representative. Thereafter, State Farm would send its claim representative to the affected property to inspect and assess the damage. At an inspection, Rice would not only try to assess the cause of the fire, but would also determine what areas of the home are affected so as to prepare an estimate for needed repairs. If emergency and loss of use services are required, they would be addressed at the foregoing meeting. Thereafter, estimates are prepared and an offer is extended to the insured. State Farm would then monitor the claim until the repairs are completed. Per State Farm's file, KO frequently spoke to State Farm's representative regarding the instant claim. As such, because State Farm would not communicate with strangers, Rice believed that plaintiff had authorized State Farm to speak to KO on her behalf. With respect to 1732, Chuck Paige (Paige), prepared the initial estimate for the loss. Said estimate listed the scope of damages, which listed all necessary repairs, the cost of materials, and the cost of labor. With respect to the labor, the estimate included an additional 10 percent for overhead and an additional 10

percent for profit. The estimate also listed the replacement cost value - which included depreciation - and the cash value - the amount paid up front for the repairs, minus any depreciation, which would be paid after the repairs are completed. Rice testified that with respect to this claim, State Farm paid $117,193.21, which included sums paid to Servpro for cleanup and demolition services performed after the fire. With regard to payments on this claim, as per State Farm's practice, checks were issued in the name of the insured and the mortgage company - here, OCWEN. Plaintiff would then endorse the check, tender the same to OCWEN, who would then pay the contractor. The estimate also included repairs to 1732's electrical and plumbing systems. With regard to the electrical system, Rice testified that after the fire, State Farm learned that said system was afflicted to code-related problems. As a result, the initial estimate had to be revised. Generally, as it relates to repair practices, Rice indicated that repairs to the electrical system should have been done before any other repairs to the home ensued. This, Rice stated, was to avoid having to remove walls put in place prior to electrical and plumbing work. While Rice was unsure whether Twins was the initial contractor retained to repair 1732, he testified that documents shown to him at his deposition did indicate the same. State Farm recommended that 1732 be winterized after the fire so as to avoid any freezing pipes. Based on the absence of any notes regarding freezing pipes at 1732, Rice

testified that 1732 was properly winterized. Rice testified that the repairs at 1732 should not have taken two years and instead, should have been completed in six to nine months. Rice attributes the delay to issues between Twins and plaintiff, a delay in retaining an architect - which Rice testified stemmed from State Farm's belief that the architect's fee was too high - and plaintiff's decision to change contractors to finish the repairs. It was Rice's understanding that Twins did some work, but that it was subpar.

Plaintiff submits KO's deposition transcript, wherein he testified, in pertinent part, as follows. KO is neither an officer nor a full-time employee of Twins. Instead, he is retained by Twins on an a case-by-case basis as an advisor or consultant. As an advisor, given his 30 years of experience in contracting, he would advise Twins via Palermo, his wife, on anything she needed with respect to Twins' work. KO was never paid in cash for any of the work he performed on behalf of Twins. KO does not recall if Twins had a license to do work in New York City, but surmises that Twins possessed such license since the NYCDOB issued a permit allowing Twins to work in New York City at 1732. With regard to 1732, KO was retained as an advisor by plaintiff after KO was asked to report to 1732 to see the damage caused by a fire. KO was so apprised by WO, who received a telephone call from WO's son, who was then living with plaintiff's daughter. KO and WO visited 1732

five days after the fire and observed that a representative from State Farm was there as well as Servpro. Thereafter, KO was retained to advise plaintiff with respect to her claim from State Farm. Significantly, plaintiff wanted to ensure that she was getting properly paid on her claim. The foregoing agreement was verbal, KO's services were limited to dealing with State Farm and OCWEN, and plaintiff and KO agreed that Twins would be paid $1,300 per month for KO's services. Plaintiff was sent KO's invoices by Twins, and his fees were debited from the initial deposit on the contract. KO stated that since Palermo met KO's financial needs while he stayed home with their kids, his fees for work done on behalf of Twins were paid to Twins and KO received none of it. The contract between Twins and plaintiff was ultimately for $109,000 and plaintiff was required to pay Twins 50 percent of that amount. Plaintiff only paid Twins $51,000 - $40,000 towards Twins' work and $11,000 towards the architect and expediter's fees. In 2018, KO was present at 1732, along with an engineer retained by State Farm. The purpose of the foregoing visit was to address a change order - meaning, having State Farm authorize additional work and funds. Specifically, while plaintiff wanted additional work performed beyond the scope of work initially authorized, State Farm indicated that they would only pay for code enhancements. KO testified that Twins did not begin to work at 1732 until May 2018, because that is when the permit for the work was issued. KO attributes many weeks

of delays in obtaining the permit to the issuance of checks by State Farm bearing the name of plaintiff's deceased husband, which had to be returned to State Farm. KO states that it took weeks for State Farm to reissue the checks. Regarding an invoice sent to plaintiff by Twins, KO testified that it indicated that Twins had been paid $54,877.48, that Twins had not received an additional $16,000 from plaintiff representing 50 percent of the electrical work approved by State Farm, that Twins had already spent all sums paid on materials and overhead expenses, and that absent the additional $16,000 required by the contract, Twins could not pay someone to perform the electrical work, without which no other repairs could be undertaken. This, KO testified, was because had walls been erected before performing electrical work, they would have been ripped down in order to perform the electrical work thereafter. KO testified that with respect to this project, Twins had spent $28,000 in materials, all of which were delivered to 1732, and whose delivery plaintiff acknowledged. With regard to the foregoing invoice, to the extent that it indicated that retainage was zero, KO testified that this meant that no funds were held back by plaintiff to ensure the work was completed and not that Twins had done no work at all. After plaintiff terminated the contract, despite agreeing to let Twins back into 1732 to retrieve tools and equipment, she denied them access. Among the tools and equipment Twins left behind were power saws, drills, ladders,

scaffolding, and other hand tools. KO believed that the cost of the tools may have been debited from the funds paid to Twins by plaintiff.

Plaintiff submits an affidavit by Graham Whittenberg (Whittenberg), a System Administrator at Wallauer Pain and Design (Wallauer), wherein he states the following. Prior to his employment at Wallauer, Whittenberg was employed by Modern Paint and held the same title. Prior to his employment with Modern Paint, he was employed by Epicor Software (Epicor), which provided point of sale software to Modern Paint. At Epicor, it was Whittenberg's responsibility to review invoices for authenticity and determine whether they were counterfeit. Whittenberg reviewed the Modern Paint invoices for purchases made by Twin in relation to 1732. In reviewing the invoices, Whittenberg determined that the invoices were either fake or did not reflect real purchases. Whittenberg bases his conclusion on the fact that the invoices did not contain a store number, were created using a font not used by Modern Paint or Epicor and the detail sections of the invoices contained extra characters not allowed by the Epicor system. Whittenberg also notes that some of the items listed in the invoices were items not sold by Modern Paint. Lastly, Whittenberg states that the "sold to" box in the invoices was only used for the respective customer's name.

Plaintiff submits an agreement between Twins and herself dated

January 27, 2017. The agreement states that it is for renovations of a fire-damaged home in accordance with the scope of work appended thereto as Exhibit A. The agreement states that the price of the work in the agreement is $76,555.14 and includes labor, materials, equipment, and services in connection with the construction project. At the outset, the agreement states that

> [t]h entire terms and conditions of the contract/purchase order . . . are incorporated in this contract and incorporated in this contract by reference as if set forth in this contract at length. The contract documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and the contractor, (2) between the owner and the subcontractors, or (3) between any persons or entities other than the owner and contractor.

With regard to cancellation of the contract, paragraph 1 states that

> [o]wner may terminate this contract in whole or in part, for cause at any time upon sixty (60) days written notice of termination to contractor. Upon receipt of such notice to terminate, contractor shall not continue with any substantial portion of the work but shall, upon Owner's direction, only take such steps as are necessary to secure the construction site and remove his construction machinery and equipment and otherwise minimize the expenses resulting from the termination.

Paragraph 3 indicates that time was of the essence and that the owner was required to approve drawings, plans, and schedules within

five days. Per paragraph 4, the plaintiff could change and modify the work under the contract and if the owner did so, the contract remained in full force and effect, except as to the amounts due. Per paragraph 6, payment was required within two days of receipt of an invoice. Per paragraph 8, Twins was required to comply with all applicable law. Paragraph 10 required any changes to the agreement to be made in writing. Paragraph 12, governing loss or damage to work states that

> [o]wner shall not be responsible for any loss or damage to the Work to be performed and furnished under this Contract, however caused. Owner shall not be responsible for loss of or damage to materials, tool, equipment or any other personal property owned, rented or used by the Contractor or anyone employed by it in the performance of the work, however caused.

The terms of payment under the agreement are listed as fifty percent of $76,555.14 - meaning $38,277.57 as an initial down payment upon signing the agreement, twenty-five percent or $19,138.79 when all subfloors, new floors, and ceilings are installed, twenty percent or $15.311.08, when 95 percent of the work is complete, and five percent or $3,827.70 upon completion of all punch list items. Appended to the contract is a scope of work listing all repairs to be made and Twins' home improvement license issued by Westchester County.

Plaintiff submits two letters[6]. The first is from plaintiff to Twins, dated July 2, 2018. Within the letter, plaintiff informs Twins that she is terminating the contract between them on grounds that she has seen no progress in the construction of her home. Plaintiff asserts that despite assertions by Twins, that work would begin, she had yet to see any work completed at her home. Plaintiff indicates that either KO or WO informed her that work would begin as soon as her insurance company agreed to pay for an electrician, and asserts that one should have been hired with the $40,000 she paid to Twins at the outset. Acknowledging that the permit for the work at 1732 was not approved until May 25, 2018, plaintiff asserted that since then, no work or demolition had begun. Plaintiff further asserts that beyond 12 pieces of wood, no other materials had been delivered to her home. Plaintiff states that prior to May 29, 2018, she had never been informed that the electrician had to be the first subcontractor to perform work at

[6] It bears noting that all three applications are replete with documentary evidence for which no foundation is laid. However, insofar as no one objects to any of the evidence proffered, this Court has considered all the evidence in determining the instant applications (*Akamnonu v Rodriguez*, 12 AD3d 187, 187 [1st Dept 2004] ["Defendant waived any objection to the evidence plaintiff submitted in opposition to its motion for summary judgment, including the affirmation of plaintiff's chiropractor, by failing to contest its admissibility" [internal quotation marks omitted].; *Sam v Town of Rotterdam*, 248 AD2d 850, 851 [3d Dept 1998]; *see also Misicki v Caradonna*, 12 NY3d 511, 519 [2009]["We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made"]).

1732. Plaintiff also asserts that her home was afflicted with mold as a result of Twins' failure to purchase a tarp for the roof. As a result of the delays, plaintiff asserts that she has incurred living expenses, for which after June 7, 2018, her insurance company would no longer pay. The second letter, dated July 10, 2018, is from Palermo to plaintiff. Within the letter, Palermo responds to plaintiff's letter, wherein plaintiff terminates the agreement between the parties. Palermo asserts that Twins has performed under the agreement of the parties. Specifically, Palermo states that Twins has spent countless hours on the telephone with plaintiff's insurance company and her bank. Further, Palermo asserts that Twins has written reports and letters on plaintiff's behalf for which it has not billed plainitff. It is because of Twins, Palermo asserts, that plaintiff was provided with an additional $33,000 for the work to her home. Palermo states that any delays in commencing and completing the repairs to 1732 were the result of OCWEN and plaintiff's insurance company. Palermo further contends that Twins fully complied with all of the schedules issued by plaintiff's insurance company and represented that the work would take 90 days from the date the construction plans were approved by the NYCDOB. However, the construction plans were not approved until May 18, 2018, and a permit was not issued until May 25, 2018. Palermo states as a result of the foregoing, on June 22, 2018, plaintiff's insurance company issued a new

schedule, which called for the work to be completed by August 16, 2018, provided that plaintiff made the payment required by the invoice submitted to her on June 9, 2018, totaling $14,887.48. Palermo concludes by stating that it received plaintiff's notice of cancellation, seeking the 60 days prescribed by the agreement between the parties to wind up at 1732, and seeking to perform under the agreement between the parties if plaintiff made the payment required under the agreement totaling $14,887.48.

Plaintiff submits a project proposal agreement between her and MSA. The agreement is dated March 20, 2017, is between MSA and plaintiff, and is executed by HM on behalf of MSA. The agreement lists the scope of architectural services as

> the restoration of all the fire damaged structure; components; utilities and finishes as per the related codes and regulations that apply to this project. The construction documents shall also include solutions to correct the existing outstanding violations that were observed during the site visit to your home. The Construction Documents and applications shall be prepared for filing with the Department of Buildings for The Borough of Bronx, New York, for the purpose to achieve a Building Permit to allow the construction to begin.

Per the agreement, MSA was required to prepare "schematic design documents consisting of drawings and other documents illustrating the scale and relationship of project components," based upon the agreed-upon program, schedule and construction budget. The foregoing documents describe the items to be repaired at 1732 and

set forth the requirements for the project. MSA was required to submit the foregoing documents to the NYCDOB for approval and communicate with the NYCDOB in furtherance thereof and for purposes of obtaining a permit to begin construction. MSA was also required to visit 1732 to ensure that the work was being performed in accordance with the foregoing documents. Per the agreement, MSA was to be paid $11,850 for its services, said sum payable as follows: $5,925 when MSA was retained, $3,555 when the documents were submitted to the NYCDOB, $1,185 after construction began, and $1,185 when the certificate of occupancy was obtained.

Plaintiff submits several documents related to MSA's applications for permits and the subsequent revocation thereof. First, a document from the NYCDOB, dated July 23, 2018, evinces that the permit to perform work at 1732 was revoked and all work at 1732 was stopped for a violation of 28-105.10.1 of the New York City Administrative Code. Second, a letter, dated August 22, 2018, to MSA from the NYCDOB states that the permits issued for work at 1732 would be revoked pursuant to 28-105.10.1 of the New York City Administrative Code. The letter indicates that the foregoing section of the administrative code allows the revocation of permits when there is a failure to comply with the administrative code, and that MSA had 15 days to provide reasons to avert revocation. Lastly, the letter indicates that the specific grounds for revocation were listed in an objection sheet dated July 25, 2018,

and appended to the letter. Third, a document titled notice of objections, dated July 25, 2018, states that the reasons for the revocation of the permits were, *inter alia*, "[c]hanges inconsistent with existing C of O . . . which permits (4) car garage in 1st floor. Proposed (3) car garage." Fourth, the permit application filed by MSA indicates that there would be "no change in use, exists, or occupancy," requiring a new or amended certificate of occupancy."

Plaintiff submits a document from the NYCDOB, dated October 1, 2018, which indicates that Grant construction was issued a permit to work at 1732 and that the order stopping work was lifted.

Breach of Contract (First Cause of Action)

Plaintiff's motion for summary judgment on her cause of action for breach of contract is denied because the evidence submitted raises questions of fact with regard to who breached the agreement between the parties first. Thus, plaintiff fails to establish that she is entitled to summary judgment on her cause of action for breach of contract against Twins.

It has long been held that absent a violation of law or some transgression of public policy, people are free to enter into contracts, making whatever agreement they wish, no matter how unwise they may seem to others (*Rowe v Great Atlantic & Pacific Tea Company, Inc.*, 46 NY2d 62, 67-68 [1978]). Consequently, when a contract dispute arises, it is the court's role to enforce the

agreement rather than to reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which is the very contract itself and the terms contained therein (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). Thus, "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc. v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co., Inc.* at 475). This approach, of course, serves to provide "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

Provided a writing is clear and complete, evidence outside its four corners "as to what was really intended but unstated or

misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *see Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]; *Mercury Bay Boating Club Inc. v San Diego Yacht Club*, 76 NY2d 256, 269-270 [1990]; *Judnick Realty Corp. v 32 W. 32nd St. Corp.*, 61 NY2d 819, 822 [1984]). Whether a contract is ambiguous is a matter of law for the court to decide (*id.* at 162; *Greenfield* at 169; *Van Wagner Adv. Corp. v S & M Enterprises*, 67 NY2d 186, 191 [1986]). A contract is unambiguous if the language it uses has "definite and precise meaning, unattended by danger of misconception in purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion" (*Greenfield* at 569; *see Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 [1978]). Hence, if the contract is not reasonably susceptible to multiple meanings, it is unambiguous and the court is not free to alter it, even if such alteration reflects personal notions of fairness and equity (*id.* at 569-570). Notably, it is well settled that silence, or the omission of terms within a contract are not tantamount to ambiguity (*id.* at 573; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). Instead, the question of whether an ambiguity exists must be determined from the face of an agreement without regard to extrinsic evidence (*id.* at 569-570), and an unambiguous contract or a provision contained therein should be given its plain and ordinary meaning (*Rosalie Estates, Inc. v RCO International, Inc.*,

227 AD2d 335, 336 [1st Dept 1996]).

Notably, while the parol evidence rule forbids proof of extrinsic evidence to contradict or vary the terms of a written instrument, it has no application in a suit brought where there are claims of fraud in the execution of an agreement or to rescind a contract on the ground of fraud (*Sabo v Delman*, 3 NY2d 155, 161 [1957]; *Adams v Gillig*, 199 NY 314, 319 [1910]; *Berger-Vespa v Rondack Bldg. Inspectors Inc.*, 293 AD2d 838, 840 [3d Dept 2002]).

In the absence of fraud or other wrongful act, a party who signs a written contract is presumed to know and have assented to the contents therein (*Pimpinello v Swift & Co.*, 253 NY 159, 162 [1930]; *Metzger v Aetna Ins. Co.*, 227 NY 411, 416 [1920]; *Renee Knitwear Corp. v ADT Sec. Sys.*, 277 AD2d 215, 216 [2d Dept 2000]; *Barclays Bank of New York, N.A. v Sokol*, 128 AD2d 492, 493 [2d Dept 1987]; *Slater v Fid. & Cas. Co. of N.Y.*, 277 AD 79, 81 [1st Dept 1950]). In discussing this long standing rule, the court in *Metzger* stated that

> [i]t has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence for the jury as

> to his understanding of its terms. This rule is as applicable to insurance contracts as to contracts of any kind.

(*id.* at 416 [internal citations omitted]).

The essential elements in an action for breach of contract "are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" (*Dee v Rakower*, 112 AD3d 204, 209 [2d Dept 2013]; *Elisa Dreier Reporting Corp. v Global Naps Networks, Inc.*, 84 AD3d 122, 127 [2d Dept 2011]; *Brualdi v IBERIA Lineas Aeraes de España, S.A.*, 79 AD3d 959, 960 [2d Dept 2010]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). Unless expressly proscribed by the Statute of Frauds (General Obligations Law § 5-701), a contract or agreement need not be in writing (*see generally McCoy v Edison Price, Inc.*, 186 AD2d 442, 442-443 [1st Dept 1992] [Alleged oral agreement which, by its terms, was to last for as long as defendant remained in business was incapable of performance within one year, rendering it voidable under Statute of Frauds.]; *Karl Ehmer Forest Hills Corp. v Gonzalez*, 159 AD2d 613, 613 [2d Dept 1990] ["An oral promise to guarantee the debt of another is barred by the Statute of Frauds."]).

It is well settled that a breach of contract by one party relieves the other from obligations under it and renders the

contract unenforceable by the one who has breached it (*Grace* at 565-566 ["In the instant case, therefore, plaintiff was well within his rights when he refused to consent to an adjournment of the closing and instead insisted upon immediate performance of defendant's obligations. Once the closing was aborted, moreover, it was not necessary for plaintiff to entertain further proposals from defendant, for if defendant had failed to satisfy a material element of the contract, he was already in default."]; *Perlman v M. Israel & Sons Co.*, 306 NY 254, 257 [1954]; *Isse Realty Corp. v Trona Realty Corp.*, 17 NY2d 763 [1966]; *Unloading Corp. v State of N.Y.*, 132 AD2d 543, 543 [2d Dept 1987]; *Melodies, Inc. v Mirabile*, 7 AD2d 783, 783 [3d Dept 1958]; *Sherry v Fed. Terra Cotta Co.*, 172 AD 57, 61 [1st Dept 1916]; *Zadek v Olds, Wortman & King*, 166 AD 60, 63 [1st Dept 1915]; *Czerney v Haas*, 144 AD 430, 436 [1st Dept 1911]; *Hudson Riv. & W.C.M.R. Co. v Hanfield*, 36 AD 605, 610 [3d Dept 1899]). Indeed, under the foregoing circumstances, the non-breaching party is discharged from performing any further obligations under the contract and can terminate the contract, sue for damages, or continue the contract (*Awards.com, LLC v Kinko's, Inc.*, 42 AD3d 178, 188 [1st Dept 2007]["When a party materially breaches a contract, the non-breaching party must choose between two remedies: it can elect to terminate the contract or continue it. If it chooses the latter course, it loses its right to terminate the contract because of the default."], *affd*, 14 NY3d 791

[2010]; *Albany Med. Coll. v Lobel*, 296 AD2d 701, 702 [3d Dept 2002]; *Capital Med. Sys. Inc. v Fuji Med. Sys., U.S.A. Inc.*, 239 AD2d 743, 746 [3d Dept 1997]; *Emigrant Indus. Sav. Bank v Willow Builders*, 290 NY 133, 144 [1943]). Stated differently, "[a] party may unilaterally terminate a contract where the other party has breached and the breach is material" (*Lanvin Inc. v Colonia, Inc.*, 739 F Supp 182, 195 [SDNY 1990]; *see Exportaciones Del Futuro Brands, S.A. De C.V. v Authentic Brands Group, LLC*, 156 NYS3d 857, 858 [1st Dept 2022] ["As a result, plaintiff's breaches of the agreement substantially defeated the parties' contractual objective and constituted material breaches, thus justifying defendants' termination of the contract" (internal quotation marks omitted).]; *Valenti v Going Grain, Inc.*, 159 AD3d 645, 646 [1st Dept 2018] ["However, [defendants'] failure to make monthly payments under the promissory note and to place $60,000 in escrow in anticipation of the accounting constituted a material breach, justifying plaintiff's termination of the contract."]).

It is equally well settled that "no action for breach of contract lies where the party seeking to enforce the contract has failed to perform a specified condition precedent" (*Redwing Constr. Co., Inc. v Sexton*, 181 AD3d 1027, 1028 [3d Dept 2020]; *MPEG LA, L.L.C. v Toshiba Am. Info. Sys., Inc.*, 161 AD3d 426, 426 [1st Dept 2018]; *Related Companies, L.P. v Tesla Wall Sys., LLC*, 159 AD3d 588, 590 [1st Dept 2018]; *Ridley Elec. Co., Inc. v Dormitory Auth.*

of State, 152 AD3d 1129, 1132 [3d Dept 2017]; *Phoenix Signal and Elec. Corp. v New York State Thruway Auth.*, 90 AD3d 1394, 1396 [3d Dept 2011]; *Hills Auto Repair, Inc. v State*, 32 AD3d 849, 850 [2d Dept 2006]). A condition precedent is "an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (*Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]; *Merritt Hill Vineyards Inc. v Windy Hgts. Vineyard, Inc.*, 61 NY2d 106, 112 [1984]). In *Redwing Constr. Co., Inc.*, the court granted defendant's motion for summary judgment and dismissed plaintiff's cause of action for breach of contract (*id.* at 1028). Significantly, the court held that plaintiff could not prevail on its claim for breach of contract because the agreement between the parties required the service of a notice of claim prior to the initiation of a lawsuit (*id.* at 1028-1029). Similarly, in *MPEG LA, L.L.C.*, the defendant was granted summary judgment on plaintiff's claim for breach of contract "because plaintiff failed to comply with the agreement's audit provision, a condition precedent to suit (*id.* at 426).

Here, the agreement between plaintiff and Twins, submitted by plaintiff, demonstrates that Twins was required to repair 1732 for $76,555.14, as per the scope of work appended thereto. Both scopes of work submitted by plaintiff, at least one of which is referenced by the agreement and submitted by plaintiff lists all the repairs

required by Twins, the activities related thereto, and the dates when said work and/or activities would be performed. The scope of work dated November 3, 2016 indicates that all repairs were to be completed by May 28, 2017 and that approval by the NYCDOB of the architect's plans was to occur no later than March 2, 2017. However, the other scope of work indicates that all repairs were to completed by August 16, 2018. Significantly, the agreement prescribed the terms of payment as $38,277.57 as an initial down payment upon signing the agreement. With regard to payment, however, the agreement was silent with respect to whether the same required additional payment in the same percentages promulgated by the agreement in the event the amount of the agreement was augmented after its execution. Palermo and KO's testimony, however, establishes that the payment schedule in the agreement did in fact apply where, as here, there was a change order resulting in additional work and additional payment due to Twins as a result. Specifically, Palermo testified that while plaintiff paid Twins $40,000 shortly after the execution of the agreement, representing 50 percent of the initial $76,555.14, a change order was issued by State Farm requiring additional work not listed in the agreement. The additional work, Palermo stated, was necessary in order to have the electrical system at 1732 meet the relevant building code. This work, Palermo testified, resulted in additional funds paid by State Farm, which in turn, required plaintiff to pay Twins

additional sums as a condition of Twins' work. KO's testimony, much like Palermo's, establishes that after State Farm issued the change order authorizing the additional electrical work, plaintiff refused to tender an additional $16,000 to Twins in order to have Twins perform the electrical work. KO further testified that without first performing the electrical work, no other work could be performed by Twins because before any walls could be erected, the electrical work had to be completed. In the letter written to plaintiff by Palermo, she states that the reason Twins had not commenced work at that point, July 10, 2018, was because plaintiff obtained an additional $33,000 from State Farm, but failed to tender $14,887.48 to Twins.

Preliminarily, here, where the agreement failed to prescribe whether the payment requirements contained therein would apply, if, as here, the price of the project was subsequently increased, the agreement was sufficiently ambiguous, thereby allowing the consideration of proof outside the agreement (*W.W.W. Assoc., Inc.* at 162; *see Greenfield* at 569; *Mercury Bay Boating Club Inc.* at 269-270; *Judnick Realty Corp.* at 822). To that end, upon KO and Palermo's testimony and Palermo's letter, it is clear that it was the intent of the parties that the portion of the agreement requiring a 50 percent down payment of the initial contract price as a prerequisite to Twins performing its work, applied to any subsequent augmentation of the agreement.

Thus, where, as here, the contract price was augmented by $33,000, plaintiff was required to tender 50 percent of the same before work could begin and, on this record, she failed to tender the same.

Based on the foregoing, one version of plaintiff's evidence establishes that prior to plaintiff failing to tender the additional sums upon which all of Twins' work and its obligation to perform on the agreement hinged, there was a breach by plaintiff. This is particularly true, because the record, namely Palermo's letter and KO's testimony, collectively establish that up until that point, the failure to begin the repairs was solely the result of delays not caused by Twins[7].

Conversely, another view of the very same evidence establishes that in failing to purchase materials, and running of afoul of the first scope of work, it was Twins who breached the contract first, long before plaintiff's alleged failure to tender additional funds. Significantly, the agreement between the parties, in making

[7] It bears noting that even if plaintiff's evidence had, in fact, unequivocally established that Twins performed no work solely as a result of circumstances attributable only to Twins - as alleged by plaintiff, defendant's evidence, raises a significant issue of fact controverting the same. Significantly, the two letters sent by plaintiff to Berlin, dated July 20, 2017 and September 2017, establish that all delays were the result of acts by OCWEN, blaming them for the delay in repairs to 1732. Thus, with this evidence, defendant's would have nevertheless raised an issue of fact as to whether Twins' breached the agreement by inaction or whether the lack of work was the result of acts by OCWEN, for which Twins is not responsible.

reference to the scope of work requiring extensive repairs at 1732, necessarily also required that Twins purchase materials to perform the work thereunder. To be sure, although KO testified that Twins purchased and had $28,000 in materials delivered to 1732, Whittenberg's affidavit coupled with Grant's testimony significantly controverts this. Grant, the contractor hired by plaintiff to replace Twins, testified that upon commencing his work at 1732, after Twins had been terminated, he saw very little in the way of materials at 1732. Moreover, and perhaps most significant, is Whittenberg's contention, that as a prior employee for Modern Paint, the store from which the materials were purchased, he knows that the invoices were counterfeit and did not reflect real purchases.

It is well settled that a breach of contract by one party relieves the other from obligations under it and renders the contract unenforceable by the one who has breached it (*Grace* at 565-566; *Perlman* at 257; *Isse Realty Corp.* at 765; *Unloading Corp.* at 543; *Melodies, Inc.* at 783; *Sherry* at 61; *Zadek* at 63; *Czerney* at 436; *Hudson Riv. & W.C.M.R. Co.* at 610). Under the foregoing circumstances, the non-breaching party is discharged from performing any further obligations under the contract and can terminate the contract, sue for damages, or continue the contract (*Awards.com, LLC* at 188; *Albany Med. Coll.* at 702; *Capital Med. Sys. Inc.* at 746; *Emigrant Indus. Sav. Bank* at 144). Moreover, "no

action for breach of contract lies where the party seeking to enforce the contract has failed to perform a specified condition precedent" (*Redwing Constr. Co., Inc.* at 1028; *MPEG LA, L.L.C.* at 426; *Related Companies, L.P.* at 590; *Ridley Elec. Co., Inc.* at 1132; *Phoenix Signal and Elec. Corp.* at 1396; *Hills Auto Repair, Inc.* at 850). A condition precedent is "an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (*Oppenheimer & Co., Inc.* at 690; *Merritt Hill Vineyards Inc.* at 112).

Here, then, who breached the agreement first is a material and dispositive question of fact on which plaintiff's breach of contact claim hinges. Indeed, if plaintiff breached the agreement first, her cause of action fails. Based on this significant question of fact, plaintiff fails to establish prima facie entitlement to summary judgment on her breach of contract claim against Twins and her motion for summary judgment on that cause of action is denied.

New York City Administrative Code § 20-387 (First Cause of Action)

Plaintiff's motion seeking summary judgment on her first cause of action, to the extent premised on a violation of New York City Administrative Code (NYCAC) § 20-387, is denied. Significantly, contrary to plaintiff's assertion, a violation of the foregoing statute does not require that Twins return all sums paid to them. Thus, she fails to establish prima facie entitlement to summary

judgment.

Pursuant to NYCAC § 20-387, "No person shall solicit, canvass, sell, perform or obtain a home improvement contract as a contractor from an owner without a license therefor." To the extent that the foregoing law appears in Title 20 of the Administrative Code, referencing the Department of Consumer Affairs, and in light of NYCAC § 20-388, which promulgates the fees required for the licenses referenced, it is clear that the license required is one specifically issued by New York City. A contractor who performs work without a home improvement license is barred from enforcing any contract for work performed (*B & F Bldg. Corp. v Liebig*, 76 NY2d 689, 691 [1990] ["Plaintiff is a home improvement contractor within the meaning of section 20–386 of the Administrative Code of the City of New York but was not licensed, as the Code requires, when the agreement was signed or when the work was performed (Administrative Code of City of New York § 20–387). Under existing case law, therefore, its contract with defendants is unenforceable."]; *Enko Const. Corp. v Aronshtein*, 89 AD3d 676, 677 [2d Dept 2011] ["An unlicensed contractor may neither enforce a home improvement contract against an owner nor seek recovery in quantum meruit."]; *Marraccini v Ryan*, 71 AD3d 1100, 1102 [2d Dept 2010], *revd on other grounds*, 17 NY3d 83 [2011]; *Chosen Const. Corp. v Syz*, 138 AD2d 284, 285 [1st Dept 1988]; *Millington v Rapoport*, 98 AD2d 765, 766 [2d Dept 1983]; *Posada v Nogara*, 36 Misc

3d 142(A) [App Term 2012]). Significantly, the failure to be licensed only bars recovery by the contractor against the person who retained him/her and precludes the contractor from recovering sums for work performed. To be sure, in *Chosen Const. Corp.*, the court granted defendants' motion for summary judgement when they established that at the time plaintiffs were engaged to build s rooftop extension and a greenhouse at their apartment, plaintiffs were unlicensed (*id.* at 284-285). Notably, after some work had been performed, defendants stopped making the required payments and plaintiffs sued (*id.* at 284). In dismissing the action, the court held that

> whether or not Chosen or Sun possessed valid building permits is of no import. Each failed to secure the requisite home improvement contractor's license, and strict compliance with the licensing statute is required, with the failure to comply barring recovery regardless of whether the work performed was satisfactory, whether the failure to obtain the license was willful or, even, whether the homeowner knew of the lack of a license and planned to take advantage of its absence

(*id.* at 286).

Here, plaintiff's evidence establishes that at the time Twins was retained to perform work at 1732, it was not licensed as a home improvement contractor in New York City. While this is a violation of NYCAC § 20-387, this does not mean, as urged, that plaintiff can recover all sums paid to Twins under the agreement between the

parties. Instead, it means that Twins cannot recover any sums due and owning on the agreement, even if it performed the work under the agreement.

Article 3-A of the NY Lien Law (First and Second Causes of Action)

Plaintiff's motion seeking summary judgment on her first and second causes of action, insofar as premised on violations of Article 3-A of the Lien Law by Twins, Palermo KO, and WO, is denied. Contrary to defendants' assertion, Article 3-A of the Lien Law did impose an obligation that Twins hold the funds paid to Twins in trust and use the same for payment of project-related expenses. However, a portion of the record demonstrates that there was no violation of the Lien Law because all funds were used to pay for repairs under the agreement.

Article 3-A of the Lien Law

> creates trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction

(*Aspro Mech. Contr., Inc. v Fleet Bank, N.A.*, 1 NY3d 324, 328 [2004]; *see Caristo Const. Corp. v Diners Fin. Corp.*, 21 NY2d 507, 512 [1968]; *Matter of RLI Ins. Co. v New York State Dept. of Labor*, 97 NY2d 256, 264 [2002]). The primary purpose of the foregoing law is to ensure that those who have expended labor and materials in connection with a construction project and at the direction of the owner and general contractor get paid for their work (*Aspro Mech.*

Contr., Inc. at 328; *Matter of RLI Ins. Co.* at 264 ["Indeed, the statute's prohibition against diversion of funds to purposes unrelated to a particular improvement was intended to eradicate the practice of pyramiding, in which contractors use loans or payments advanced in the course of one project to complete another" [internal quotation marks omitted].). Under the Lien Law, qualified assets - those received by owners, contractors and subcontractors in connection with improvements of real property - are trust assets and trust begins when any asset thereof comes into existence, whether or not there are any beneficiaries of the trust at that time (*Aspro Mech. Contr., Inc.* at 328-329). Significantly, "the use of trust assets for a nontrust purpose--that is, a purpose outside the scope of the cost of improvement--is deemed a diversion of trust assets . . . and if the diversion occurs by the voluntary act of the trustee or by his consent such act or consent is a breach of trust" (*id.* at 329 [internal quotation marks omitted)]. The failure to deposit qualifying funds into an escrow account is not a diversion under the Lien Law (*Langston v. Triboro Contr., Inc.*, 44 A.D.3d 365, 365 [1st Dept 2007]). Instead, for purposes of determining whether there has been a diversion, the inquiry is "whether the funds have actually been used to pay subcontractors, suppliers and laborers" (*id.* at 365-366). Notably, funds paid by a homeowner to a contractor constitute funds under Article 3-A of the Lien Law and give rise to an action for a violation of the Lien

Law (*Ippolito v TJC Dev., LLC*, 83 AD3d 57, 67 [2d Dept 2011] ["Contrary to the Supreme Court's determination, as a general matter, the foregoing provisions enable the plaintiffs, as owners, to assert a cause of action pursuant to Lien Law article 3-A against the defendants."]). In *Ippolito*, the court held that the plaintiffs, homeowners who retained defendants to make home improvements, could bring a cause of action for breach of the Lien Law. Specifically, the court noted that

> It is undisputed that the plaintiffs are owners within the meaning of Lien Law article 3-A. It is undisputed that the funds paid by the plaintiffs to TJC qualified as trust funds within the meaning of Lien Law article 3-A (see Lien Law § 70[1]). In the complaint, the plaintiffs alleged that the defendants each participated in diverting the trust assets in violation of Lien Law article 3-A, and specifically Lien Law § 72(1). As the plaintiffs argue, pursuant to Lien Law § 71, the trust assets of which TJC was a trustee were to be held and applied to, among other things, 'payment to which the owner is entitled pursuant to the provisions of section seventy-one-a of this chapter' (Lien Law § 71[2][f]). Under Lien Law § 71-a, those funds remained the property of the owners, the plaintiffs here, until the proper payment of such funds by the contractor to the purposes of the home improvement contract, breach by the owners relieving the contractor from its obligation to perform (not alleged here), or substantial performance of the contract

(*Ippolito* at 67).

Here, plaintiff fails to establish prima facie entitlement to

summary judgment because KO testified that all sums paid to Twins were used to purchase materials for the repairs required thereunder and for ancillary costs related to Twins' overhead. Thus, plaintiff's evidence demonstrates compliance with the Lien Law rather than a violation of the same. To the extent that plaintiff urges that the failure to escrow the instant funds is, in and of itself, a violation of the Lien Law, said claim is without merit (*Langston* at 365-366).

General Business Law § 770 et seq (First and Second Causes of Action)

Plaintiff's motion seeking summary judgment on her first and second causes of action, to extent premised on violations of General Business Law § 770 et seq, is denied insofar as the record is bereft of any evidence that she was induced into the agreement with Twins upon fraudulent written misrepresentations, as required for a plenary action under the relevant law.

General Business Law (GBL) §770, et seq., promulgates the laws governing home improvement contracts in New York State. Pursuant to GBL § 771(1)(a), all home improvement contracts need to be in writing. The contract between the parties must list the name, address, and telephone number of the contractor (*id.)*, the dates for the commencement of the work and its completion (GBL § 771[1][b]), a description of the work to be performed (GBL § 771[1][c]), and include a notice that "the home improvement

contractor is legally required to deposit all payments received prior to completion in accordance with subdivision four of section seventy-one-a of the lien law" (GBL § 771[1][e]). Any owner induced into a home improvement contract

> in reliance on false or fraudulent written representations or false written statements, may sue and recover from such contractor a penalty of five hundred dollars plus reasonable attorney's fees, in addition to any damages sustained by the owner by reason of such statements or representations

(GBL § 772[1]).

Violations of GBL § 770 et seq. are punishable by the imposition of civil penalties. Technical violations merit a penalty not to exceed $100 (GBL § 773[1]), while substantial violations, such as the failure to comply with NY Lien Law, are punishable by a penalty not exceeding $250 (GBL § 773[2]). Pursuant to GBL § 774(1), a violation of the GBL § 770 et seq. is only punishable by the attorney general (*id.* ["Upon any violation of the provisions of this article, an application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of the violation."]). Accordingly, it is clear that while an owner who has been induced into executing an agreement by fraud may sue for damages resulting therefrom, technical violations, as defined by GBL § 773, may only

be enforced by the attorney general. Accordingly, the only private right of action created by GBL § 770 et seq, is that promulgated by GBL § 772(1). Indeed, courts will only imply a private right of action when a statute fails to prescribe one (*Uhr ex rel. Uhr v E. Greenbush Cent. School Dist.*, 94 NY2d 32, 38 [1999] ["The availability of a private right of action for the violation of a statutory duty—as opposed to one grounded in common-law negligence—is not a new concept. When a statute itself expressly authorizes a private right of action, there is no need for further analysis. When a statute is silent, as it is here, courts have had to determine whether a private right of action may be fairly implied" [internal citations omitted].).

Here, the first amended complaint, while inartfully drafted, appears to assert that the fraud on which a violation of GBL § 772(1) is premised is Twins' failure to possess a license to perform work in New York City at the time plaintiff retained it. The record, however, is bereft of any evidence that such representation was made by Twins, let alone in writing. Palermo testified that at the time Twins entered into the agreement with plaintiff, Twins was only licensed in New York State, not New York City. KO testified that while he was unsure whether Twins was licensed in New York City at the time the relevant agreement was executed, he presumed that Twins did possess a license to work in New York City because the NYCDOB issued a permit for Twins to work

at 1732. Significantly, the agreement between the parties is bereft of any representations regarding Twins' license, and the only license submitted by plaintiff as an attachment to the agreement is Twins' license issued by Westchester County. Accordingly, there is absolutely no evidence that Twins misrepresented that it had a license to perform work in New York City, let alone in writing. Thus, on this record, there is no violation of GBL § 772(1).

Architectural Malpractice (Third Cause of Action)

Plaintiff's motion seeking summary judgment on her claim for architectural malpractice by MSA and HM is denied. Significantly, she fails to establish prima facie entitlement to summary judgment on her third cause of action against MSA and HM for architectural malpractice insofar as she fails to present any expert evidence establishing malpractice.

It is well settled that "expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" (*De Long v Erie County*, 60 NY2d 296, 307 [1983]; *Selkowitz v Nassau County*, 45 NY2d 97, 102 [1978] ["expert testimony has been held to be admissible not only to explain highly technical medical or surgical questions, but has also been found appropriate to clarify a wide range of issues calling for the application of accepted professional standards. This includes the

standard of care for contractors, fire fighters, window washers and mariners to name but a few" [internal citations omitted].). In *530 E. 89 Corp. v Unger* (43 NY2d 776 [1977]), a case where it was alleged that defendants architect had committed malpractice, the court held that the failure to present expert evidence on the issue of defendants' inordinate delays in complying with objections of the building department was fatal (*id.* at 777). Significantly, the court held that

> [w]hether the allegedly inordinate delays of defendants in complying with objections of the building department constituted architectural malpractice is not within the competence of an untutored layman to evaluate. Common experience and observation offer little guidance. Absent a standard of competent architectural practice based on expert testimony, it would be difficult, if not impossible, to form a reasoned opinion as to whether, given the nature and number of objections raised as well as other relevant attendant circumstances, a delay of two years constituted incompetent architectural practice

(*id.* at 778).

Here, where the first amended complaint alleges that MSA and HM committed architectural malpractice in failing to draft proper plans depicting the plumbing and electrical systems at 1732, plaintiff's wholesale failure to offer any expert evidence in support of her allegations, so as to establish malpractice, is fatal.

GBL § 349 (Fourth Cause of Action)

Plaintiff's motion for summary judgment with respect to her fourth cause of action premised on defendants' violation of GBL § 349 is denied. Significantly, inasmuch as the instant transaction was a private one between the parties, not impacting consumers at large, the cause of action fails as a matter of law. Moreover, beyond allegations in the first amended complaint premising this cause of action on the allegation that Twins misrepresented that it had a license to work in New York City, the record is bereft of any evidence that defendants engaged in any deceptive practices.

GBL § 349(a) makes it unlawful to engage in "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service." Upon a violation of the foregoing statute, the attorney general "may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices" (GBL § 349[b]). Additionally, "any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions" (GBL § 349[h]). Significantly, an action pursuant to GBL § 349 requires that "acts or practices have a broader impact on consumers at

large" (*Oswego Laborers' Local 214 Pension Fund v Mar. Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]). As such, "[p]rivate contract disputes, unique to the parties, for example, would not fall within the ambit of the statute" (*id.* at 25; *see Genesco Entertainment, a Div. of Lymutt Indus., Inc. v Koch*, 593 F Supp 743, 752 [SDNY 1984] ["The nature of the instant transaction clearly places it outside the purview of section 349 when that statute is construed in the light of the Federal Trade Commission Act. The rental of Shea Stadium is not an ordinary or recurring consumer transaction. It is in effect a single shot transaction involving complex arrangements, knowledgeable and experienced parties and large sums of money. The nature of alleged deceptive government practices with respect to such a transaction are different in kind and degree from those that confront the average consumer who requires the protection of a statute against fraudulent practices. The only parties truly affected by the alleged misrepresentations in this case are the plaintiff and the defendants. A breach of a private contract affecting no one but the parties to the contract, whether that breach be negligent or intentional, is not an act or practice affecting the public interest"] [internal quotation marks omitted]). Accordingly, a cause of action pursuant to GBL § 349 must meet three elements: (1) that the challenged act or practice was consumer-oriented; (2) that it was misleading in a material way; and (3)that the plaintiff suffered injury as a result of the

deceptive act (*Benetech, Inc. v Omni Fin. Group, Inc.*, 116 AD3d 1190 [3d Dept 2014]; *Beneficial Homeowner Serv. Corp. v Williams*, 113 AD3d 713, 714 [2d Dept 2014]).

Here, as noted above and to obviate repeating, the record does not establish that any of the defendants ever misrepresented whether Twins was licensed to perform work in New York City. Moreover, with regard to the private nature of the instant transaction, the Court need look no further than the agreement between plaintiff and Twins, listing them as the only parties.

Unjust Enrichment and Conversion (Fifth and Sixth Causes of Action)

Plaintiff's motion seeking summary judgment on her causes of action for unjust enrichment and conversion is denied. Significantly, these causes of action arise from allegations identical to plaintiff's cause of action fro breach for contract and therefore fail as a matter of law.

It is well settled that "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello v Verizon New York, Inc.*, 18 NY3d 777, 790 [2012]; *Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski*, 14 AD3d 644, 645 [2d Dept 2005]; *Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 470 [2d Dept 2002]). This is because a quasi contract cause of action only exists in the absence of a valid contract governing the very same events being asserted in a quasi contract cause of action (*Clark-Fitzpatrick, Inc. v Long Is.*

R. Co., 70 NY2d 382, 388 [1987]). Stated differently, where a party sues in tort, solely to enforcer a contract, a tort claim is barred (*Encore Lake Grove Homeowners Ass'n, Inc. v Cashin Assoc., P.C.*, 111 AD3d 881, 883 [2d Dept 2013] ["A court enforcing a contractual obligation will ordinarily impose a contractual duty only on the promisor in favor of the promisee and any intended third-party beneficiaries. Thus where a party is merely seeking to enforce its bargain, a tort claim will not lie" [internal citation and quotation marks omitted].). Accordingly, a conversion claim predicated on breaches of contract is not actionable (*Johnson v Cestone*, 162 AD3d 526, 527 [1st Dept 2018]; *Fesseha v TD Waterhouse Inv. Services, Inc.*, 305 AD2d 268, 269 [1st Dept 2003]), as is one for quantum meruit (*Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski* at 646).

Here, not only are the allegations upon which the unjust enrichment and conversion claims premised identical to those that undergird the breach of contract claim, but a review of the record evidence fails to establish any evidence of unjust enrichment and/or conversion.

Fraudulent Conveyance (Sixth Cause of Action)

Plaintiff's motion seeking summary judgment on her claim pursuant to Debtor and Creditor Law (DC) § 276 is denied insofar as she fails to establish prima facie entitlement to summary judgment. Significantly, to the extent that she seeks to disgorge funds paid

by Twins to relatives, the record raises questions of fact as to whether any funds were fraudulently conveyed.

Pursuant to DC § 273, a "transfer made or obligation incurred by a debtor is voidable as to a creditor" (DC § 273[a}, when made "with actual intent to hinder, delay or defraud any creditor of the debtor" (DC § 273[a][1]), or "without receiving a reasonably equivalent value in exchange for the transfer or obligation" (DC § 273[a][2]), when the debtor "intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due" (DC § 273[a][2][ii]). Pursuant to DC § 276(a)(1), a creditor alleging a fraudulent conveyance may bring "an action for relief against a transfer or obligation under this article . . . [and] may obtain . . . avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim."

The proponent of a fraudulent conveyance claim pursuant to DC § 276 bears the burden of establishing actual fraud and must do so by clear and convincing evidence (*Kreisler Borg Florman Gen. Const. Co., Inc. v Tower 56, LLC*, 58 AD3d 694, 696 [2d Dept 2009]; *Polkowski v Mela*, 143 AD2d 260, 262 [2d Dept 1988]; *Mar. Midland Bank v Murkoff*, 120 AD2d 122, 126 [2d Dept 1986]).

Here, the allegations in the complaint are that funds paid to Twins by plaintiff for purposes of repairing 1732 were not used for that purpose and instead transferred to family members. However,

while as noted above, a portion of the record cast doubt as to whether Twins used all funds paid to it to purchase materials, a portion of plaintiff's evidence submitted by plaintiff establishes the opposite. KO testified that all funds paid to Twins were used to buy supplies and pay bills incurred by Twins in the course of operating its business. Palermo added that to the extent that there debits from Twins' accounts for items such as Hulu and Netflix, these were payments for work performed by WO for Twins, who preferred that his salary be paid directly to his creditors. Thus, the record fails to establish that any of plaintiff's funds were fraudulently conveyed.

Inasmuch as plaintiff fails to meet her burden, the Court need not consider the sufficiency of any of the opposition papers submitted by defendants (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Accordingly, plaintiff's motion for summary judgment as to the causes of action in the first amended complaint is denied.

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANT'S COUNTERCLAIMS

Plaintiff's motion seeking dismissal of defendants' counterclaims, treated as a motion for summary judgment, is granted, in part, to the extent of dismissing all but defendants' counterclaim for conversion.

Breach of Contract, Promissory Estoppel, Unjust Enrichment (First, Second, Third, Fourth, and Fifth Counterclaims)

Plaintiff's motion seeking summary judgment on defendants' counterclaims for breach of contract is granted. Significantly, the record establishes that when the agreement between the parties was executed, Twins was not licensed to engage in home improvement work in New York City as required by NYCAC § 20-387, such that it cannot recover for a breach of the agreement between the parties.

As noted above, a contractor who performs work without a home improvement license is barred from enforcing any contract for work performed, including an action for *quantum meruit* (*B & F Bldg. Corp.* at 691; *Enko Const. Corp.* at 677; *Marraccini* at 1102; *Chosen Const. Corp.* at 285; *Millington* at 766; *Posada* at *1).

Here, as per Palermo and KO's testimony, the record establishes that Twins was not licensed to perform work in New York City while it was engaged by plaintiff to repair 1732. Accordingly, both agreements referenced in defendants' counterclaim - the written agreement for repairs and the oral agreement with KO for assistance with State Farm - are unenforceable.

The same is true for the counterclaims for unjust enrichment, promissory estoppel, and quantum meruit since they seek relief for the very same acts and transactions on which the breach of contract claims are premised. To be sure, it is well settled that "[a]n unjust enrichment claim is not available where it simply

duplicates, or replaces, a conventional contract or tort claim" (*Corsello* at 790; *Cooper, Bamundo, Hecht & Longworth, LLP* at 645; *Bettan* at 470). The same is true for a quantum meruit claim (*Cooper, Bamundo, Hecht & Longworth, LLP v Kuczinski* at 646), and one for promissory estoppel (*Kim v Francis*, 184 AD3d 413, 414 [1st Dept 2020]). Accordingly, plaintiff establishes prima facie entitlement to summary judgment.

Although defendants submit a legion of documents, no discussion of that evidence is warranted, since none of it establishes that Twins was licensed to perform work in New York City at the time of the instant project. Accordingly, defendants' counterclaim for breach of contract is barred as are their duplicative claims for unjust enrichment, promissory estoppel, and *quantum meruit*.

Conversion (Sixth Counterclaim)

Plaintiff's motion for summary judgment with regard to defendants' counterclaim for conversion is denied. Significantly, the record raises an issue of fact as to whether Twins was paid for the tools they allege were stolen from them by plaintiff.

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49–50 [2006]; *see Peters Griffin Woodward, Inc. v*

WCSC, Inc., 88 AD2d 883 [1st Dept 1982]). Thus, to establish conversion a plaintiff (1) must demonstrate legal ownership or an immediate superior right of possession to a specific identifiable thing; and (2) that the defendant exercised an unauthorized dominion over that property to the exclusion of the plaintiff's rights (*Meese v Miller*, 79 AD2d 237, 242–243 [4th Dept 1981]; *Indep. Discount Corp. v Bressner*, 47 AD2d 756, 757 [2d Dept 1975]). Property in an action for conversion must be tangible personal property (*Indep. Discount Corp.* at 757), or money (*id.* at 757; *Peters Griffin Woodward, Inc.* at 884).

Here, KO testified that after plaintiff terminated the contract, despite agreeing to let Twins back into 1732 to retrieve tools and equipment, she denied them access. KO further stated that among the tools and equipment Twins left behind were power saws, drills, ladders, scaffolding, and other hand tools. KO believed that the cost of the tools may have been debited from any the funds paid to Twins by plaintiff. Accordingly, plaintiff establishes prima facie entitlement to summary judgment as to this counterclaim insofar as Ko's testimony establishes that although the tools were stolen, Twins was nevertheless paid for them from funds plaintiff paid Twins.

In opposition to plaintiff's motion and cross-motion and in support of its cross-motion for summary judgment, defendants submit an affidavit by WO, wherein he states, in relevant part, the

following. WO is Twins' employee. With respect to the repair of plaintiff's home, for which Twins was retained, WO was the Project Manager and would have been the Superintendent if plaintiff had not terminated the contract. On February 20, 2017, after payment to Twins had been authorized, WO began to purchase material for the project. With regard to payments, on February 21, 2017, Twins deposited plaintiff's first installment check for $18,331.04. On March 2, 2017, Twins deposited a second check from plaintiff for $21,668.96. Thereafter, through April 28, 2017, WO made eight purchases for materials, totaling $28,256.82. To capitalize on discounts so as to maximize funds, WO paid for the materials in cash. In June 2018, plaintiff barred Twins from entering her home and Twins was unable to gather its equipment. Specifically, WO states that the equipment in question, included

> 7 baker scaffolds ($1,512), 7 scaffold caster wheels ($735), 3 outrigger baker scaffolds ($372), 2 twelve-foot ladders ($704), 2 ten-foot ladders ($474), 2 eight-foot ladders ($292), 2 six-foot ladders ($328), 2 forty-eight inch gang boxes ($542), 3 thirty-two inch gang boxes ($651), 10 shovels ($810), 3 circular saws ($456), 1 rosary hammer drill ($1,015), 2 hammer drills ($400), 4 drills ($520), 1 air compressor and nailers ($217), 1 table saw ($141), 1 tabletop tile saw ($141), 2 abrasive cut-off machines ($346), 1 sliding miter saw ($184), and miscellaneous hand tools, blades, hammers, bits, screw drivers, levels, rulers (approximately $500).

WO values the lost tools at approximately $10,339.00.

Based on the foregoing, defendants raise an issue of fact with regard to their claim for conversion of their tools. Specifically, contrary to KO's testimony that Twins was paid for the foregoing tools, in his affidavit, WO states that Twins was not.

Insofar as the conversion claim arises from acts separate and apart from the agreement between the parties - an alleged subsequent theft, there is an issue of fact sufficient to preclude summary judgment. Accordingly, this portion of plaintiff's motion is denied.

Defamation (Seventh Counterclaim)

Plaintiff's motion seeking summary judgment with respect to defendants' counterclaim for defamation is granted. Significantly, the record fails to establish that the alleged defamatory statements were made by plaintiff.

An action for defamation is one where a defendant is accused of making a

> false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society

(*Foster v Churchill*, 87 NY2d 744, 751 [1996]; *see Manfredonia v Wiess*, 37 AD3d 286, 286 [1st Dept 2007]; *Dillon v City of New York*, 261 AD2d 34, 37-38 [1st Dept 1999]; *Fairley v Peekskill Star Corporation*, 83 AD2d 294, 296 [2d Dept. 1981]). The elements of a

cause of action for defamation are (1) the publishing of a false statement to a third party; (2) publishing said statement without authorization or privilege; (3) fault, judged at a minimum by a negligence standard; and (4) special harm or defamation per se (*Dillon* at 38; *Salvatore v Kumar*, 45 AD3d 560, 563 [2d Dept 2007]). Special harm or special damage means the loss of something having economic or pecuniary value (*Liberman v Gelstein*, 80 NY2d 429, 434-435 [1992]).

Special damages need not be pleaded or proven when the cause of action is for defamation or libel per se (*id.* at 435; *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 379 [1977]); *Donati v Queens Ledger Newspaper Group*, 240 AD2d 696, 697 [2d Dept 1997]). Slander per se is any oral statement which relate to any one of the following: statements charging plaintiff with a serious crime, statements that tend to injure another in his trade, business or profession, statements that accuse plaintiff of having a loathsome disease, or statements that impute that a woman is unchaste (*Rinaldi* at 379). Libel per se is a writing which exposes plaintiff to "public contempt, ridicule, aversion or disgrace, or induce[s] an evil opinion of him in the minds of right-thinking persons, and to deprive[s] him of their friendly intercourse in society" (*Rinaldi* at 379).

A plaintiff seeking to recover on a cause of action asserting defamation per se inasmuch as a defendant's statements have hurt

his trade, business or profession, must prove that the defamation is of the kind incompatible with his business, trade, office, or profession (*Liberman* at 436). Rather than a general reflection on the plaintiff's character or qualities, the statement must be in reference to a matter of significance an importance for that purpose (*id.* at 436)

Truth provides a complete defense to an action asserting defamation (*Dillon* at 39; *Proskin v Hearst Corporation*, 14 AD3d 782, 783 [3d Dept 2005]; *Love v William Morrow and Co., Inc.*, 193 AD2d 586, 586 [2d Dept 1983]), as is substantial truth (*Rinaldi* at 383; *Love* at 588; *Leibowitz v St. Luke's Roosevelt Hospital Center*, 281 AD2d 350, 350 [1st Dept 2001]); *Fairley v Peekskill Star Corporation*, 83 AD2d 294, 297 [2d Dept 1991]). On the issue of substantial truth as a bar to defamation, the court in *Flekenstein* (266 NY 19 [1934]) articulated what it called a workable test, namely whether the statement as published would have a different effect on the reader or listener than the truth as pleaded (*id.* at 23). The rationale being that "[w]hen the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done (*id.* at 23 [internal quotation marks omitted].).

Here, while Palermo testified that someone made a statement on a website called BuildZoom, accusing Twins of stealing $50,000, she

attributed the same to someone named Mari and possibly to plaintiff's daughter. A document submitted by plaintiff, depicting the review about which Palermo testified confirms that the same was made by Mari. Insofar as the record fails to establish that plaintiff actually posted the statement in question, there is no nexus between the statement and plaintiff. Accordingly, plaintiff establishes prima facie entitlement to summary judgment with respect to the counterclaim for defamation.

Nothing submitted by defendants in opposition raises an issue of fact sufficient to preclude summary judgment. Significantly, defendants submit KO's transcript, which as already noted, fails to attribute the alleged defamatory statements to plaintiff. Defendants also submit interrogatories, wherein Palermo, although asserting that the alleged defamatory statements were made by Mari, who she believes is plaintiff, also fails to conclusively establish that Mari - the person who made the statements - is in fact plaintiff. Thus, since it is well settled that mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to warrant or defeat summary judgement (*Zuckerman* at 562), defendants do not submit any evidence establishing that the statements alleged were actually made by plaintiff or as urged, by her daughter, a non-party.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFF'S CLAIMS IN THE FIRST AMENDED COMPLAINT

Defendants' motion seeking summary judgment with respect to

the causes of action in the first amended complaint is granted, in part. Significantly, with the exception of the breach of contract cause of action as against Twins, Palermo, WO, and KO, the cause of action pursuant to Article 3-A of the NY Lien Law, and the cause of action pursuant to Debtor and Creditor Law (DC) § 276, defendants establish entitlement to summary judgment.

In support of their motion and in opposition to plaintiff's motion and cross-motion, defendants submit WO's affidavit, which was already discussed above.

Defendants submit an affidavit from HM, wherein he states that he is MSA's principal. HM states that with regard to 1732, he requested the aid of an expediter, to aid in navigation of MSA's plans through the approval process with the NYCDOB. Approval of architectural plans is critical, because no permit to do any construction will issue absent the approval. With respect to 1732, there were extended negotiations with State Farm, plaintiff's insurer. Despite theses negotiations the failure to pay MSA's fees, HM nevertheless worked with plaintiff and drafted architectural plans. In discussions with plaintiff, she repeatedly asked HM that he design items for 1732 that were beyond the scope of work set forth in plaintiff's agreement with Twins. This included creating a new bedroom over one of the garages at 1732, and converting one of the garages into an expanded living area. The construction at 1732 was delayed for over a year because it was

discovered that 1732 had an electrical configuration that violated the governing code and because there were other substandard aspects at 1732. Although State Farm initially resisted, HM supplied a proposal to address the issues at 1732, submitted drawings and other documents regarding the work needed to bring the premises up to code, prompting State Farm to authorize an inspection of 1732 on February 5, 2018. As a result of that inspection, State Farm's engineer issued a report on March 1, 2018, wherein he agreed that the changes sought were necessary. On that same date, State Farm indicated that it would only approve the necessary changes requested by HM and not the changes sought by plaintiff. The latter was denied because the changes sought were not repairs for damage caused by the fire, but were instead, home improvements. Nevertheless, HM and KO convinced State Farm to approve a change order to address some of the foregoing issues. On May 14, 2018, HM filed MSA's architectural plans with the NYCDOB and on May 18, 2018, those plans were approved. On May 25, 2018, the NYCDOB issued a permit allowing Twins to begin its work at 1732.

Defendants submit an affidavit from KO, wherein he reiterates his testimony at his deposition, and reiterates the contents of HM's affidavit, namely that he and HM worked for a year in an attempt to convince State Farm to approve the necessary change orders to bring the electrical system at 1732 into compliance with the relevant code.

Defendants also submit a portion of plaintiff's deposition transcript, wherein she testified that the total amount spent to repair her home was approximately $150,000 - $160,000, some portion of which was paid to MSA and Twins.

Defendants submit many of the same exhibits submitted by plaintiff, including KO's deposition transcript, as well as that of Grant, Rice and Palermo, Twins' home improvement license issued by Westchester County, the document from BuildZoom, wherein there's an allegedly damaging review about Twins, the NYCDOB document revoking Twins' permit to work at 1732, the invoices sent to plaintiff for KO's work, the agreement between plaintiff and Twins, the invoices for Twins' Capital One Bank account, the invoices from Modern Paint, the project proposal agreement between MSA and plaintiff, Angelides' inspection report, the application for a permit submit by MSA, the photographs of the wooden beam installed at 1732 by Twins, and the letter plaintiff sent to Twins terminating the Agreement.

Additionally defendants submit a series of emails. Saliently, several emails are dated in July 2018, are sent to Twins by plaintiff, and inform Twins that they have been terminated because Twins failed to account for how the $40,00 she paid them was used. Thus, plaintiff sought a return of her $40,000. In an email sent by plaintiff to Berlin and dated February 10, 2018, she references that her architect presented State Farm withdrawings and proposals

so as to bring the electrical system in compliance with the codes and the resulting inspection on February 5, 2018 by Angelides. Plaintiff states that the last time funds were paid to the architect, it took two months to access those funds because of procedures by State Farm and OCWEN. Because plaintiff anticipated a delay in the repair of her home and given that her lease at her current residence was expiring, she asked that further payments be expedited.

Defendants submits two letters sent by plaintiff to Berlin and dated July 20, 2017, and September 2017. Both letters assert complaints against OCWEN, blaming them for the delay of the repairs to 1732. The letter dated September 10, 2017, states that OCWEN has continuously delayed the repair of her home by withholding funds for the repairs. Plaintiff indicates that she, Twins, and MSA had provided all the documents necessary for the release of the requisite funds. Plaintiff also states that OCWEN refused to initially pay Twins because they thought that a check previously issued to Servpro was a payment to Twins. Additionally, because OCWEN repeatedly requested information although the same had already been submitted, the appropriate check for the architect was not issued until after September 2017. On August 11, 2017, although OCWEN was aware that plaintiff's husband was dead, they nevertheless issued the foregoing check in plaintiff's deceased husband's name, which Citibank would not cash. Plaintiff asserts

that

> [d]ue to the constant delays in construction caused by Ocwen's inefficient handling of my claim, neither I nor my contractor has a definite timeframe for the completion of the project and for that, I am now formally asking State Farm to consider extending the coverage of my living expenses beyond the deadline in December.

Defendants submit responses to interrogatories, wherein Palermo asserts that

> Mari Escabi submitted a review on the BuildZoom website dated January 6, 2019, which falsely and untruthfully published a statement to the public that Twins had stolen money from her and lied about being licensed in New York City.

Defendants submit an email from plaintiff to KO, dated August 8, 2017, detailing the multitude of documents which Twins had already provided to State Farm between February and August 2017.

Defendants submit a document titled 1732 St. Peter's Avene Timeline, detailing when Twins submitted documents to State Farm and when State Farm and/or OCWEN tendered requisite payments. Saliently, the document indicates between 2016 and 2017, OCWEN and State Farm delayed the repair of 1732 by 43 weeks.

Defendants submit a letter sent by Twins to plaintiff, dated May 30, 2018, wherein plaintiff is told that in light of State Farm's authorization of additional repairs, the total price for Twins' work was increased to $109,754. As a result, and as per the agreement between the parties, plaintiff was required to tender an

additional $14,887.48, representing 50 percent of the contract price. Plaintiff is apprised that work could not begin until those sums, necessary to pay subcontractors, were tendered.

Defendants submit an application submitted to the NYCDOB, wherein Peter Klein (Klein), an architect, submits plans for approval for repairs at 1732. The document indicates that the plans are being submitted to replace those submitted by HM.

Defendants submit Klein's architectural plans, which evince that two of the garages at 1732 were to be converted into living space.

Breach of Contract

Defendants' motion seeking summary judgment with regard to the first cause of action, insofar as it alleges a breach of contract against Twins, is denied. Significantly, as noted above, questions of fact with regard to whether Twins breached the agreement first, in failing to purchase materials or whether plaintiff initially breached the initially breached the agreement by failing to tender sums due thereunder, precludes summary judgment on this cause of action with respect to Twins.

Defendants' motion seeking summary judgment in favor of Palermo, KO, and WO, insofar as it is alleged that they breached the written agreement between the parties is denied. Significantly, there exist questions of fact with respect to whether the individual defendants actually spent plaintiff's

payment on supplies, which if resolved against them, may be tantamount to fraud.

A corporation is a legal entity which is distinct from its managers and shareholders (*Port Chester Electrical Construction Corp. v Atlas*, 40 NY2d 652, 656 [1976]; *R.T. Subway Const. Co. v City of New York*, 259 NY 472, 487 [1932]). The separate personalities of the corporation, its shareholders and its managers cannot be disregarded (*Port Chester Electrical Construction Corp.* at 656; *R.T. Subway Const. Co.* at 487). However, the Court does have the authority to look beyond the corporate form and hold shareholders and managers liable by piercing the corporate veil (*Port Chester Electrical Construction Corp.* at 656; *R.T. Subway Const. Co.* at 487). The Court can pierce the corporate veil to prevent fraud or to achieve equity (*Port Chester Electrical Construction Corp.* at 656; *see Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 140 [1993] ["Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, pierce the corporate veil, whenever necessary to prevent fraud or to achieve equity" [internal quotation marks omitted].). "The determinative factor is whether the corporation is a dummy for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends" (*id.* at 657). As such, the corporate veil will be pierced when an individual shareholder uses

the corporation to conduct personal business in order to shield himself from liability (*id.* at 657; *Perez v One Clark St. Hous. Corp.*, 108 AD2d 844 [2d Dept 1985]). However, the corporate veil will generally not be pierced absent proof of fraud, illegality, or wrongdoing by the shareholder or manager (*Marino v Dwyer-Berry Const. Corp.*, 146 AD2d 750, 750-751 [2d Dept 1989]; *Guptill Holding Corp. v State*, 33 AD2d 362, 365 [3d Dept 1970], *affd*, 31 NY2d 897 [1972]), and proof of control, by itself, is not enough. (*Matter of Morris* at 141-142). Hence, plaintiff must demonstrate an abuse of control to perpetrate a wrong or injustice (*id.* at 141-142).

The party seeking to pierce the corporate veil has the burden of establishing that there is a basis to do so (*Katz v N.Y. Tint Taxi Corp.*, 213 AD2d 599, 600 [2d Dept 1995]; *Ravel v Dirco Enterprises, Inc.*, 159 AD2d 564, 565 [2d Dept 1990]), and must demonstrate that

> (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury

(*Matter of Morris* at 141).

When a member of a corporation executes an agreement on behalf of a corporation, that individual is ordinarily not liable for the corporation's subsequent breach of the agreement (*Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961] ["We think that precedent and policy

require an affirmance here. In modern times most commercial business is done between corporations, everyone in business knows that an individual stockholder or officer is not liable for his corporation's engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice -- once as an officer and again as an individual."]. This is because it is well settled that officers and/or agents of a corporation do not bind themselves and become liable for a breach of an agreement, unless it is clear that they purport to bind themselves (*Georgia Malone & Co., Inc. v Ralph Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd sub nom. Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511 [2012]; *PNC Capital Recovery v Mech. Parking Sys., Inc.*, 283 AD2d 268, 270 [1st Dept 2001]; *Stamina Products, Inc. v Zintec USA, Inc.*, 90 AD3d 1021, 1022 [2d Dept 2011] ["There must be "clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal" [internal quotation marks omitted]).

With regard to employees, it is well settled that an employee of a corporation who commits no separate tortious act and who acts solely in his capacity as employee of the corporation cannot be liable for the acts of the corporation (*Mendez v City of New York*, 259 AD2d 441, 442 [1st Dept 1999]; *Urbach, Khan & Werlin, P.C. v 250/PAS Associates*, 176 AD2d 151, 151 [1st Dept 1991]). This is

because an individual acting solely in his capacity as an agent of his corporate principal, without any showing of exclusively independent control of operations, cannot be held individually liable for alleged corporate wrongdoing (*Mendez* at 442). Accordingly, absent evidence that an officer committed independent tortious acts, or that he acted in any other manner other than within the scope of his employment as a corporate officer, summary dismissal of the individual action is required (*id.* at 442). In Mendez, a premises liability case, the court dismissed the action against an individual defendant employed by the managing company when the evidence demonstrated that while defendant did engage in maintenance of the property therein, he had committed no independent tort and had acted in no other capacity other than that of employee (*id.* at 442).

Here, Palermo testified that she is Twins' sole owner and shareholder and that Twins has no permanent employees. Palermo testified that KO was solely retained by plaintiff to aid plaintiff in communicating with State Farm and that WO was hired by Twins in relation to Twins' project at 1732. Palermo further testified that WO's salary was paid by directly sending the same to his creditors. Specifically, Twins paid WO's landlord and his Netflix subscription. KO testified that while he was neither a full-time employee of Twins nor an officer of the same, he advised Palermo based on his years of experience and was never directly paid for

his work. With regard to plaintiff and 1732, KO testified that he had an oral agreement with plaintiff, whereby he agreed to aid her in her communications with State Farm to ensure she received maximum payment on her claim. In return, Twins would be paid $1,300 per month for KO's work.

Based on the foregoing, the defendants establish prima facie entitlement to summary judgment with respect to the breach of contract claim against Palermo insofar as the record fails to demonstrate that Palermo, Twins' sole shareholder, bears any liability for breach of the agreement between Twins and plaintiff. As noted above, the corporate veil will only be pierced when an individual shareholder uses the corporation to conduct personal business in order to shield himself from liability (*id.* at 657; *Perez* at 844). The corporate veil will generally not be pierced absent proof of fraud, illegality, or wrongdoing by the shareholder or manager (*Marino* at 750-751; *Guptill Holding Corp.* at 365), and proof of control, by itself, is not enough (*Matter of Morris* at 141-142). As to Palermo, the evidence tendered by defendants is that she at all times acted in accordance with the agreement between the parties. Thus, this portion of the record is bereft of evidence that she engaged in fraud, illegality or wrongdoing so as to warrant any liability for the agreement between plaintiff and Twins.

Additionally, when a member of a corporation executes an

agreement on behalf of a corporation, that individual is ordinarily not liable for the corporation's subsequent breach of the agreement (*Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961] ["We think that precedent and policy require an affirmance here. In modern times most commercial business is done between corporations, everyone in business knows that an individual stockholder or officer is not liable for his corporation's engagements unless he signs individually, and where individual responsibility is demanded the nearly universal practice is that the officer signs twice -- once as an officer and again as an individual."]. This is because it is well settled that officers and/or agents of a corporation do not bind themselves and become liable for a breach of an agreement, unless it is clear that they purport to bind themselves (*Georgia Malone & Co., Inc.* at 408; *PNC Capital Recovery* at 270; *Stamina Products, Inc.* at 1022). Here, then defendants' evidence is that Palermo signed on Twins's behalf and not in her individual capacity. Therefore, the record is similarly bereft of any evidence that when Palermo executed the agreement she sought to individually bind herself.

Defendants also establish prima facie entitlement to summary judgment with respect to the breach of contract claim asserted against KO and WO. Significantly, defendants' evidence establishes that WO and KO are not liable for any breach of the agreement between Twins and plaintiff since the record establishes that at

all times, they were merely Twins' employees and did nothing more than act within the scope of their employment with Twins. Specifically, with regard to WO and KO, the record is evinces that they acted in accordance and in furtherance with the agreement between plaintiff and Twins and plaintiff and KO. Again, it is well settled that an employee of a corporation who commits no separate tortious act and who acts solely in his capacity as employee of the corporation cannot be liable for the acts of the corporation (*Mendez* at 442; *Urbach, Khan & Werlin, P.C.* at 151).

Plaintiff's opposition, however, raises an issue of fact sufficient to preclude summary judgment with regard to this cause of action as against the individual defendants. Significantly, as discussed above, plaintiff's evidence, namely Whittenberg's affidavit - asserting that the Modern Paint invoices are fake, Grant's testimony - wherein he testifies that he saw very little in the way of materials at 1732 when he began his work therein, establishes that no materials were bought. If the foregoing facts are decided against defendants, then it is at the very least fraud, which is sufficient to hold Palermo accountable as well as KO and WO, since they were the only members/employees working for Twins on this project and who had access to plaintiff's funds.

NYCAC § 20-387

Defendants' motion seeking summary judgment to the extent that plaintiff seeks a return of sums paid to Twins because Twins

violated NYCAC § 20-387 is granted as a matter of law. As already discussed, while the evidence tendered by defendants and plaintiff establish that because Twins did not possess a license to perform home improvement work issued by the City of New York, they did, in fact, violate NYCAC § 20-387, this only precludes Twins from enforcing the agreement between the parties so as to recover money damages. It does not, however, as urged by plaintiff, require that Twins be forced to refund all sums paid to it by plaintiff.

Article 3-A of the NY Lien Law (First and Second Causes of Action)

Defendants' motion seeking summary judgment on the causes os action alleging that defendants violated Article 3-A of the NY Lien Law, is denied insofar as questions of fact as to whether the funds paid to Twins by plaintiff were used to pay for the work performed by Twins precludes summary judgment.

Defendants submit WO's affidavit wherein he testified that he spent $28,000 of plaintiff's money to buy materials. Additionally, KO testified that Twins spent $28,000 to purchase materials and that all other sums paid to Twins by plaintiff were used to cover Twins' overhead, including salaries.

As noted above, under the Lien Law, qualified assets - those received by owners, contractors and subcontractors in connection with improvements of real property - are trust assets and trust begins when any asset thereof comes into existence, whether or not there are any beneficiaries of the trust at that time (*Aspro Mech.*

Contr., Inc. at 328-329). Significantly, "the use of trust assets for a nontrust purpose--that is, a purpose outside the scope of the cost of improvement--is deemed a diversion of trust assets . . . and if the diversion occurs by the voluntary act of the trustee or by his consent such act or consent is a breach of trust" (*id.* at 329 [internal quotation marks omitted)]. The failure to deposit qualifying funds into an escrow account is not a diversion under of the Lien Law (*Langston* at 365). Instead, for purposes of determining whether there has been a diversion, the inquiry is "whether the funds have actually been used to pay subcontractors, suppliers and laborers (*id*. at 365-366).

Here, insofar as defendants' evidence establishes that the relevant sums were used for the payment of work related to plaintiff's project, they establish prima facie entitlement to summary judgment on this claim.

Plaintiff's opposition, however, raises a question of fact with regard to whether all or some of the funds paid to Twins by plaintiff were used in furtherance of the project. As noted above, plaintiff submits Grant's testimony regarding the absence of any significant materials at 1732, where WO alleges they were delivered. Moreover, Whittenberg's affidavit establishes that the invoices for the foregoing materials are counterfeit. Accordingly, questions of fact as to whether Article 3-A of the NY Lien Law was violated preclude summary judgment on this claim.

General Business Law § 770 et seq (First and Second Causes of Action)

Defendants' motion seeking summary judgment to the extent that plaintiff seeks a return of sums paid to Twins because Twins violated General Business Law § 770 et seq. is granted as a matter of law. As discussed above, the record is bereft of any evidence that she was induced into the agreement with Twins upon fraudulent written misrepresentations, as required for a plenary action under the relevant law. Indeed, defendants submitted the agreement between the parties, which does not contain any representation that Twins was licensed to perform work in New York City. Since this is the gravamen of plaintiff's cause of action, defendants establish prima facie entitlement to summary judgment and nothing submitted by plaintiff controverts the same so as to raise an issue of fact.

Architectural Malpractice (Third Cause of Action)

Defendants' motion seeking dismissal of plaintiff's cause of action for architectural malpractice is granted. Significantly, defendants submitted MSA and HM's plans, which per the record, when submitted to the NYCDOB were approved and garnered the permit submitted by defendants. Per the project agreement, this was what MSA and HM were retained to do. Accordingly, this alone is sufficient to establish *prima facie* entitlement to summary judgment.

Nothing submitted by plaintiff controverts the same so as to

raise an issue of fact. While plaintiff submits her deposition transcript, wherein she testified that MSA and HM submitted defective and false plans to the NYCDOB, thereby delaying the issuance of a permit and the repair of 1732, this is not tantamount to the expert evidence required to establish malpractice.

GBL § 349 (Fourth Cause of Action)

Defendants' motion seeking summary judgment to the extent that plaintiff asserts a cause of action for a violation of GBL § 349 is granted as a matter of law. To the extent that this cause of action os premised on Twins' alleged misrepresentation that it was licensed in New York City, as noted above, the record is bereft of any evidence of the same. Moreover, the record evinces that the instant transaction was a private one between the parties, not impacting consumers at large. Thus, defendants establish prima facie entitlement to summary judgment and nothing submitted by plaintiff controverts the same so as to raise an issue of fact sufficient to preclude summary judgment.

Fraudulent Conveyance (Sixth Cause of Action)

Defendants' motion seeking summary judgment with respect to plaintiff's cause of action pursuant to DC § 276 is denied. Significantly, because there is a question of fact regarding how defendants used at least $28,000 of the sums paid to them by plaintiff and whether they were transferred to others without consideration, questions of fact preclude summary judgment.

While defendants' evidence, specifically, WO's affidavit, wherein he states that he made eight purchases for materials, totaling $28,256.82, evinces a proper use of the instant funds, sufficient to establish prima facie entitlement to summary judgment, plaintiff's evidence, particularly Whittenberg's affidavit, controverts the same. The foregoing version of the facts, coupled with Palermo's assertion that WO received payment for his work on this project, sufficiently establishes a violation of DC § 276. To be sure, a "transfer made or obligation incurred by a debtor is voidable as to a creditor" (DC § 273[a][1]), when made "with actual intent to hinder, delay or defraud any creditor of the debtor" (DC § 273[a][1] or "without receiving a reasonably equivalent value in exchange for the transfer or obligation" (DC § 273[a][2]), when the debtor "intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due" (DC § 273[a][2][ii]). It is hereby

ORDERED with respect to Twins, Palermo, WO, and KO with the exception of the cause of action for breach of the written agreement between the parties, and a violation of Article 3-A of the NY Lien Law, the first and second causes of action are dismissed, as well as the third, fourth, and fifth causes of action, with prejudice. It is further

ORDERED that with the exception of the sixth counterclaim for

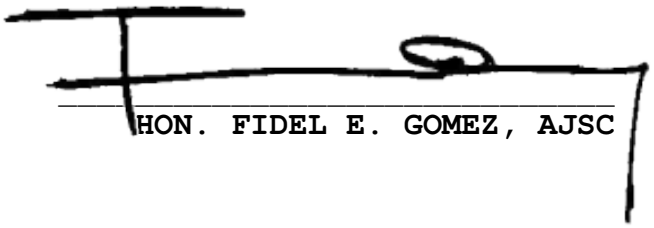
conversion, each and every other counterclaim in the answer be dismissed, with prejudice. It is further

ORDERED that all parties appear for a virtual Settlement Conference on July 11, 2022 at 12:30pm.

ORDERED that plaintiff serve a copy of this Decision and Order with Notice of Entry upon defendants within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : May 25, 2022
Bronx, New York



HON. FIDEL E. GOMEZ, AJSC