STATE OF MAINE
SAGADAHOC, ss.

BUSINESS & CONSUMER DOCKET
LOCATION: West Bath
DOCKET NO. BCD-WB-CV-08-24

BLACK BEAR DEVELOPERS, LLC,
ET AL

Plaintiffs

v.

DECISION AND ORDER

KEVIN LACROIX, ET AL,

Defendants

This matter was tried before the court without jury on the combined Counterclaims and Third–Party claims of Defendant/Counterclaim–Plaintiff/Third–Party–Plaintiff Consolidated Plumbing and Heating, LLC ("Consolidated") against Plaintiff/Counterclaim–Defendants Black Bear Developers, LLC ("Black Bear") and Bauer & Gilman Construction, LLC ("B & G"); and against Third–Party Defendant Racala, Inc. ("Racala"). More particularly, Consolidated has brought (i) counterclaims against B & G for Breach of Contract (Count I), Account Stated (Count III), and Violation of Maine's Prompt Payment Act (Count IV); (ii) counterclaims against Black Bear for Unjust Enrichment (Count V) and Quantum Meruit (Count VI); and (iii) third-party claims against Racala for Unjust Enrichment (Count V) and Quantum Meruit (Count VI).[1] The facts, below, are based on evidence that this court finds credible.

[1] Before trial, Plaintiffs Black Bear and B & G resolved all of the claims in their Complaint against all of the Defendants: Consolidated, Kevin LaCroix, Wallace Wooster and Builder Services Group, LLC. As a result, this case proceeded to trial on the Counterclaims of Consolidated against Black Bear and B & G, and on the Third-Party Complaint of Consolidated against Racala. The claims in Counts V and VI of the Counterclaims against Black Bear were combined with and are the same as the claims in the identically numbered counts of the Third–Party Complaint. The parties have stipulated to the dismissal of Count II of the Counterclaims and of the Third–Party Complaint.

FINDINGS

Black Bear is owned by Racala and PTG Properties, Inc. ("PTG"). B & G is owned by Allen Bauer and his wife Connie Bauer, and by Peter Gilman and his wife Tammy Gilman. At the times relevant to this litigation, Black Bear was the owner and developer of a residential condominium project at Sugarloaf Mountain in Carrabassett Valley, Maine, called Black Bear Lodges at Sugarloaf. B & G was the general contractor. The project contemplated four buildings: Building A housing Units 1–4; Building B housing Units 5–9; Building C housing Units 10–16; and Building D housing Units 17–22. As of the trial of this case, three buildings (A, B, and D) had been built.[2]

Building B was the first to be constructed. B & G hired Todd Hamilton of Hamilton Plumbing & Heating ("Hamilton") to do the plumbing, heating, and sprinkler work on this building. They had an oral agreement under which Hamilton was to be paid a flat rate of $21,000 per Unit for the plumbing, heating, and sprinkler work. In addition, the parties agreed to an additional flat rate per Unit for each furnace ($5,100), hot water heater ($1,800), basement bathroom ($2,500), and basement heating system ($2,000) that Hamilton installed at the direction of the general contractor.

In turn, Hamilton hired Consolidated as a subcontractor to install the sprinkler system. However, in time Consolidated was asked take over all of the plumbing, heating and sprinkler work for the same flat rates originally negotiated with Hamilton. Consolidated successfully finished Building B and its five Units to the satisfaction of the developers, and was fully paid for its work.

Wallace Wooster and Kevin LaCroix were the principals of Consolidated. Mr. Wooster had a journeyman's license to do plumbing, heating, and sprinkler work. Mr. LaCroix was a

[2] Building B was constructed first, then Building D, and, finally, Building A.

master plumber and primarily responsible for obtaining permits necessary for Consolidated's work. Most of the actual work by Consolidated on the Black Bear project was done by Mr. Wooster, who was also Consolidated's primary contact with the general contractor. Mr. LaCroix's responsibility was to inspect Mr. Wooster's work from time to time.

B & G also hired Consolidated to do the plumbing, heating and sprinkler work on Building D and its six Units 17–22. The parties did not have a written contract. However, they had an oral agreement that Consolidated would be paid to do the same type of work at the same flat rates as on Building B. Although the parties disagree as to whether they ever discussed a schedule for the completion of Consolidated's work on Building D, the credible evidence is that B & G told Consolidated at the time Consolidated was hired to work on Building D that Units 17-22 needed to be completed by Thanksgiving so that they could be shown to prospective buyers and sold in time for the 2007-2008 ski season.[3] Consolidated assured B & G that its part of the work on those Units would be completed in time for other contractors to do their work and meet that schedule.

Consolidated began its work on Building D in the spring of 2007. In late summer of that year, B & G first expressed concern that Consolidated was not performing its work in a timely manner and was not spending sufficient time on the project. B & G became more concerned in early Fall 2007. Mr. Bauer of B & G told Mr. Wooster that Consolidated was holding up other contractors and was putting Building D's completion schedule in jeopardy. Mr. Wooster reaffirmed that Consolidated would complete its work so that the Units could be finished and shown prior to the ski season. Although Mr. Wooster did not complain to B & G, then or at any

[3] It is relevant to court's assessment of the parties' differing memories of their conversations that all the scheduling discussions with the general contractor B & G were by Wallace Wooster, one of the principals of Consolidated. At trial, Mr. Wooster noted during his testimony that his memory was not good on some things because of medical treatments he was undergoing prior to and during the trial. In addition, he also testified that he did not keep a record of when he did particular work on the project.

other time, that anything or anyone, including any contractors, interfered with or prevented Consolidated from completing its work in a timely manner, at trial he testified that delays in the project were attributable to the sheet rockers, painters, and electricians.

By October 2007, Mr. Wooster sensed that his working relationship with B & G was breaking down. Although Consolidated's work was not done, he wanted the general contractor to pay his fixed rates for the furnaces for the six Units in Building D. On October 26, 2007, Consolidated submitted an invoice for $30,600 for the installation of furnaces in Units 17 through 22. (Stip. Exh. 2.) B & G paid the invoice in full.

In November 2007, Consolidated walked off the job for the first time because, in Mr. Wooster's view, he (Mr. Wooster) was "bull-headed" and was upset that Mr. Bauer and Mr. Gilman were calling him so frequently about his work on the project. On November 10, 2007, after the walk-off, Consolidated sent two invoices to B & G. One was for one-half of Consolidated's quote for fixed fees and for extras relating to Unit 22 totaling $14,150. (Stip. Exh. 3.) This sum included $12,150 for the complete rough–in of Unit 22. The other invoice was for roughing–in the basement for Unit 20 totaling $1,250. (Stip. Exh 4.) B & G promptly paid both invoices, but soon discovered that the rough-in work for Unit 22 was not complete and, in fact, had barely been started.

B & G's then–attorney, James Barns, sent a letter to Consolidated on November 20, 2007, complaining that Mr. Wooster misrepresented that the rough–in work for Unit 22 was complete. (Stip. Exh. 26.) Attorney Barns also indicated that the "matter needs to be corrected immediately," but also informed Consolidated that it "was no longer allowed on the premises for any reason" until arrangements were first made with Mr. Bauer. (Stip. Exh. 26.) On November 26, 2007, Consolidated's then–attorney, Paul Copeland, faxed a response to Attorney Barns that

Mr. Wooster maintained that the rough-in was complete. (Stip. Exh. 27.) However, at trial, Mr. Wooster acknowledged that the rough-in was not complete when the November 2007 invoices were sent and was still not complete when Consolidated walked off the job a second and last time around Christmas 2007.

On November 26, 2007, in response to Attorney Copeland's fax, Attorney Barns wrote to Attorney Copeland complaining about Consolidated's walk–off and advising that the plumber's absence was "creating a tremendous burden on the developer in terms of time and costs[.]" (Stip. Exh. 28.) Attorney Barns urged Attorney Copeland to encourage Consolidated to return to the project ("...the sooner that he can get back on the job, the better"). (Stip. Exh. 28.) Attorney Barns also indicated that the plumbing, heating, and sprinkling work on Units 18 and 21 had not yet begun, and the work on Units 19 and 20 was not complete. The unfinished work included "furnaces, connecting water, sinks, heat, etc.." (Stip. Exh. 28.) The rough-in of Unit 22 was also not finished. Consolidated returned to the project.

In December 2007, B & G hired Eric Gay, a home inspector, to inspect Units 17-22 and identify all the work remaining to be done. Mr. Gay went to the work site on December 7, 2007, but his inspection was limited because of the overall lack of completion of the work on the units. Only Unit 19 was sufficiently complete to permit a meaningful inspection report. (*See* Stip. Exh. 12.) At that time, the basement bathtub and sink fixtures in Unit 19 had not been installed, the sewage pump was not functional, the plumbing was not working, the light fixtures and mirror in the second floor bathroom had not been installed, the backsplash on the first floor sink needed to be caulked, the intake air kit for the boiler was not properly installed, the sprinkler heads were missing their trim covers, the baseboard heat was missing end caps, and the baseboard trim needed to be secured. (Stip. Exh. 12.)

Two weeks later, on December 21, 2007, Mr. Gay returned to re-inspect Units 17-22. He focused on Units 19-21 because they were under contract to be sold and B & G was trying to finish them so that closings could be scheduled and the sales consummated. At the time of Mr. Gay's second inspection, the work in Unit 19 was still not complete: the plumbing was not working; the ice-maker was not connected; the pressure relief valves and back-flow valves needed to be piped toward the floor; the basement thermostats needed to be installed; and the basement heat needed to be connected. (Stip. Exh. 13.)

Mr. Gay noted similar concerns with the boiler work in Units 19-21. (Stip. Exh. 13.) The boiler wiring needed to be secured, the air intakes were not installed, the horizontal run was not properly pitched, the control and junction boxes needed covers, and, in his estimation, the foil tape work was sloppy. (Stip. Exh. 13.) In Unit 21, in addition to the fact that the boiler was not properly installed, the ice-maker was not connected, the dishwasher and disposal did not work, the dishwasher door was missing a face plate, the toilet was not square on the second floor, the second floor bathtub was missing a drain stop, and several sprinklers were missing trim caps. (Stip. Exh. 13.) Further, all six of the Units in Building D were missing exterior faucets, and the plumbing vent stacks for Units 17-22 were dead-ended into the attic instead of being connected through the roof and piped outside. (Stip. Exh. 13.) Moisture and condensation, attributable in Mr. Gay's opinion to venting into the attic, formed on the rafters, sheathing, insulation and gypsum firewall, as well as white, black and green mold throughout the attic particularly in the area above Units 19 and 20. (Stip. Exh. 13.)

Mr. Gay also noted that the flex tubing installed by Consolidated in the attic spaces for the sprinklers was coiled above the insulation. (Stip. Exh. 13.) To avoid freezing, the tubing is supposed to lay flat underneath the insulation. It was also later discovered that the boiler in Unit

19 was connected to a garden hose instead of a permanent water feed, which caused the boiler to fail. (Stip. Exh. 13.) Mr. LaCroix admitted that during his inspection of Mr. Wooster's work he did not notice that the boiler in Unit 19 was not connected to a permanent water feed or that the building's vent pipes were dead-ended in the attic, and that the sprinkler tubing was coiled above the insulation.

In the face of the defects noted by Mr. Gay and the work remaining to be done, Consolidated and B & G had a disagreement regarding payment for work Consolidated believed was already done and payment for work remaining to be done. Consolidated left the project for a second and final time in late December 2007, around Christmas, and did not return.[4] On January 14, 2008, Attorney Barns wrote to inform Attorney Copeland that "a number of furnaces in both buildings B and D have failed and [Mr. Wooster's] services are needed to repair these furnaces." (Stip. Exh. 29.) Neither Consolidated, nor its attorney replied to Attorney Barns' letter and Consolidated never returned to repair the furnaces.

B & G hired other contractors to correct and complete Consolidated's work. B & G hired Hamilton to do some of the work that Consolidated had not finished at a cost of $8,198.64. B & G also hired Kevin Ritzi of Bob White Heating to do some of the unfinished plumbing and heating work in Units 17-22, including permanently connecting the boiler in Unit 19 to the water feed and fixing a shower drain that Consolidated had not properly installed and sealed. B & G paid Bob White Heating $12,318.21 for this work.[5] (*See* Stip. Exhs. 14–17.)

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[4] When Consolidated finally left the project, Units 19, 20 and 21 were under contract for sale and occupied. By the end of December 2007, Unit 18 was also under contract and occupied. To keep from losing the anticipated sales of these Units, Black Bear allowed the prospective buyers to occupy them even though they were unfinished and the closings had not been held. By the end of January 2008, Black Bear closed on Units 19, 20 and 21. By the end of February 2008, it closed on Unit 18.

B & G hired Sugarloaf Mountain Corporation to repair the basement shower in Unit 18 and to patch and paint Unit 17 because of a waste line leak at a cost of $488.70. B & G paid Dry Wall Services, Inc., $1,250 to rehang, patch, tape, and repair damage to sheetrock in Unit 22 caused by Consolidated during its work in that Unit. B & G also paid Quality Insulation $1,080 to re-insulate the attics in Units 17-22 after the insulation was disturbed while fixing the sewer vent pipes that Consolidated had improperly dead-ended in the attics. The insulation also needed to be fixed because Consolidated had installed the sprinklers improperly, coiling the flex tubing instead of laying it flat. Further, because Consolidated had failed to provide permanent heat to the units during the winter, B & G rented a temporary space heater from Mountain Valley Gas at a cost of $315.[6]

On February 11, 2008, Consolidated sent six separate invoices to B & G for Units 17 through 22, respectively. (Stip. Exhs. 5–10.) In Mr. Wooster's words, these invoices were a reconciliation that reflected charges for all of the work Consolidated was hired to do on Building D under its agreement with B & G, plus charges for extra work and credits for payments made. However, those invoices do not reflect all of the work that was actually done, or done correctly.

The invoices for Units 17 through 20 each itemized the flat rate quote of $21,000 for all of the plumbing, heating and sprinkler work, plus additional flat rates for installing a hot water heater ($1,800), a basement bathroom ($2,500), and a basement heating system ($2,000). (Stip. Exhs. 5–8.) The invoice for Unit 21 was nearly identical, but did not include a flat rate charge for installation of a basement bathroom. (Stip. Exh. 9.) After adding charges for additional labor

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[5] Bob White Heating also submitted two additional invoices to B & G totaling $586.76. (*See* Stip. Exhs. 18-19.) However, these charges included work on Unit 7 in Building B and the evidence is insufficient as to what work reflected in those charges related to Building D.

[6] B & G also paid Doug's Tubs $440 to repair many of the tubs installed by Consolidated that were scuffed and chipped. (Stip. Exh. 21.) However, Mr. Bauer testified that he was unable to say whether or where this might have been done in Building D.

and materials and deducting payments previously made by B & G, the balance claimed by Consolidated to be due on these five invoices for Units 17 through 21 is $34,865.[7]

The sixth invoice was for Unit 22. (Stip. Exh. 10.) This invoice reflected a higher flat rate quote of $24,300 for all of the plumbing, heating and sprinkler work,[8] plus additional flat rate quotes for installing a hot water heater, a basement bathroom and a basement heating system. (Stip. Exh. 6.) The invoice also included charges for additional labor and materials and deductions for payments previously made by B & G. (Stip. Exh. 6.) At trial, Mr. Wooster testified that Consolidated does not seek and is not owed any money for the work it did on Unit 22, except the sum of $1,395 for the additional work identified on the invoice for styrofoam, plastic and for gas piping, labor and fittings. (*See* Stip. Exh. 6.)

Although all of six of Consolidated's February 11, 2008 invoices to B & G included the per Unit flat rate of $1,800 for installing hot water heaters, collectively totaling $10,800, none were ever installed. Rather, B & G purchased a furnace for each of these Units that included a hot water heater. B & G paid the supplier directly for these furnaces. In addition, Consolidated did not provide outside faucets. B & G installed those outside faucets at a cost of $500.

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[7] More particularly, Consolidated claims the following balances are owed for each of the five Units: Unit 17 – $6,440; Unit 18 – $6,490; Unit 19 – $6,595; Unit 20 – $8,645; and Unit 21 – $8,695.

[8] The evidence indicates that at some point in time during construction Black Bear conveyed Unit 22 to Racala. In paragraph 13 of the combined Counterclaims and Third–Party claims, Consolidated alleges that the unit was conveyed to Racala on or about April 14, 2008. However, in response to that allegation, Black Bear, B & G and Racala all answered that they were without knowledge or information sufficient to form an opinion as to the truth of that allegation. The alleged deed of conveyance was not offered as an exhibit and, therefore, there is no evidence of the precise date of the transfer to Racala. That said, there is also nothing in the record to suggest that the April 14, 2008, date is incorrect.

DISCUSSION

1. Breach of Contract (Count 1)

Consolidated alleges that B & G breached the contract between them regarding Consolidated's work on Building D. A legally binding contract between parties must reflect, either expressly or impliedly, their mutual assent to be bound by all of its material terms and be sufficiently definite to permit the court to determine its meaning and fix any legal liability of the parties. *June Roberts Agency, Inc. v. Venture Props., Inc.*, 676 A.2d 46, 48 (Me. 1996). In this case, there was no written agreement or any collection of documents that, when taken together, constitute a written contract between these parties for the work Consolidated was to perform on Building D. However, the evidence persuades the court that there was an oral agreement to pay various flat rates for the work that was done by Consolidated.

The total amount claimed by Consolidated under that agreement, as reflected in its six invoices for Units 17 through 22, dated February 11, 2008, total $36,260.[9] However, those invoices do not accurately reflect the amount actually owed to Consolidated for the work it did as of the date it finally left the project. For example, although the flat rate agreement for Units 17-22 included $1,800 per unit for hot water heaters, no hot water heater was installed in any of them. Instead, B & G purchased furnaces that included a hot water heater and paid the supplier directly. B & G should thus not have been charged $10,800 for the six hot water heaters. In addition, Consolidated also failed to provide outside faucets. B & G installed those outside faucets at a cost of $500.

[9] As to Units 17 through 21, those invoices reflect flat rate charges totaling $134,000, plus charges for extras totaling $5,365. In addition, Mr. Wooster specifically testified that Consolidated makes no claim for any charges for Unit 22, except the extra items totaling $1,395. Accordingly, Consolidated's total claim for work on Building D based on flat rate charges and extras is $140,760. The total credits reflected on these invoices for payments made by B & G to Consolidated for Units 17 through 21 total $104,500. Thus, the net balance of Consolidated's claim is $36,260.

B & G also incurred costs to correct and/or complete the work Consolidated agreed to do and for which it billed B & G. Those costs are reflected in B & G's payments to Hamilton ($8,198.64), Bob White Heating ($12,318.21), Sugarloaf Mountain Corporation ($488.70), Dry Wall Services, Inc. ($1,250), Quality Insulation ($1,080), and Mountain Valley Gas ($315), totaling $23,650.55. Although B & G also claims that it incurred utility, security, and mortgage loan fees and costs because of its inability to close Units in time for the beginning of the 2007-2008 ski season, the evidence is insufficient to conclude that those closing delays were solely attributable to Consolidated failure to complete its work in a timely manner.

Among the affirmative defenses interposed by B & G are set off and recoupment. "A 'set off' is a demand that a defendant has against a plaintiff arising out of a transaction extrinsic to the plaintiff's cause of action, whereas a 'recoupment' is a reduction of part of the plaintiff's damages because of a right in the defendant arising out of the same transaction." *Inniss v. Methot Buick-Opel, Inc.*, 506 A.2d 212, 217-18 (Me. 1986); *accord Cheung v. Wu*, 2008 ME 131, ¶ 3, 955 A.2d. 746, 747 (describing recoupment as an equitable doctrine of a defensive nature "founded upon an equitable reason, inhering in the same transaction, why the plaintiff's claim in equity should be reduced"). Thus, as alleged, B & G seeks recoupment, not set off.[10]

The court finds that B & G is entitled to recoupment for the sums that it paid to Consolidated for work that it did not do, but for which it billed B & G ($11,300),[11] and for sums that it paid to other contractors to complete or correct work done by Consolidated ($23,650.55). B & G is entitled to a total recoupment in the amount of $34,950.55, and this amount must be

[10] Recoupment is "[t]he right of a defendant to have the plaintiff's claim reduced or eliminated because of the plaintiff's breach of contract or duty in the same transaction." Black's Law Dictionary 1302 (8th ed. 2004). The Maine Rules of Civil Procedure require recoupment to be plead either as an affirmative defense, pursuant to Rule 8(c), or as a counterclaim, pursuant to Rule 13. *Inniss v. Methot Buick-Opel, Inc.*, 506 A.2d 212, 217-18 (Me. 1986).

[11] This figure represents the cost of hot water heaters ($11,300) and faucets ($500).

subtracted from the claims of Consolidated in this case. *Cheung*, 2008 ME 131, ¶ 3, 955 A.2d at 747. After deducting all recoupments to which B & G is entitled ($34,950.55) from the amounts claimed by Consolidated ($36,260), the net amount that Consolidated is entitled to recover is $1,309.50.

2. Account Stated (Count 3)

Consolidated also alleges that it is entitled to recover from B & G based on an account stated in connection with Consolidated's work on Building D. That account is comprised of the same six invoices for Units 17 through 22, dated February 11, 2008, which form the basis of Consolidated's breach of contract claim. An action on an account is generally appropriate where the parties have conducted a series of transactions for which a balance remains to be paid. 1 Am. Jur. 2d *Accounts and Accounting* § 8 (2005). According to the Restatement (Second) of Contracts,

> [a]n account stated is a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor. A party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent. . . . The account stated does not itself discharge any duty but is an admission by each party of the facts asserted and a promise by the debtor to pay according to its terms.

Restatement (Second) of Contracts § 282 (1979); *see also* Black's Law Dictionary 18 (8th ed. 2004) (defining an account stated as "[a] balance that parties to a transaction or settlement agree on, either expressly or by implication").

In order to prevail on a claim for account stated the court must find that (i) liability for definite sum had been agreed upon by the parties, (ii) the account balance is correct, and an express or implied promise was given to make payments. *Haynes v. Lincoln Trust Co.*, 141 Me. 100, 111, 39 A.2d 657, 661 (1944). In the instant case, although the parties had a flat fee agreement, there is no definite sum upon which the parties have agreed, as evidenced by this

litigation. Further, the account balance presented by Consolidated was not correct because of the incomplete and defective work. As the court has already determined in its breach of contract analysis, Consolidated is entitled to recover $1,309.50, and this somewhat arcane cause of action affords Consolidated no further relief.

3. Violation of 10 M.R.S. §§ 1111-20 (2010)—the prompt payment statute (Count 4)

Next, Consolidated alleges that B & G violated Maine's prompt payment statute and seeks statutory interest, penalties, and attorney fees pursuant to 10 M.R.S. § 1113(4),[12] and 10 M.R.S. § 1118(2), (4).[13] Those statutory consequences flow from an owner's failure to meet

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[12] Title 10 M.R.S. § 1113 (2010) provides:

> Payment to a contractor for work is subject to the following terms.
>
> **1. Contractual agreements.** The owner shall pay the contractor strictly in accordance with the terms of the construction contract.
>
> **2. Invoices.** If the construction contract does not contain a provision governing the terms of payment, the contractor may invoice the owner for progress payments at the end of the billing period. The contractor may submit a final invoice for payment in full upon completion of the agreed upon work.
>
> **3. Invoice payment terms.** Except as otherwise agreed, payment of interim and final invoices is due from the owner 20 days after the end of the billing period or 20 days after delivery of the invoice, whichever is later.
>
> **4. Delayed payments.** Except as otherwise agreed, if any progress or final payment to a contractor is delayed beyond the due date established in subsection 3, the owner shall pay the contractor interest on any unpaid balance due beginning on the 21st day, at an interest rate equal to that specified in Title 14, section 1602-C.

[13] Title 10 M.R.S. § 1118 (2010) provides:

> **1. Withholding payment.** Nothing in this chapter prevents an owner, contractor or subcontractor from withholding payment in whole or in part under a construction contract in an amount equaling the value of any good faith claims against an invoicing contractor, subcontractor or material supplier, including claims arising from unsatisfactory job progress, defective construction or materials, disputed work or 3rd-party claims.
>
> **2. Penalty.** If arbitration or litigation is commenced to recover payment due under the terms of this chapter and it is determined that an owner, contractor or subcontractor has failed to comply with the payment terms of this chapter, the arbitrator or court shall

payment obligations triggered either by the terms of the construction contract or, if there are no such provisions, "at the end of the billing period." 10 M.R.S. § 1113(2). Under the law, in the absence of an agreement by the parties, a billing period means "the calendar month within which work is performed." 10 M.R.S. § 1111(1).

Maine's prompt payment statute "provides for penalties against owners or contractors who do not make payments to [contractors or] subcontractors in a timely fashion." *Jenkins, Inc. v. Walsh Bros., Inc.*, 2001 ME 98, ¶ 23, 776 A.2d 1229, 1237. These penalties are provided in addition to damages available for breach of contract or quantum meruit claims and, as such, a higher burden of proof applies. *Id.* ¶ 24, 776 A.2d at 1237. As the Law Court explained in *Jenkins*, "[b]ecause the remedies provided by the prompt payment provisions are intended to augment damages that are traditionally available for contracts or quantum meruit claims, it is not sufficient for the party seeking penalties to prove that work was completed and that an outstanding balance exists." *Id.* To the extent a claimant fails to demonstrate the amounts due "and the dates from which penalties should run," a court may "not award enhanced interest or a monthly penalty" pursuant to the statute. *Id.* ¶¶ 29, 32, 776 A.2d at 1238, 1240.

In this case, the evidence is clear that Consolidated did not have a reasonable understanding of the amounts that were actually due it or "the dates from which penalties should

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award an amount equal to 1% per month of all sums for which payment has wrongfully been withheld, in addition to all other damages due and as a penalty.

3. Wrongful withholding. A payment is not deemed to be wrongfully withheld if it bears a reasonable relation to the value of any claim held in good faith by the owner, contractor or subcontractor against which an invoicing contractor, subcontractor or material supplier is seeking to recover payment.

4. Attorney's fees. Notwithstanding any contrary agreement, the substantially prevailing party in any proceeding to recover any payment within the scope of this chapter must be awarded reasonable attorney's fees in an amount to be determined by the court or arbitrator, together with expenses.

run." As previously noted, B & G timely paid Consolidated's earlier invoices. The remaining six invoices, dated February 22, 2008, which are the subject of this dispute, were sent nearly two months after Consolidated walked off the Black Bear project without finishing its work, and, as the court has determined, none of balances reflected in these invoices is accurate.

Given that Consolidated bears the burden of proof of a violation of the statute and given the insufficiency of its proof on this point, the court concludes that Consolidated has not demonstrated a violation of the prompt payment statute and is therefore not entitled to recover under it. Similarly, because an award of attorney fees under 10 M.R.S. § 1118(4) is dependant upon a successful claim under the prompt payment statute, the court concludes that Consolidated may not recover attorney's fees under section 1118(4). *See Jenkins, Inc*, ¶ 32, 776 A.2d at 1240.

4. Unjust Enrichment (Count 5)

Consolidated also claims that it is entitled to recover damages against Black Bear and Racala under the theory of unjust enrichment. "Unjust enrichment describes recovery for the value of the benefit retained when there is no contractual relationship." *In re Wage Payment Litig. v. Wal-Mart Stores, Inc.*, 2000 ME 162, ¶ 19, 759 A.2d 217, 224 (quotations marks and emphasis omitted); *see also A.F.A.B., Inc. v. Town of Old Orchard Beach*, 610 A.2d 747, 749 (Me. 1992) (a plaintiff/subcontractor may properly pursue an action for unjust enrichment against a defendant/property owner, even in the absence of privity of contract with the defendant). A contemporaneous understanding that compensation is anticipated for the services being rendered is not a necessary element. *Siciliani v. Connolly*, 651 A.2d 386, 387 (Me. 1994). To make out a claim for unjust enrichment,

> a claimant must establish that: (1) it conferred a benefit on the other party; (2) the other party had appreciation or knowledge of the benefit; and (3) the acceptance or retention of the benefit was under such circumstances as to make it inequitable for it to retain the benefit without payment of its value.

Tucci v. City of Biddeford, 2005 ME 7 ¶ 14, 864 A.2d 185, 189 (quoted in *Me. Eye Care Assocs. P.A. v. Gorman*, 2006 ME 15, ¶ 26, 890 A.2d 707, 712).

In this case, Consolidated has sustained its burden on the first two of these elements. It did work on the units owned by Black Bear (Units 17–21) and Racala (Unit 22) with their knowledge, and the work benefited those units. The receipt or acceptance of a benefit is at the heart of a claim for unjust enrichment and distinguishes it from a claim for quantum meruit. In unjust enrichment, the measure of damages is based "on the value of what was inequitably retained," and in quantum meruit, the measure of damages is the value of the services rendered. *See Paffhausen v. Balano*, 1998 ME 47, ¶ 6, 708 A.2d 269, 271.

The third element of an unjust enrichment claim has two subparts. In the context of this case, those subparts require the court to determine the value of the benefits conferred by Consolidated and then determine whether it would be unjust for Black Bear and Racala to retain those benefits without paying for their value. As to the first of these, quite simply, there is no credible evidence of the *value* of the benefits conferred and retained. *See Me. Shipyard & Marine Ry. v. Lilley*, 2000 ME 9, ¶ 18, 743 A.2d 1264, 1269 ("When determining the benefit conferred, the court has a duty 'to reconcile conflicting testimony, to determine its relative weight, and to determine what part of the testimony is credible and worthy of belief.'" (quoting *State v. Cotton,* 673 A.2d 1317, 1321 (Me. 1996))). In this analysis, courts should "consider all of the costs of improvements, including the value of the work, labor, services, and materials furnished, when determining the benefit of the value conferred." *Me. Shipyard & Marine Ry.*, 2000 ME 9, ¶ 17, 743 A.2d at 1269. There is no evidence of those costs and values in this case; as noted earlier in this decision, Mr. Wooster testified that his memory has been compromised by

his health; and Consolidated did not keep a record of its work on the Black Bear project. *See supra* n. 3.

Further, the court cannot presume and will not assume that the net amount determined by the court to be owed by B & G under its oral agreement with Consolidated is tantamount to the value of the uncompensated benefits retained by Black Bear and Racala. Ascertaining the value of any retained benefits is not as simple as deducting payments made and recoupments allowed from a contract price negotiated by others. At best, that calculation may inform the reasonable value of the work done by Consolidated – an issue relevant to a quantum meruit claim — but not the value of the benefits conferred and retained in an unjust enrichment claim as a result of the improvements provided by the contractor. *See Aladdin Elec. Assocs. v. Town of Old Orchard Beach*, 645 A.2d 1142, 1145 (Me. 1994) ("Unjust enrichment describes recovery for the value of the benefit retained when[,] on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay.") (quoting *A.F.A.B., Inc. v. Town of Old Orchard Beach,* 639 A.2d 103, 105 n.3 (Me. 1994)).

Even if the value of the benefits could be determined from the evidence in this case, the court must also decide whether it would be inequitable to allow Black Bear and Racala to retain them without compensating Consolidated. *See Aladdin Elec. Assocs.*, 645 A.2d at 1145 ("The damages analysis [in an unjust enrichment claim] is based on principles of equity, not contract.") The determination of whether an enrichment is unjust has been describe as the "most significant element" of the unjust enrichment analysis. *Howard & Bowie, P.A. v. Collins*, 2000 ME 148, ¶ 14, 759 A.2d 707, 710 (quoting *Styer v. Hugo*, 619 A.2d 347, 350 (Pa. Super. Ct. 1993)). Under the circumstances of this case, the court cannot conclude that it would be inequitable for either Black Bear or Racala to retain the benefits to their respective condominium units. Most

importantly, as noted earlier, there is insufficient evidence of the value of those benefits. In addition, Consolidated did not confer all of the benefits to those units. Some of the work that Consolidated was supposed to do was done by other contractors, and portions of the work that it did do had to be corrected by other contractors. The evidence simply does not support a determination that, as to Black Bear and Racala, "on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay." *Forrest Assocs. v. Passamaquoddy Tribe*, 2000 ME 195, ¶ 14, 760 A.2d 1041, 104. In sum, Consolidated has failed to establish that it is entitled to recovery on a theory of unjust enrichment.

5. Quantum Meruit (Count 6)

Finally, Consolidated claims that it is entitled to recover damages against Black Bear and Racala under the theory of quantum meruit. Quantum meruit is grounded in a theory of implied contract and is based on proof that services or materials were provided "under circumstances consistent with contract relations." *Danforth*, 650 A.2d at 1335 (quotation marks omitted); *see also Forrest Assocs.*, 2000 ME 195, ¶ 11, 760 A.2d at 1045 (quantum meruit involves liability under an implied contract theory). In order to "sustain a claim in quantum meruit, a plaintiff must establish that (1) services were rendered to the defendant by the plaintiff; (2) with the knowledge and consent of the defendant; and (3) under circumstances that make it reasonable for the plaintiff to expect payment." *Forrest Assocs.*, 2000 ME 195, ¶ 11, 760 A.2d at 1045 (quotation marks omitted); *see also Siciliani v. Connolly*, 651 A.2d 386, 387 (Me. 1994) (explaining that a "contemporaneous understanding that compensation is anticipated for the services being rendered" is a necessary element of quantum meruit).

The court has already determined that there was an oral contract between Consolidated and B & G governing all of Consolidated's work on Building D and Units 17 through 22. The

evidence does not support a residual basis on which Consolidated might advance a quantum meruit claim against Black Bear or Racala, nor does it support a finding that either Black Bear or Racala understood that compensation would be anticipated for the services rendered by Consolidated. *See Siciliani*, 651 A.2d at 387.

DECISION

Pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Decision and Order on the Civil Docket by a notation incorporating it by reference, and the entry is

A. Judgment for Counterclaim–Plaintiff Consolidated Plumbing and Heating, LLC, against Counterclaim–Defendant Bauer & Gilman Construction, on Counts 1 and 3 of the Counterclaims in the total amount of $1,309.50, together with pre-judgment interest at the rate of 6.42% and post-judgment interest at the rate of 6.40%; and

B. Judgment for Counterclaim–Defendant Bauer & Gilman Construction, LLC on Count 4 of the Counterclaims;

C. Judgment for Counterclaim–Defendant Black Bear Developers, LLC on Counts 5 and 6 of the Counterclaims; and

D. Judgment for Third–Party–Defendant Racala, Inc., on Counts 5 and 6 of the Counterclaims.

Dated: January 21, 2011

Chief Justice, Superior Court

JUDGMENT ENTERED: 1/26/11