SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOEL M. COHEN** **PART** IAS MOTION 3EFM

Justice

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MADISON 465 W LLC and ARTHUR BECKER

Plaintiffs,

- v -

VALERIE DILLON a/k/a VALERIE BEST,

Defendant.

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INDEX NO. 656747/2017

DECISION AFTER TRIAL

In 2012, Plaintiffs Madison 465 W LLC ("Madison") and Arthur Becker sought to redevelop the TriBeCa apartment building in which Defendant Valerie Dillon then lived. Dillon agreed to temporarily vacate her apartment while the renovations went on, and in turn Plaintiffs agreed to pay Dillon up to $10,000 per month to defray her "actual residential occupancy rental costs" to live somewhere else. The arrangement was supposed to be short-lived and straightforward; it proved to be neither of those things. Five years later, Dillon was still living in a "temporary" apartment in Chelsea while Plaintiffs' development efforts at the TriBeCa building limped along, and she was still receiving a $10,000 rent subsidy from Plaintiffs every month. Complicating matters, by then Dillon, who operates an art gallery, was using part of the Chelsea apartment to conduct her gallery business.

The dispute at hand concerns whether Dillon properly allocated her rent for the Chelsea apartment between business and residential use, such that Plaintiffs' $10,000 monthly allowance was only funding her "actual residential occupancy rental costs." That narrow question underpins Plaintiffs' three causes of action – for breach of contract, unjust enrichment, and fraud – as well as Dillon's counterclaim for breach of contract.

Based on the evidence presented during a 2-day non-jury trial on November 30 and December 1, 2020, including evaluating the testimony of live witnesses (including Becker and Dillon), the Court concludes that Plaintiffs failed to prove any of their claims against Dillon. The evidence did not establish that Dillon's allocation of her rental costs in the Chelsea apartment violated the Allowance Agreement or constituted either unjust enrichment or fraud.

On the other hand, Dillon established by a preponderance of the evidence that Plaintiffs' termination of the monthly rental allowance constituted a breach of the Allowance Agreement. As a result of Plaintiffs' breach, the Court finds that Dillon incurred damages in the amount of $136,000.

FINDINGS OF FACT

A. Dillon Enters Into a Deal with Madison to Develop the Building

Dillon was a member of an LLC – "465 Project LLC" – that owned a five-floor residential building at 465 Washington Street in North TriBeCa (the "Building") (Dillon ¶¶2-5).[1] Dillon resided in a third-floor apartment (the "Apartment") in the Building starting in 2007 (*id.* ¶2). By early 2010, the Building was falling behind on its operating expenses and mortgage (*id.* ¶4; PX.2 ¶¶9-48). The following year, one of the other LLC members forfeited his membership interest, leaving Dillon and another tenant in complete control of both the LLC and the Building (*id.* ¶5). At that point, Dillon was looking for a way to preserve her right to live in the Apartment, protect her investment in the Building, and also rectify the property's financial situation. One solution was to secure a developer for the Building (*id.* ¶¶5-6).

[1] "Dillon ¶ __", "Becker ¶ __" and "Goldglit ¶ __" refer to those witnesses' direct testimony by affidavit. "DX" and "PX" refer to, respectively, Defendant's and Plaintiffs' exhibits, while "T" refers to the trial transcript.

In December 2011, Dillon was introduced to Becker, who became the main candidate to purchase and develop the Building (Dillon ¶6). Becker – through Madison – planned to acquire the Building and then either (a) convert it into a condominium, "as is" with only cosmetic improvements or (b) undertake a much more expensive project to double the size of the Building and convert it into a luxury condominium (Becker ¶11).

In 2012, Dillon caused 465 Project LLC to convey the deed for the Building to Madison, an entity wholly owned by Becker, pursuant to a Purchase Agreement dated October 25, 2012 (*id.* ¶¶7-8; PX.6; T.9:15-10:02). Plaintiffs executed certain agreements with Dillon that were preconditions for closing under the Purchase Agreement, including a License Agreement and Option Agreement, both dated October 25, 2012 (DX.D ¶27 [g]-[i]). The License Agreement permitted Dillon to continue living in the Apartment, for up to nine months, in exchange for: (i) certain fees and costs, and (ii) Dillion's agreement to vacate the apartment temporarily to allow for renovations (DX.D ¶27 [g]; DX.I).

The Option Agreement granted Dillon the right to repurchase the Apartment for $50,000 ("Option") after Madison satisfied certain defined conditions, which included completing renovations, a condominium conversion, and obtaining a certificate of occupancy ("Option Conditions") (DX.D ¶27 [i]; DX.G). The Option Agreement stated that the Option was a "valuable and material benefit of the transaction covered by" the Purchase Agreement (*id.*). The Option was the primary consideration Dillon received for conveying the Building (T.229:04-17, 230:02-08; Dillon ¶12). Becker knew that Dillon intended to exercise the Option and move back to the Apartment (T.43:05-12). The Option Agreement "triggered the completion and submission of the purchase agreement" (T.23:10-14).

Contemporaneous with the License Agreement and Option Agreement, the parties executed a side letter governing a monthly rental allowance payable to Dillon ("Allowance Agreement"). Under the Allowance Agreement,

> Madison and its principal Arthur Becker ("Arthur"), jointly and severally, agree to pay to Valerie a monthly rental allowance, which shall be pro-rated to the extent necessary, of Valerie's actual residential occupancy rental costs, as indicated by appropriate leases, occupancy agreements, licenses, bills and receipts, in the amount of such residential occupancy costs, not to exceed $10,000 a month, for the period commencing upon Valerie's vacating the 3rd Floor unit and ending the date that Valerie is required to close upon the purchase of the 3rd Floor Unit pursuant to the Option Agreement.

(DX.H, Def. 136; T.41:15-18; Dillon ¶¶17-18).

B. Dillon Moves to the Chelsea Apartment

In June 2013, Dillon relocated with her children and then-husband to 487 West 22nd Street in Chelsea ("Chelsea Apartment") (Dillon ¶19). Dillon executed a two-year lease for $13,000/month, based on Becker's representations that the renovations would take approximately 12-18 months (DX.N, Def. 224; DX.BE; T.43:05-12). Becker knew that Dillon calibrated her lease to his timetable, after which Dillon intended to move back to her Apartment (T.43:05-12). Dillon told Plaintiffs she was vacating the Apartment on July 31, 2013 and requested that Plaintiffs "begin making the wire transfers for our rent payments which begin August 1st for 10,000 per month" (PX.11). Plaintiffs requested, and received, a copy of Dillon's lease so that they could "appropriately document the cost of [her] rental" (*id.*).

The Chelsea Apartment was approximately 2,700 square feet (Dillon ¶21). The first floor consisted of a living room, bedroom, and bathroom; a second floor consisted of a kitchen, dining room, and bedroom; and a third floor consisted of two bedrooms and a bathroom (*id.*; T.248:13-19). The Chelsea Apartment was located near the modern art gallery that Dillon founded in 1994 ("Gallery") (Dillon ¶22). The Gallery was then located at 555 West 25th Street (*id.*).

C. Dillon Begins Conducting Gallery Business in the Chelsea Apartment

In June 2015, Dillon was forced to close the Gallery's brick-and-mortar location for financial reasons (*id.* ¶¶24-27). Dillon then transformed a portion of the first floor of the Chelsea Apartment into a home office, enabling the Gallery to conduct business virtually (*id.* ¶27). Dillon began using the Apartment's first floor bedroom, which was approximately 300 to 400 square feet, as her primary home office (*id.*). Dillon also began using the adjacent living room, which was also approximately 300 to 400 square feet, to exhibit and photograph art (*id.*). Dillon used no portion of the top two floors for business (*id.* ¶21; T.195:09). After Dillon established the home office in 2015, her family would occasionally use the first floor for nonbusiness purposes (T.175:04-15; 248:02-12). That changed in 2016, when Dillon stopped using the first floor for purposes unrelated to the Gallery (T.248:02-12).

D. Building Renovations Drag On

Meanwhile, Becker's renovations and Building conversion did not proceed as planned (Dillon ¶30; DX.T, Def.0307 [Becker describing process as "progressing slowly"]; DX.AA; DX.BC, Def. 297 [Becker in 2016 "estimat[ing] a 22-24 month build"]). When it became clear that the renovations would not be complete when Dillon's lease expired (DX.T, Def. 310), Dillon extended the lease at the Chelsea Apartment for an additional year at $14,000/month, effective June 2015 (DX.N, Def. 230). One year later, when renovations were still not complete, Dillon extended the lease for another year at $15,000/month, effective June 2016 (*id.*, Def. 231).

While Plaintiffs were developing the Building and marketing it for sale, they accounted for Dillon's interest in the Apartment, by virtue of her Option, as tantamount to an ownership interest (*see* T.49:13-50:05; DX.EE, MAD00004606 [July 2015 "Unit Schedule" indicating the third-floor Apartment is "Pre-Sold"]; DX.Z, MAD00004439 [March 25, 2015 email from Becker

to potential investor stating, "[t]he plan has always been for the [] 3rd floor to be given up post TCO and post release from the Lenders."]; DX.V, MAD00003421, 23 [July 2014 valuation by brokerage firm excluding the third-floor Apartment[; S [same]).

Becker soon began contemplating how to buy out Dillon's interest in the Apartment, so that he "wont [sic] have to pay $10k per mo" (DX.X; T.48:19-50:03). In November 2014, Becker emailed his accountant and bookkeeper requesting "a simple analysis of Valerie's unit to see what would make sense for me to offer to purchase her interest" (DX.X, MAD00003655 [emphasis added]). This "simple analysis" posited a "Buyout Amount" for the Option of $4,000,000 and a "Rent Buyout" of $240,000.

On June 24, 2016, Dillon met Becker for breakfast at Union Square Cafe to discuss the status of the renovations (T.66:22-67:06; Dillon ¶32). Becker offered to buy Dillon's Option for $1.5 million, less the Allowance paid to date (Dillon ¶32). Becker threatened that if Dillon did not accept, he could always "file for bankruptcy and leave her with nothing" (*id.*). Dillon left in tears (*id.*).

E. Plaintiffs Demand Additional Documentation from Dillon

Shortly after Dillon rejected Becker's buyout offer, Becker's attorney reached out to Dillon's attorney, noting her rejection of Becker's offer and – for the first time since executing the Allowance Agreement – demanding Dillon's lease and other "substantiation" of Dillon's occupancy costs (Dillon ¶33; DX.BQ, Def. 346). Becker and Dillon, through their respective counsel, "agreed that substantiation will be promptly provided in writing of the monthly expenses . . . being provided to Ms. Dillon" (DX.BQ, Def.346). Dillon sent Becker her lease renewals, which evidenced monthly rental payments of $15,000, approximately six hours later (DX.VV; T.70:09-71:03). Dillon also sent Becker the lease riders as soon as her landlord made

them available (DX.BF; T.71:08-19; T.171:20-172:04). These riders showed Becker that Dillon was responsible for, among other Residential Costs: (i) "all other utilities [other than water] including electric heat"; (ii) a $26,000 security deposit; (iii) the costs of removing a wall; and (iv) the costs of repairing a chimney fireplace (DX.BF, MAD00005150-51; T.71:20-72:15).

On September 26, 2016, Becker tried to "sell" Dillon on the idea of accepting an "equity credit" in exchange for her Option (DX.BC, Def. 286-87; T.72:16-19). Dillon rejected Becker's offer on October 15, 2016 (DX.BD; T.73:02-14).

Between July 2016 and January 2017, Becker's and Dillon's attorneys exchanged numerous emails about Dillon's Residential Costs, and use of part the Chelsea Apartment for business purposes (DX.BQ). Dillon and her accountants worked in good faith to respond to Becker's inquiries. Initially, Dillon's attorney sent Becker's attorney copies of her lease, extensions, and riders (*id.*, Def. 345), all of which Becker previously received (DX.K, 321-23; DX.VV; DX.BF; T.41:19-43:04, 70:09-71:19). Further, to confirm the portion of the rent at the Chelsea Apartment paid by the Gallery, Dillon created a printout of the Gallery's Quickbook records showing that the Gallery paid approximately $4,000 in rent for the Chelsea Apartment from July 2015 to May 2016 (DX.BN, MAD00005318-19). Although the printout was intended to be conveyed through counsel, Dillon emailed the printout to Becker, who received it (*id.*).

On January 20, 2017, Becker thanked Dillon for providing the information (DX.BN, MAD00005320-21) and declined Dillon's invitation to visit the Chelsea Apartment (*id.*). Becker and Dillon agreed to consider further whether "an appropriate allocation" was being made for the business use of the Chelsea Apartment (*id.*). That same day, Dillon asked her (and the Gallery's) longtime accountant, Steven Goldglit, to prepare a letter memorializing that "1/3 or less" of her rent had been deducted as a business expense for tax purposes, as reflected the printout she sent

to Becker (DX.BO; T.246:17-21, 247:03-11). Dillon's request mirrored the deductions taken by the Gallery: *i.e.*, less than one-third of the rent from July 2015 to May 2016, and approximately one-third of the rent from June 2016 to May 2017 (DX.BN, MAD00005319).

Goldglit prepared a draft letter attaching the printout that Dillon already sent to Becker and stating that the Gallery took a "one-third" deduction (DX.BM). Because the Gallery actually took deductions of "one third or less," as Dillon previously indicated, Dillon asked her accountant to revise the letter to be more precise (DX.CO; T.194:03-14, 247:08-21). Goldglit prepared a revised letter ("January 24th Letter") (DX.BP) that "was more in line with what was entered through the [previously provided] general ledger and what actually occurred" (DX.T.274:14-20). Dillon's attorney sent the letter to Becker's attorney (DX.BQ, Def. 337-38).

After receiving the January 24th Letter, neither Becker nor his attorneys claimed that the allocation was improper, or that Dillon breached the Allowance Agreement. Becker's testimony that his counsel gave "written notice of Dillon's breach" in a January 27, 2017 email (Becker ¶30) is contradicted by the document Becker misquoted as the basis for that testimony, which shows that Becker's attorney merely asked if there was any overpayment (DX.BQ, Def. 331).

Becker never questioned the information provided by Dillon or her representatives, or requested specific additional documentation that he, or his advisors, needed to further evaluate Dillon's representations. Becker admitted that he could not recall any request for information to which Dillon said "no" (T.96:12-18; *accord* Dillon ¶49). And Becker declined to visit Dillon's apartment when invited (DX.BN, MAD00005320; T.84:13-15).[2]

[2] At trial, Becker testified that he did in fact visit Dillon's apartment at a later date, which Dillon denies. As noted *infra* at n.3, Becker's testimony on this point was not credible.

Becker's silence after January 2017, coupled with his decision to continue payments without offset, reasonably led Dillon to believe that any issue Becker had with the Gallery's use of the Chelsea Apartment had been resolved (Dillon ¶44). With the allowance issues seemingly sorted out and Plaintiffs no closer to completing renovations, Dillon executed a one-year lease extension at $15,300/month, for the period June 2017-May 2018 (DX.N, Def. 232). Each month from March-August 2017, Becker paid Dillon the $10,000 residential allowance in full without indicating any outstanding issues (T.97:18-99:09; PX.31, MAD00012473-74).

F. Plaintiffs Terminate the Monthly Rental Allowance

In September 2017, without notice to Dillon, Becker stopped paying the monthly rental allowance to Dillon's landlord (Dillon ¶47; T.100:11-13). Dillon was not notified of Becker's action until almost two months later, *by her landlord*, who told Dillon that he had not received the $10,000 payment for either September or October 2017 (Dillon ¶47). Alarmed, Dillon immediately reached out to Becker, informing him of the situation and asking that he resume the payments (DX.CA, Def.0280). Becker did not respond (T.128:04-10. 45). Three days later, Plaintiffs sued Dillon for breach of contract and fraud (NYSCEF 1-2; T.96:24-97:05; 97:18-99:09; Dillon ¶50).

Becker testified that he stopped paying the rental allowance because he was "trying to bring this to a head" and wanted "to create a dialogue" (*see* T.108:10-109:05; 112:21-22, 111:03-112:23; 114:01-07 [Q: "What did you do to create a dialogue with Ms. Dillon?" A: "I stopped paying the rent."]). Based on the evidence presented, the Court finds that Becker sought to exert pressure on Dillon – not only to change her rental allocation, but also to consider his buy-out offer with respect to the Option Agreement – by threatening her ability to remain in her home (T.94:22-95:13, 114:01-07).

With the payments terminated, Dillon was unable to pay her rent for the remaining nine months of her lease (DX.N, Def. 232; Dillon ¶57). Dillon scrambled to pay her $15,300 rent in full through November, and was able to pay only a portion of her rent for December (Dillon ¶57; *see also* DX.CU, Def. 621; DX.CT, Def. 544). On or about January 15, 2018, Dillon was forced to abandon the Chelsea Apartment and break her lease, forfeiting her $26,000 security deposit (Dillon ¶57).

Dillon was unable to afford the security deposit for a new apartment (T.239:21-240:02). , In January 2018, she moved her family to an apartment in Brooklyn that a friend, Daniel Lewis (her future husband [*see* NYSCEF 311]), was renting (the "Brooklyn Apartment") (Dillon ¶58). Dillon did not pay rent on the Brooklyn Apartment (T.239-240). She executed promissory notes with Lewis in the amount of $52,165.24 (*see* Dillon ¶58; DX.CH; DX.CN), but has not paid on those notes (T.239-240). Six months later, in June 2018, Dillon moved in with her partner at his home in Lake George, New York (Dillon ¶59). Plaintiffs still have not completed the renovations of the Building (T.337:05-19).

CONCLUSIONS OF LAW

I. Plaintiffs Fail to Prove Breach of Contract

To establish their claim for breach of the Allowance Agreement, Plaintiffs needed to prove (1) the existence of the contract, (2) their own performance under that contract, (3) Dillon's breach, and (4) damages (*e.g.*, *Belle Lighting LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019]). As to the first element, there is no question that the Allowance Agreement is a valid, binding contract (*e.g.*, NYSCEF 355 ¶50; NYSCEF 353 at 10). It is also undisputed that Plaintiffs stopped performing under that contract in September 2017, when they ended the monthly allowance payments to Dillon. Plaintiffs' sole excuse for non-performance

under the Allowance Agreement is Dillon's alleged breach; Dillon's counterclaim for breach of contract is predicated, in turn, on Plaintiffs' non-performance.

So, the dispositive question underlying Plaintiffs' claim as well as Dillon's counterclaim is whether Dillon violated the Allowance Agreement by overstating her "actual residential occupancy rental costs." Plaintiffs contend that Dillon breached the Allowance Agreement in two ways, by (a) failing to provide required documentation and (b) misusing the monthly rental allowance to fund her business's expenses.

A. Failure to Provide Documentation

Plaintiffs did not establish at trial that Dillon's failure to provide them with certain documentation, such as "subleases, appraisals, [or] analyses," constituted a breach of the Allowance Agreement. The Allowance Agreement requires Plaintiffs "to pay to Valerie a monthly rental allowance . . . of Valerie's actual residential occupancy rental costs, **as indicated by appropriate leases, occupancy agreements, licenses, bills and receipts**" (DX.H, Def. 136 [emphasis added]). Dillon obliged Plaintiffs' repeated requests for such documentation. When Plaintiffs sought to validate the amount of the monthly rental allowance in light of Dillon's commingled space, Dillon provided Plaintiffs with copies of her lease, lease extensions and riders, along with printouts and letters attesting to the allocation of space in the Chelsea Apartment (Dillon ¶¶37, 41-42). As Becker admitted, he could not recall making any request for information to which Dillon said "no" (T.96:12-18; *compare with* Becker ¶32 ["Her response was always 'no.'"]).

The additional documents that Plaintiffs sought are not grounds for breach of the contract. It does not appear, for example, that a separate "sublease[ ]" existed between the Gallery and the apartment's landlord (Dillon ¶29; DX.BQ, Def.0340 ["You have indicated

[Dillon] is not subletting and has not sublet space at that address"]), so Dillon's failure to provide such a document cannot constitute a breach of the Allowance Agreement (*see* T.197 [DILLON: "[T]he lease. . . That was proof of what I was expensing."]). And the idea of an independent appraisal or analysis of the Chelsea Apartment arose in discussions between the parties in 2016 and 2017 (DX.BQ, Def.0340 ["Our thinking is that an appraisal of monthly market value . . . would be useful in determining the monthly rental value of the portion of the leasehold used as personal residential space."]; DX.BQ, Def.0346 ["To confirm and follow up on our last discussion . . . We agreed that substantiation will be promptly provided"]). The contract itself does not require Dillon to provide such extraneous forms of verification.

B. <u>Dillon's Use of the Monthly Rental Allowance</u>

1. Dillon's allocation was not proven to breach the Allowance Agreement.

Plaintiffs also failed to establish that the monthly rental allowance exceeded Dillon's "actual residential occupancy rental costs" for any period. Dillon's allocation of rent in the Chelsea Apartment – roughly one-third business, two-thirds residential – reasonably approximated her actual use of the space. Part of one floor, in her three-floor apartment, was used to conduct Gallery business (Dillon ¶¶21, 27; T.195:9). In terms of square footage, which is generally the metric favored by the IRS when evaluating the propriety of a home-office tax deduction (T.283:19-287:05), Dillon used about 600-800 square feet of her 2,700 square-foot apartment for the Gallery (Dillon ¶¶21, 27; 291:14-18). In other words, had the parties conducted a square-footage analysis to validate the monthly rental allowance, Dillon's reimbursable residential costs still would have been over $10,000/month. And once Dillon's various other residential occupancy costs are factored in (*e.g.*, DX.N, Def.0229 [rider to lease explaining that "Tenant is responsible for paying all other utilities including electric heat."]), it

does not appear that the monthly rental allowance ever eclipsed Dillon's true "residential occupancy rental costs."

Dillon's home office carved out a portion of what was, first and foremost, a *residential* space. When Dillon began living in the Chelsea Apartment in 2013, she was paying $13,000/month in rent and using the entire space for residential purposes. It was not until almost two years later, when the Gallery's brick-and-mortar space was shuttered, that Dillon looked to convert part of the apartment into a home office. And even then, after Dillon established the home office in 2015, her family would occasionally still use the first floor for nonbusiness purposes (T.175:04-15; 248:02-12). That did not change until 2016 – three years after Dillon first moved into the space. In other words, this is not a situation in which Dillon rented a $13,000 per month *commercial* space, and then later tried to defray the cost of that space by moving in and seeking reimbursement under the Allowance Agreement. The Chelsea Apartment was first and foremost Dillon's residence.

To cast doubt on Dillon's stated allocation, Plaintiffs latch on to indirect evidence, such as tax returns and the prices on other apartments in the neighborhood, to infer an inconsistency in Dillon's use of the monthly rental allowance. None of these arguments, however, proves that overpayment occurred. Start with the Gallery's taxes. Under the tax estoppel doctrine, "[a] party to litigation may not take a position contrary to a position taken in an income tax return" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]). In its 2015 tax returns, the Gallery claimed a tax deduction for rent in the amount of $157,190 (PX.17). From that figure, Plaintiffs deduce that Dillon's residential rental expenses for the second half of that year could not have been more than $4,112.55. The argument goes like this. In 2015, the Gallery existed in two different places – the West 25th Street location for the first half of the year, and the Chelsea

Apartment for the latter half. Monthly rent at West 25th Street was $16,319.88 (PX.15), or a six-month total of $97,919.28. If the remainder of the rent deduction ($59,270.72) corresponded to rent paid by the gallery for the rest of the year, then the Gallery was paying $9,887.45/month in rent at the Chelsea Apartment. Since *total* rent in the Chelsea Apartment that year was $14,000 per month (PX.14), the difference ($4,112.55/month) must (according to Plaintiffs) represent Dillon's actual residential rent for the second half of 2015. And because Plaintiffs were paying Dillon $10,000/month, that would imply an overpayment of $5,884.45/month, a total of $35,306.70 for the year.

The key to Plaintiffs' tax estoppel argument is accepting that whatever part of the tax deduction was not paid as rent for the first half of 2015 was necessarily paid as rent for the second half of 2015. But that assumption was not proven at trial. Dillon's accountant, Goldglit, explained that the gallery's general ledger as of December 31, 2015 ("General Ledger") shows the $157,190.11 entry on the Dillon Gallery's 2015 tax return was attributable to three categories of business rent expenses: (i) $104,364.48 (not $96,000) to rent at the 25th Street Gallery; (ii) $28,825.63 retained by the landlord at the 25th Street Gallery security deposit; and, importantly, (iii) $24,000.00 to Dillon's home office (*see* Goldglit ¶16; DX.MM, Goldglit 000778-79; T.276:15-279:05; T.281:12-21 [affirming that $157,000 in rent was accurate when 2015 tax return was prepared]). That means Dillon attributed $4,000/month to Gallery rent for the second half of 2015, in line with residential costs of $10,000/month.

Plaintiffs did not adduce competent evidence proving that Dillon manipulated the 2015 tax deduction to produce a favorable result in this litigation. No accounting expert was put forward to analyze the Gallery's tax returns. While Plaintiffs themselves questioned Goldglit about the returns – probing individual components such as utilities and security deposit –

Goldglit responded that such costs were properly attributable to rent (T.260:16-261:12.7; 268:14-22). The Court found Goldglit's testimony to be credible.

Plaintiffs' slapdash valuation of the Chelsea Apartment also failed to prove overpayment. Becker testified that he "was advised that the market rental value of the space Ms. Dillon was using as a residence . . . was about $6,000 per month," which apparently alerted him that the monthly rental allowance was excessive (Becker ¶40). Whatever advice Becker received, its probative value in this case is zero. Dillon was not required by the contract to allocate her expenses based on the fair market value of each floor as if it had been rented as a separate and distinct unit. Rather, she reasonably allocated the rent based on her approximate use of the space, consistent with the contractual obligation to reimburse her for "*actual* residential occupancy rental costs." But even assuming the fair market value of the space was somehow relevant, the shoddy methodology involved in estimating that value rendered it useless. The real estate broker who advised Becker on the value of the Chelsea Apartment never actually visited the Chelsea Apartment, nor did he know Dillon's specific address when he provided the advice (PX.30; Tr.119:17-21). Instead, the broker provided a handful of prices for two-bedroom apartments in the Chelsea area, even though Dillon's apartment had three bedrooms, not two (T.122:04-15). Becker conceded, moreover, that the most analogous market data provided by the broker – *i.e.*, the estimated cost of a ground floor live/work space without a garden ($5,000) – was comparable to the allocation Dillon used (PX.29; T.126:02-23). In a nutshell, Becker's self-serving "valuation" is not credible.[3]

[3] Becker backed away from the suggestion that he ended the monthly allowance because of what he saw on a supposed visit to the Chelsea Apartment in 2017 (T.107:8-11 [Q: "[W]as it because of your visit to the apartment that you reached out to the real estate broker?" A: "I – I can't say that one caused the other."]). Just as well, because Becker's recollection about the visit was not credible. Becker testified that on that visit, "Dillon showed [him] the backyard garden, which

Becker's stated justification for breaching the Allowance Agreement – the purported need "to create a dialogue" – is unavailing, and in fact undermines the credibility of Plaintiffs' position on the merits. Becker and Dillon were in frequent "dialogue" about issues relating to the Building and the Chelsea Apartment for years (T.104:19-22), with Dillon promptly responding to Becker's past inquiries about her use of the Chelsea Apartment (*see* DX.BN, MAD00005318- 19; DX.BM, Def. 360; DX.BQ, Def. 337-38). Becker's termination of the monthly rental allowance burned those lines of communication: he did not inform Dillon that her rent was no longer being subsidized, and when asked to explain, opted to sue her. Instead, the evidence suggests that Becker's decision was driven, at least in part, by a desire to jettison Dillon's valuable Option right. In his testimony, Becker linked the Allowance Agreement dispute with the dispute over Dillon's Option, as part of "a slow rolling ball" that ultimately led to his decision to unilaterally end the rent payments (T.95:3-7 ["I think this is just a slow rolling ball. . . . The differen[t] ideas about trying to value her rental allowance agreement **or the option agreement**. The attempts to finance the building differently by having her become an equity partner. These were all fluid and long, extended discussions."] [emphasis added]). Plainly, Becker sought leverage here, not an evenhanded commercial "dialogue."

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she mentioned was used as a social space to entertain prospective clients" (*id.*). But Dillon testified that this visit did not, and could not, have happened, because she was away from New York City (T.298:15-299:25). Dillon explained that she would not and could not have shown Becker the "backyard garden," which was not part of her apartment and could not be accessed from her apartment, despite Becker's recollection that the garden was accessible via a "stairway" or "hallway" (T.105:11-24). Despite its relevance to the case, Becker did not mention the visit when deposed on the topic in June 2018, less than a year after it supposedly occurred (T.103:23-104:18). Becker also identified no record – no emails, texts, or calendar invitations – reflecting the "visit" (T.105:02-10). In short, the Court doubts such a visit took place.

2. Any breach by Dillon was, in any event, immaterial.

Even if Dillon did breach the Allowance Agreement by accepting incrementally more money per month than her "actual residential occupancy rental costs" allowed, and the Court finds that she did not, such breach was immaterial and therefore did not excuse Plaintiffs from performing their end of the bargain. Under New York law, an immaterial breach constitutes substantial performance of a contract and does not excuse the counterparty from performing (*see N450JE LLC v Priority 1 Aviation, Inc.*, 102 AD3d 631, 632 [1st Dept 2013]). Factors relevant to substantial performance include the absolute and relative magnitude of the breach, the willfulness of the breach, its effect on the contract's purpose, and the degree to which the counterparty benefited under the contract (*see Hadden v Consol. Edison Co. of New York*, 34 NY2d 88, 96 [1974]).

Supposing that Dillon's one-third allocation resulted in a total overpayment of $7,333.37 over the course of 11 months (*i.e.*, $666.67 per month),[4] that figure represents less than *one* monthly payment under an agreement requiring payments since August 2013 (*i.e.*, 89 months), and constitutes 1.5% of the total amount paid ($490,000) and 0.8% of the total amount due and owing ($890,000, and counting) (*see Savasta v Duffy*, 257 AD2d 435, 436 [1st Dept 1999] [defendant's breach of million-dollar contract due to his failure to disclose a $4,400 assessment was immaterial]; *Nature's Plus Nordic A/S v Nat. Organics, Inc.*, 980 F Supp 2d 400, 411 [ED NY 2013] [breach immaterial where defendant was approximately $3,000 short of the contractually-required amount of $600,000]). Any breach by Dillon was neither willful nor impacted the purpose of the contract, which was to compensate Dillon until she could exercise

[4] The rent for the Chelsea Apartment was $14,000/month from July 2015 to May 2016, so a strict one-third allocation during that period would have meant that Dillon was due $9,333.33/month for those 11 months, not $10,000/month (*see* PX.24; PX.14).

her Option. Dillon reasonably believed there was no overpayment (*see* T.154:07, 177:13, 196:20-25), and had no reason to suspect otherwise. She provided Plaintiffs with all requested information (DX.BN, MAD00005318- 19; DX.BM, Def. 360) and explained the business allocation (DX.BQ, Def. 337-38). Dillon invited Becker to view the apartment, which he declined (DX.BN, MAD00005320; T.84:13-15). In any event, as noted, any purported overpayment could have – and should have – been addressed by Plaintiffs offsetting the amount from a single month's payment (T.142:12-22).

Therefore, Plaintiffs' claim for breach of contract is dismissed.

II. Plaintiffs Fail to Prove Unjust Enrichment

Plaintiffs' unjust enrichment claim fails, for two reasons. First, this claim duplicates the breach of contract claim. The "existence of a valid contract governing the subject matter precludes recovery in quasi-contract for events arising out of the same subject matter" (*EBCI, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 23 [2005]). Plaintiffs concede that the Allowance Agreement is valid and binding. Even if Dillon were overpaid – and, in the Court's view, she was not – that overpayment constitutes a breach of the contractual obligation to "accurately disclose [her] residential cost[s]" (T.153:18-23; *see also* T.307:07-308:04). Accordingly, Plaintiffs have no viable claim for unjust enrichment (*see Andrews v Cerberus Partners*, 271 A.D.2d 348, 348 [1st Dept 2000] [dismissing "indistinguishable" unjust enrichment claim]). Second, for the reasons stated in Part I, *supra*, the unjust enrichment claim is also deficient on the merits. There is no evidence that Dillon was enriched by the monthly rental allowance beyond her actual residential rental costs (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

Therefore, the claim for unjust enrichment is dismissed.

III. Plaintiffs Fail to Prove Fraud

Likewise, Plaintiffs also failed to prove their fraud claim, both as a matter of law and on the evidence presented. First, it is well-settled that a cause of action for fraud does not arise, where, as here, the only fraud alleged relates to a contracting party's alleged intent to breach a contractual obligation (*Orix Credit Alliance, Inc. v R.E. Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998]). Plaintiffs' fraud and contract claims are essentially identical, as both claims allege that Dillon breached her duty to accurately report her Residential Costs. Plaintiffs thus have not proven that "a legal duty independent of the contract itself has been violated" (*Moustakis v Christie's, Inc.*, 68 AD3d 637, 637 [1st Dept 2009]).[5]

Second, even setting aside the claim's duplicative nature, Plaintiffs failed to prove the elements of a fraud claim. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 [2009]). "The burden of proving fraud at trial is one of clear and convincing evidence, and not mere preponderance" (*Abrahami v UPC Const. Co.*, 224 AD2d 231, 233 [1st Dept 1996]). Plaintiffs have not proven any misrepresentation or omission. Nor have they proven that Dillon acted with knowledge or reckless disregard of the purported falsity of any

[5] Dillon's testimony does not change this result. On cross-examination, Plaintiffs' counsel asked Dillon whether, "separate and apart from [the Allowance Agreement], you understood you had a duty to Mr. Becker to be truthful with him if he or his entity was paying $10,000 to you" (T.153:21-154:3). Dillon answered in the affirmative (*id.*). But Dillon's answer, as a lay witness, cannot be taken as a binding legal conclusion (*see Davis v City of New York*, 959 F Supp 2d 427, 435 [SD NY 2013] ["neither expert nor lay witnesses may present testimony in the form of legal conclusions"], citing *Cameron v City of New York*, 598 F3d 50, 62 [2d Cir 2010]). Ultimately, it is up to the Court to determine whether, as a matter of law, Plaintiffs established the existence of a legal duty independent of the contract.

representation or omission; that Dillon intended to deceive and induce Plaintiffs when she made an alleged misrepresentation or omission; or that Plaintiffs reasonably relied on Dillon's alleged representation or omission.

Therefore, the claim for fraud is dismissed.

IV. Dillon Proved Her Counterclaim for Breach of Contract

A. Plaintiffs Breached the Allowance Agreement

Dillon established, by a preponderance of the evidence, each element of her claim for breach of contract: (1) the existence of a contract; (2) her performance under that contract; (3) Plaintiffs' breach; and (4) damages (*e.g.*, *Belle Lighting LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019]). Plaintiffs' sole excuse for non-performance under the Allowance Agreement is Dillon's alleged breach. For the reasons stated in Part I, *supra*, the Court finds that Dillon did not breach the Allowance Agreement. Therefore, Plaintiffs have no defense for failing to reimburse Dillon starting in September 2017, and Dillon therefore prevails on her counterclaim for breach of the Allowance Agreement.

B. Calculating Dillon's Damages

On the question of damages, Dillon "bears the burden of proving the extent of the harm suffered" (*J.R. Loftus, Inc. v White*, 85 NY2d 874, 877 [1995]). "[T]he general measure of damages in a breach of contract case under New York law" is "expectation damages," which "put[] plaintiff in the same economic position [s]he would have occupied had the breaching party performed the contract" (*Emposimato v CICF Acquisition Corp.*, 89 AD3d 418, 421 [1st Dept 2011]; *see Coventry Enterprises LLC v Sanomedics Intl. Holdings, Inc.*, 191 F Supp 3d 312, 321 [SD NY 2016] ["damages for breach of contract should put the plaintiff in the same economic position he would have occupied had the breaching party performed the contract"], *quoting*

Oscar Gruss & Son, Inc. v Hollander, 337 F3d 186, 196 [2d Cir 2003]). In other words, "a plaintiff alleging breach of contract is entitled to damages restoring the full benefit of the bargain" (*Kumiva Group, LLC v Garda USA Inc.*, 146 AD3d 504, 506 [1st Dept 2017]).

Under New York law, "we look to what would most probably have occurred if [defendant] had performed as required by the contract" and "note that certainty as to the amount of damages is not required, **particularly when it is the defendant's breach that has made such imprecision unavoidable**" (*Commonwealth Assocs. v Palomar Med. Techs., Inc.*, 982 F Supp 205, 208 [SD NY 1997] [emphasis added]; *see Gottesman & Co. v Int'l Tel. & Tel. Corp.*, 102 AD2d 407, 409-11 [1st Dept 1984] [awarding damages for future sales that would have occurred absent defendant's interference]). That said, "[w]hile a plaintiff may recover damages when the measure of damages is unavoidably uncertain or difficult to ascertain, a reasonable connection between a plaintiff's proof and a [fact finder's] determination of damages is nevertheless necessary" (*J.R. Loftus, Inc.*, 85 NY2d at 877).

Here, the Court finds that Dillon proved she incurred $136,000 in damages, an amount that comprises (1) the value of Plaintiffs' remaining monthly rental allowance obligations under the 2017-2018 lease ($90,000), (2) the value of the security deposit that Dillon forfeited as a result of Plaintiffs' breach ($26,000), and (3) the value of the foregone monthly rental allowances for June and July 2018, when Dillon would have remained in the Chelsea Apartment (or a comparable rental) but for Plaintiffs' breach ($20,000).

As a starting point, Dillon is entitled to $90,000 in damages, plus incidental costs, to give her the full benefit of the bargain she struck with Plaintiffs to subsidize her rent under the 2017-2018 lease. Dillon bargained for the right to receive the allowance for residential costs "as indicated by appropriate leases, occupancy agreements, licenses, bills, and receipts." Dillon's

one-year lease extension "indicated" that her rent costs for the period June 2017-May 2018 would be $15,300/month (DX.N, Def. 232), meaning that she was entitled to a $120,000 rent subsidy over the coming year. Becker paid Dillon $30,000 of that obligation – $10,000/month in June, July, and August 2017 (T.97:18-99:09; 31, MAD00012473-74) – and then stopped performing. Plaintiffs' own records confirm their obligations were ongoing. Madison's balance sheets recorded, as "Valerie Best Payable", a current liability of $80,000.00 for the 8 months after September 2017 in anticipation of owing what it characterized as a "Monthly Fee" (PX.31, MAD00012514; DX.CJ, MAD00007983-84). Because Plaintiffs paid only $30,000 of the full $120,000 obligation for the period June 2017-May 2018, Dillon would have received $90,000 in additional benefit had Plaintiffs performed under the Allowance Agreement. In addition, Dillon would not have forfeited her security deposit ($26,000) if Plaintiffs' breach had not forced her to break her lease early. Therefore, Dillon is entitled to $116,000 as expectation damages for the period running through May 2018.

Dillon is also entitled to expectation damages for June and July 2018. The evidence at trial showed that but for Plaintiffs' breach, Dillon would have received the full $10,000/month rental allowance for those months because she would have either renewed her lease for the Chelsea Apartment or rented a comparable apartment to maximize her rent subsidy. Dillon had already signed three one-year renewals for the Chelsea Apartment in 2015, 2016, and 2017, calibrated to Plaintiffs' delays in completing renovations (DX.N, Def. 224; DX.BE; T.43:05-12; Dillon ¶12). She was prevented from reaching the next renewal date in the lease because of Plaintiffs' improper termination of the monthly rental allowance. Therefore, for June and July 2018, Dillon is entitled to $10,000/month to give her the benefit of what she would have received

if Plaintiffs' performed their contractual obligations. That raises Dillon's total damages to $136,000.

To the extent Plaintiffs argue that Dillon's damages figures are based on undocumented expenses, the argument is unavailing. Prior to Plaintiffs' breach of the Allowance Agreement, Dillon had an obligation to "indicate[ ]" her true residential costs. But when Plaintiffs repudiated these ongoing obligations in September 2017, they relieved Dillon of her obligation to indicate residential costs under the Allowance Agreement, thereby obligating Plaintiffs to pay Dillon the full amount of the allowance, or $10,000/month (*see Am. List Corp. v U.S. News & World Report, Inc.*, 75 NY2d 38, 43-45 [1989] [defendant's breach "relieves the nonrepudiating party of its obligation of future performance and entitles that party to recover the present value of its damages from the repudiating party's breach of the total contract"]); *accord Long Island R. Co. v Northville Indus. Corp.*, 41 NY2d 455, 466-68 [1977] [same]).

However, Dillon did not prove that she suffered damages from July 2018 to the present (*see* Dillon ¶60 ["I incurred no rent-related costs after July 2018"]). Damages must be "directly traceable to the breach, not remote or the result of other intervening causes" (*Kenford Co., Inc. v Erie County*, 67 NY2d 257, 261 [1986]; *Natl. Mkt. Share, Inc. v Sterling Nat. Bank*, 392 F3d 520, 525 [2d Cir 2004] ["Damages for breach of contract must be such only as actually follow or may follow from the breach of the contract."]). Once Dillon moved to a home in Lake George, New York, with no rental expenses, the chain of causation from Plaintiffs' breach becomes too attenuated to support damages. Up to that point, Dillon was harmed because she would have, but for Plaintiffs' breach, continued to rent the Chelsea Apartment that she preferred. Thus, she was deprived of the benefit of the $10,000/month rental allowance to which she was contractually entitled. But the move to Lake George was not proven to be a direct consequence of Plaintiffs'

breach: the but-for cause of that change in living arrangement was Dillon's "enter[ing] a personal relationship that made it unnecessary for [her] to incur additional rent-related expenses" (Dillon ¶60). Therefore, Dillon is not entitled to damages after July 2018 to the present.[6]

* * * *

Accordingly, based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED AND ADJUDGED that Plaintiffs' claims for breach of contract (first cause of action), unjust enrichment (second cause of action), and fraud (fourth cause of action) are dismissed with prejudice; it is further

ORDERED AND ADJUDGED that Defendant has prevailed on her fourth counterclaim for breach of contract; it is further

ORDERED AND ADJUDGED that judgment shall be entered against Plaintiffs and in favor of Defendant in the amount of $136,000, plus prejudgment interest at the statutory rate from January 15, 2018 (the mid-point between September 1, 2017 and July 31, 2018); and it is further

ORDERED that the Clerk of the Court enter judgment accordingly.

This constitutes the Decision and Order of the Court.

3/22/2021
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

[6] This decision does not address Dillon's entitlement to payments under the Allowance Agreement with respect to any *future* rent-related costs.