IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

RONALD CHRISTOPHER, Plaintiff,	CIVIL NO. 313/2000
vs.	ACTION FOR BREACH OF CONTRACT
CALVIN HERBERT d/b/a C. HERBERT CONSTRUCTION COMPANY Defendant.	**MEMORANDUM OPINION DENYING IN PART AND GRANTING IN PART MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT**
	NOT FOR PUBLICATION

COUNSEL:

MARK L. MILLIGAN, ESQ.
Attorney for Plaintiff Ronald Christopher
P.O. Box 3031
28A King Street, Christiansted
St. Croix, VI 00822-3031

VINCENT COLIANNI II, ESQ.
COLIANNI & COLIANNI
Attorney for Defendant Calvin Herbert
1138 King Street
St. Croix, VI 00820

CABRET, MARIA M., Presiding Judge

MEMORANDUM OPINION
(Filed June 14, 2006)

THIS MATTER is before the Court on the Motion for Judgment Notwithstanding the Verdict [hereinafter "JNOV"] filed by Plaintiff Ronald Christopher on March 22, 2005. Defendant Calvin Herbert opposed the Motion, to which Plaintiff replied. Trial commenced on February 28, 2005. On March 1, 2005, the jury returned an award for the Plaintiff in the amount of $15,000 in liquidated damages. The jury also returned an award for the Defendant on his counterclaim in the amount of $12,000 in quantum meruit. On March 8, 2005 the Court entered judgments in conformity with the jury's awards. For the following reasons, the Court denies in part and grants in part Plaintiff's Motion.

I. BACKGROUND

On January 21, 1999, Plaintiff and Defendant entered into a written contract in the amount of $85,116.84 for the construction of a dwelling on Plot No. 59-A, Estate Frederikshaab. The contract provided that the Plaintiff pay Defendant in four installments and that construction would be completed by July 1, 1999.[1] After Defendant failed to deliver the house as agreed, Plaintiff instituted this suit on June 29, 2000, seeking liquidated damages for the delay. Defendant counterclaimed, arguing that he was entitled to quantum meruit for the value of the services he furnished above and beyond the payments received. After the initial pleadings, Plaintiff filed a joint Motion for Summary Judgment on his claim and a Motion for Dismissal of Defendant's Counterclaim. In an order dated September 6, 2001, the Court granted in part and denied in part Plaintiff's Motion for Summary Judgment, finding that Defendant breached the contract but, reserving for trial, the issue of whether the liquidated damages clause applied. Plaintiff's Motion for Dismissal of Defendant's Counterclaim was denied.

Post trial, Plaintiff challenges both jury awards. First, Plaintiff argues an award of anything other than $35,750 for his liquidated damages claim, the $50 a day multiplied by the purported 715-day delay, was irrational. Defendant contends that the evidence supported the jury award on Plaintiff's claim, as the jurors may have considered the Plaintiff's failure to mitigate damages in reducing the amount of recoverable liquidated damages. Second, Plaintiff claims that any award on quantum meruit in favor of Defendant should be set aside in its entirety. In support of this second ground, Plaintiff asserts that an action in quantum meruit is precluded by the existence of a contract. Plaintiff also contends that there was insufficient

[1] Defendant secured an extension for 60 days, making the new completion date September 1, 1999. (Def.'s Ex. 1.) Plaintiff retained the services of another contractor who completed the work on August 14, 2001. (Pl. Mem. in Supp. of JNOV at 8.)

evidence before the jury to quantify the value of the benefit received and that the jury instruction regarding the proper measurement of the benefit supplied by the Defendant, misled the jury. Defendant responds that quantum meruit is permissible when a party cannot enforce a contract and also maintains that there was sufficient evidence before the jury to determine the value of the benefit conferred by the Defendant on the Plaintiff. Finally, Defendant argues that the instruction on quantum meruit was not in error.

II. STANDARD

Rule 50(b) of the Federal Rules of Civil Procedure, applicable through Superior Court Rule 7, governs renewed motions for judgment as a matter of law, such as the motion for JNOV before the Court. SUPER. CT. R. 7; FED. R. CIV. P. 50(b).[2] A JNOV motion will be granted where the record fails to contain the minimum quantum of evidence from which a jury might reasonably afford relief. *Couch v. St. Croix Marine, Inc.*, 667 F. Supp. 223, 225 (D.V.I. 1987) (citing *Smollett v. Skayting Development Corp.*, 793 F.2d 547, 548 (3d Cir. 1986)). "In ruling on a motion for JNOV, the [Superior Court] must view the evidence, together with all reasonable inferences therefrom, in the light most favorable to the verdict winner." *Dunn v. HOVIC*, 1 F.3d 1362, 1364 (3d Cir. 1993) (citing *Rotondo v. Keene Corp.*, 956 F.2d 436, 438 (3d Cir. 1992)). In reviewing jury awards, it is not the job of the Court to judge credibility or

---

[2] Rule 50 provides, in relevant part:

> (b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment-- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:
> (1) if a verdict was returned:
> (A) allow the judgment to stand,
> (B) order a new trial, or
> (C) direct entry of judgment as a matter of law;

FED. R. CIV. P. 50(b).

weigh evidence but rather to determine whether, after giving non-moving party every fair and reasonable inference, there was sufficient evidence upon which a jury could reasonably find for the non-moving party. *Couch*, 667 F. Supp. at 225.

III. DISCUSSION

Plaintiff's Motion raises two distinct challenges to the jury awards. To resolve these challenges, the Court must inquire into both the reasonableness of the liquidated damages award and the propriety of an action for quantum meruit by a breaching party.

A. The Evidence Supports the Jury Award of $15,000 in Liquidated Damages

First, in his Motion, Plaintiff suggests that the only rational award for his liquidated damages breach of contract cause of action is $35,750. The Court disagrees. Plaintiff's challenge is nothing more than a veiled attempt for additur and no court in this jurisdiction has specifically endorsed this disfavored post-trial remedy.[3] *See Dimick v. Schiedt*, 293 U.S. 474, 487-88 (1935) (disapproving of additur and suggesting that a new trial is the proper remedy for an inadequate judgment). Because Plaintiffs has failed to elaborate on the requirements of additur or establish how the facts of this particular case compel this extraordinary remedy, the Court cannot grant him the relief he seeks.

Even if additur were appropriate, Plaintiff's Motion for JNOV seeking an increase in the quantum of damages is outside the ambit of Rule 50(b). Plaintiff failed to argue a motion for directed verdict on his own claim, and thus, he may not *renew* it now. *See generally Acosta v. Honda Motor Co., Ltd*, 717 F.2d 828 (3d Cir. 1983). If the award was not supported by the

---

[3] Some states have adopted additur by statute. *See Accardo v. Cenac*, 722 So.2d 302, 306 (La. Ct. App. 1998) (applying the elements of additur). Others have done so judicially. *See Carney v. Preston*, 623 A.2d 47, 57 (Del. Super. Ct. 1996) (granting additur consistent with the Delaware Constitution).

evidence, a fact which the Court does not find,[4] the proper procedure would not be to substitute some other arbitrary award supplied by the Plaintiff post-trial; it would be to substitute the relief requested in the litigant's initial motion for directed verdict. There was no initial directed verdict here. Accordingly, the Court will not address the merits of this ground.

B. An Action in Quantum Meruit May be Brought by Breaching Party

Post trial, Defendant concedes that he breached the contract at issue and maintains that he was entitled to an action in quantum meruit. Plaintiff argues that a cause of action in quantum meruit is improper "where there is an express contract that governs the relationship of the parties." *Hershey Food Corp. v. Chapek*, 828 F.2d 989, 998-99 (3d Cir. 1987) (applying Pennsylvania law); *see also*, *Morton v. Hewitt*, 202 F. Supp. 2d 394, 398 n.5 (D.V.I. App. Div. 2002) (recognizing that an express contract, i.e. the agreed upon price, should be the measure of damages, not quantum meruit). The Third Circuit Court of Appeals, writing in general terms, only precluded quantum meruit where the party seeking such equitable relief could have enforced the contract, as such a party is "limited to the measure provided in the

[4] The jury was entrusted with determining how long a period of delay was reasonable. *See generally* 24 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 65.20 at 316 (4th ed. 2002) (liquidated damages permissible "for such time following abandonment as is reasonably necessary to complete the work called for by contract."). In finding the permissible amount of liquidated damages was $15,000, the members of the jury implicitly determined that a period of 300 days was the reasonable delay attributable to the Defendant's breach in refusing to perform. By the same implication, then, the other 415 days were attributable to the Plaintiff's delay in finding a suitable replacement and that replacement's slow pace in completing the construction of the house. Testimony in the record suggests that as early as February 2000, Defendant communicated his intention to abandon the project. By June 29, 2000, when the relationship between the Plaintiff and Defendant had deteriorated to the point that Plaintiff instituted suit, the abandonment could not be questioned. Furthermore, the Defendant's testimony assessing the completeness of the project and the comparatively smaller amount of the second contract suggest that the second contract could have been completed in substantially less time than the original contract. In particular, since the Defendant asserted that the project was at least fifty-five percent complete (Feb. 28, 2005 Tr. of Def.'s Test. at 12:23), and the original contract called for five (5) months to complete the entirety of the work, a shorter time period for the remaining portion of the project would have been expected. Similarly, the amount of the replacement contract – the contract was for $47,553 and comparatively less than the original contract – suggests that less time should have been needed for the remainder of the project. Taken together, these inferences may be drawn from the record, and accordingly, support a finding that 300 days of liquidated damages was the reasonable duration of the delay attributable to the breach.

express contract; and where the contract fixes the value of the services involved, there can be no recovery under a *quantum meruit* theory." *Hershey Foods Corp.*, 828 F.2d at 999 (emphasis in the original) (internal quotations and citation omitted). The case before the Court, however, involves a breaching party seeking to recover in quantum meruit. Thus, *Hershey* and its progeny, as explained herein, are not instructive on this issue.

To that end, the parties rely on the same Utah case, *Bailey-Allen Co. v. Kurzet*, 876 P.2d 421, 424-26 (Utah Ct. App. 1994), for the viability of an action in quantum meruit under these circumstances. While the *Bailey-Allen* court provides that typically, in agreement with *Hershey*, actions in quantum meruit are not available when the party bringing the action may enforce the contract, this recitation of the law, however, does not impact a party who has breached the contract and therefore cannot enforce its remedies under the contract. *See Bailey-Allen Co.*, 876 P.2d at 424-26.[5] The *Bailey-Allen* court dealt squarely with this distinction. Accordingly, substantial performance is the key:

> [a] contractor whose breach is such that he [or she] has rendered less than "substantial performance" has no right to the contract price; he [or she] is said to have no remedy "on the contract".... The contractor's right is a right to reasonable compensation for value received by the defendant over and above the injury suffered by the contractor's breach.

Id. at 425 (citing 3A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 710, at 342 (1960)). The existence of substantial performance is conditioned on whether the breach was material; if the breach was material, there was no substantial performance. *See* RESTATEMENT (FIRST) OF CONTRACTS § 275 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 241 (listing factors to

---

[5] Plaintiff cites to this case for the limited proposition that a party may not recover in quantum meruit where there is a contract. The *Bailey-Allen* court, however, also considered whether a breaching party may bring a cause of action in quantum meruit.

determine materiality of a breach) (1981).[6] *See e.g., Wells Benz, Inc. v. U.S. for Use of Mercury Elec. Co.*, 333 F.2d 89, 92-93 (9th Cir. 1964) (substantial performance is satisfied where the "deviation is unintentional and so minor or trivial as to not substantially defeat the object which the parties intend to accomplish"); *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1013 (D.C. Cir. 1985) (providing that substantial performance exists when "contracting party has failed to render full performance but the defects are, all considered, minor"). In referencing Corbin, the *Bailey-Allen* court recognized that typically an action in quantum meruit exists only when there is "no enforceable contract." *Bailey-Allen Co.*, 876 P.2d at 424-25. That a breaching party might have an action in quantum meruit available follows from the premise that where a party has not substantially performed under the contract, it may not enforce the contract; there is no enforceable contract from the breaching party's perspective. *See Id.* at 425.

In the instant matter, it is undisputed that Defendant breached the contract. (Compl. at ¶ 6(a); Answer at ¶ 1.) It is similarly conceded that Defendant did not render substantial performance, or the breach was material, as Defendant only completed fifty-five percent of the contract before ceasing work. (Feb. 28, 2005 Tr. of Def.'s Test. at 12). Under such circumstances, the *Bailey-Allen* court allowed a breaching party to recover for work performed prior to the breach, in legal restitution, i.e. quantum meruit, as a contract implied in law. *Bailey-Allen Co.*, 876 P.2d at 425. *See also Welch v. Webb*, 615 P.2d 391, 393 (Or. 1980) (reaching same result after applying Restatement (First) of Contracts section 357); *Truly v. Austin*, 744 S.W.2d 934, 937-38 (Tex. 1988) (applying Texas law). This Court should endorse this

[6] Under section 4 of title 1 of the Virgin Islands Code, the American Law Institute's Restatement shall be rules of decision in the absence of local law to contrary. V.I. CODE ANN. tit. 1, § 4 (1995). Neither provision has been expressly endorsed by appellate court in this jurisdiction. The application of either set of factors does not change the outcome in this matter.

same rationale, especially in light of similar results under the Restatement in *Welch*, and permit an offset against the Plaintiff's liquidated damages claim.

Under both the Restatement (First) of Contracts section 357 and the Restatement (Second) of Contracts section 374, a breaching party may be entitled to restitution for part performance in the amount of the benefit conferred to the non-breaching party in excess of the loss caused by the breach. RESTATEMENT (FIRST) OF CONTRACTS § 357(1); RESTATEMENT (SECOND) OF CONTRACTS § 374(1).[7] Monies paid and expected to be retained after breach by the manifested assent of the parties,[8] however, may not be recovered in quantum meruit even if such monies constituted a benefit to the non-breaching party in excess of the loss from the breach. RESTATEMENT (FIRST) OF CONTRACTS § 357(2); RESTATEMENT (SECOND) OF CONTRACTS § 374(2).

The retention of monies contemplated under subsection (2) of the Restatement (First) of Contracts section 357 and Restatement (Second) of Contracts section 374 is distinct from the Plaintiff's recovery of liquidated damages in this matter; the liquidated damages were not paid in advance of breach and the parties failed to manifest assent that the uncompensated part performance be retained in the event of breach. And, although in this situation the jury awarded less in quantum meruit than it did under the liquidated damages provision,[9] this likewise should

---

[7] See discussion under note 6. Similarly, neither provision has been adopted by the appellate courts of this jurisdiction, nor is the endorsement of a particular provision outcome determinative. The Court notes that the Restatement (Second) of Contracts § 374 suggests that it is liberalizing the previous requirements of the Restatement (First) of Contracts § 357. *See* RESTATEMENT (SECOND) OF CONTRACTS § 374 rptr. notes.

[8] The quintessential example of such unrecoverable sums is earnest money in a failed real estate transaction. *See* RESTATEMENT (FIRST) OF CONTRACTS § 357 cmt. i.

[9] Both the Restatement (First) of Contracts § 357 and the Restatement (Second) of Contracts § 374 contemplate a cause of action for restitution only when the benefits bestowed on the non-breaching party exceed the damages attributable to the breach. It is apparent that the Restatement employs a measure of damages for quantum meruit causes of action similar to the one used in an actual damages context. *See* RESTATEMENT (FIRST) OF CONTRACTS § 357 cmt. h, illus. 3 (damages constitute "value of the part performance less the harm caused by the breach. [Breaching party's] judgment will always be the unpaid contract price less the cost of completion and other

not preclude a cause of action similar to those described in these sections. To the contrary, a separate cause of action is proper to avoid a potential windfall for the Plaintiff. *See* RESTATEMENT (FIRST) OF CONTRACTS § 357 cmt. d (providing that this action is meant to avoid "making the [breaching party] suffer a penalty for his wrong in excess of the compensatory damages that are held to be a fully adequate remedy in actions for wrongful breach"). A recovery in quantum meruit under these circumstances would incorporate and redistribute the Plaintiff's avoided costs as a result of the breach so as to more closely align the clause with actual compensatory damages.

The allowance for a cause of action resulting in a lesser total award for the Plaintiff and the necessity of pleading it separately can be attributed to the existence of the liquidated damages clause. Had Plaintiff sought actual damages, his avoided costs would have been a part of the measure of damages, lowering his total recovery. *See* RESTATEMENT (FIRST) OF CONTRACTS §§ 329, 335; RESTATEMENT (SECOND) OF CONTRACTS § 347(c). With an award of actual damages there would have been no need for a counterclaim. Allowing for a quantum meruit cause of action to offset the recovery under a liquidated damages clause is consistent with the framework for the measure of actual damages, especially when the Court considers that the Plaintiff had the choice to pursue actual or liquidated damages.[10] *See Entergy Servs. Inc. v*

---

additional harm to [non-breaching party], except that it must never exceed the benefit actually received by [non-breaching party]"); RESTATEMENT (SECOND) OF CONTRACTS § 374 cmt. b, illus. 2. As the illustration explains, the measure of damages for the breaching party would generally include actual loss caused as an offset to the recovery for the benefit bestowed.

[10] The liquidated damages provision contained the following language, in relevant part:

> If the Contractor refuses or fails to complete the work within the time specified in paragraph B of this contract, or any extension thereof, the Owner may, with the approval of the Representative, terminate the Contractor's right to proceed...If the Owner does not terminate the right of the Contract to proceed, the Contractor will continue to work, in which event, *actual damages for delay* will be impossible to determine and in lieu thereof, the Contractor *may* be required to pay to the Owner the sum of $ __50.00___ as liquidated damages

Union Pacific R.R. Co., 35 F. Supp. 2d 746, 754-55 (D.Neb. 1999) (highlighting the difference between liquidated damages clauses containing the word "shall" and "may"). In the event that a non-breaching party did not have the choice and liquidated damages were especially low, courts have made allowances for non-breaching parties to bring suit for damages that do not arise from the delay. *See Constr. Contracting & Mgmt v. McConnell*, 815 P.2d 1161, 1167-68 (N.M. 1991) (allowing for compensatory damages above and beyond the liquidated damages for greater costs associated with finding replacement contractors).

The result in *Circle B Enterprises Inc. v. Steinke*, is illustrative of the unique inquiry into actions in quantum meruit despite a liquidated damages provision and bolsters the conclusion that such a cause of action is permissible. 584 N.W.2d 97, 100 (N.D. 1998). In particular, the court there applied the Restatement (Second) of Contracts section 374 to suggest that only a liquidated damages clause that integrates the value of part performance will preclude a cause of action for quantum meruit by a breaching party. *Id.* at 100; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 374(2). In *Circle B Enterprises*, the court did not allow an action for quantum meruit where the liquidated damages clause expressly provided that the per diem charge was to be deducted against the amount owed to the breaching party for its part performance. *Id.* at 100.[11] The liquidated damages clause in this case does not contain such an inclusion, nor does

> for each calendar day of delay, and the Contractor will be liable for the amount thereof.

(Pl.'s Ex 1) (emphasis supplied). The Court is mindful that periodic liquidated damages provisions like the one at issue, whether mandatory or optional, normally only account for damages associated with the delay. *See* 24 WILLISTON, *supra* § 65:20 at 316.

[11] The court described the language of the particular provision as containing the following information:

> if Steinke failed to finish restoring the car by April 21, 1995, a "penalty" of $100 a day would be deducted from the $10,333.42 balance to be paid for the work remaining at the time of the contract, and "[f]urther, Circle B [would] then be free to contact a third party to perform what [Steinke] had agreed to perform on this vehicle, and any

it limit the potential offset. Thus, in these unusual circumstances, a cause of action based in restitution is proper, despite the existence of a liquidated damages provision.

C. A Quantum Meruit Award is Justified by Independent Findings of Fact and Conclusions of Law

Although not raised by the parties,[12] upon further review, the Court is compelled by the holding *University of V.I. v. Petersen-Springer*, 232 F. Supp. 2d 462 (D.V.I. App. Div. 2002) to make specific findings and conclusions in support of the award for quantum meruit. As an equitable claim, an action for quantum meruit should be considered by the judge. *Petersen-Springer*, 232 F. Supp. 2d at 471-72. The Appellate Division in *Petersen-Springer* requires this Court to make its own independent findings and judgments. *Id.* (citing *Jacquin Et Cie, Inc. v. Destileria Serralles, Inc.*, 921 F.2d 467, 471-72 (3d Cir.1990)). Accordingly, the jury award of $12,000 in quantum will only be considered as advisory. The satisfaction of the elements of quantum meruit will also independently be reviewed. The Court now makes its own findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. FED. R. CIV. P. 52(a).

1. Findings of Fact

1. Plaintiff is a resident of St. Croix and was the owner of Plot No. 59-A, Estate Frederikshaab in 1999, located in Frederiksted, St. Croix. (Compl. at ¶ 2.; Answer at ¶ 1.)

> amount which Circle B does have to pay to that third party [would] be the responsibility of [Steinke].

Circle B Enterprises Inc., 584 N.W.2d at 100.

[12] Plaintiff's other challenges are no longer relevant. Plaintiff asserts that Defendant failed to offer the minimum quantum of evidence upon which a jury could rationally quantify the benefit conferred. Plaintiff also contends that the Court erred in instructing the jury by using the terms "reasonable value of [Defendant's] services" instead of the value of the benefit conferred. As indicated in the body of the opinion, the Court erred in entering a judgment on the jury's findings regarding quantum meruit. Thus, Plaintiff's final grounds for challenging the Defendant's award hold no continued relevance.

2. Defendant is a resident of St. Croix, doing business under the trade name of "C. Herbert Construction Company," a business engaged in the construction of residential homes. (Compl. at ¶ 3; Answer at ¶ 1.)

3. On January 21, 1999, Plaintiff and Defendant entered into a written contract for the construction of a dwelling on Plaintiff's plot and agreed that construction would be completed by July 1, 1999. (Compl. at ¶ 4; Answer at ¶ 1.)

4. Plaintiff and Defendant later agreed to a Contract Change Order which extended the date of delivery by sixty (60) days to September 1, 1999. (Def.'s Ex. 1.)

5. Plaintiff and Defendant agreed that Defendant's compensation would be Eighty-Five Thousand One Hundred Sixteen Dollars and Eighty-Four Cents ($ 85,116.84), with payments paid at the following stages of completion: 25% ($ 12,767.51), 50% ($ 12,767.51), 75% ($ 12,767.51) and 100% ($ 46,814.31). (Pl.'s Ex. 1.)

6. The written contract was for a dwelling containing 1828 square feet. (Pl.'s Ex. 1.)

7. Defendant failed to deliver the completed dwelling by September 1, 1999. (Compl. at ¶ 6(a); Answer at ¶ 1.)

8. Plaintiff paid Defendant $ 12,767.51 for the completion of Stage 1 (25%) on October 18, 1999. (Pl.'s Ex. 3.)

9. Plaintiff paid Defendant an additional $ 15,000.00 on February 9, 2000. (Pl.'s Ex. 4.)

10. On August 21, 2000, Defendant indicated by letter that no further work would be performed under the contract. (Pl.'s Ex. 6.) At the time of the letter, Defendant had completed approximately 55% of the work required under the Contract. (Feb. 28, 2005 Tr. of Def.'s Test. at 12:23.)

11. On February 13, 2001, Plaintiff and Leonel Sendar, a replacement builder, entered into a written contract for the completion of the construction of the dwelling on Plaintiff's plot and agreed that construction would be completed by August 14, 2001. (Pl.'s Ex. 2.) The work was completed on time.

12. Plaintiff and Leonel Sendar agreed that Sendar's compensation would be Forty-Seven Thousand Five Hundred Fifty-Three Dollars and Thirty-Four Cents ($ 47,553.30), with payments paid at the following stages of completion: 25%, 50%, 75% and 100%. (Pl.'s Ex. 2.)

13. In total, Plaintiff paid $ 75,320.81 to Defendant and Leonel Sendar for the construction of a dwelling on Plot No. 59-A, Estate Frederikshaab. (Pl.'s Ex. 2, 3, 4.)

14. Defendant testified that because of extensions and the peculiar angles, the square footage of the building was considerably more than the 1828 square feet listed in the contract. (Feb. 28, 2005 Tr. of Def.'s Test. at 52:20-23.) Defendant claimed that the building was closer to 3000 square feet. (Feb. 28, 2005 Tr. of Def.'s Test. at 36:7, 55:9-22.)

15. Defendant also testified that the payment schedule of 25% ($ 12,767.51), 50% ($ 12,767.51), 75% ($ 12,767.51) and 100% ($ 46,814.31) did not reflect the actual value of the work completed during the corresponding stages. (Feb. 28, 2005 Tr. of Def.'s Test. at 57.) Defendant claimed that under the contract he would be paid only 60% of the value of the work during each of the stages and would receive a balloon payment covering the difference upon completion of the project. (*Id.*) As an example, Defendant claimed he spent between $18,000.00 and $25,000.00 to complete the items required for Stage 1. (Feb. 28, 2005 Tr. of Def.'s Test. at 7-8.)

Thus, Defendant claims that the amount he was to be paid at the completion of each stage did not necessarily reflect the actual amount of the benefit retained.

2. Conclusions of Law

1. This Court has jurisdiction over this cause of action pursuant to section 76(a) of title 4 of the Virgin Islands Code. V.I. CODE ANN. tit. 4, 76(a) (1997).

2. In this case, it is undisputed that a contract was formed and that Defendant materially breached the contract by failing to deliver a completed dwelling on September 1, 1999. Accordingly, there is contract that the Defendant, the breaching party, may not enforce.

3. Thus, Defendant may recover in quantum meruit, if he satisfies the elements, since he may not enforce the contract. *See Hershey Food Corp.*, 828 F.2d at 999; *Bailey-Allen Co.*, 876 P.2d at 425-26.

4. As evidenced by the written contract, Defendant performed his construction services with the reasonable expectation that Plaintiff would pay for them. (Pl.'s Ex. 1.)

5. As evidenced by the written contract, Plaintiff had notice that Defendant expected to be paid for his services. (Pl.'s Ex. 1.)

6. The services conferred on the Plaintiff were of value to him. Plaintiff avoided paying the difference between the original contract price of $ 85,116.84 and $ 75,320.81, the combined amount paid to the Defendant and the replacement builder, or $ 9,796.03. Avoided cost is one measure of the value of the benefit conferred.

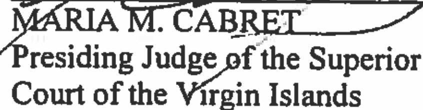
7. Two other bases may also support awarding more to the Defendant based on the value of the services to the Plaintiff. First, because of the changes to the specifications, Defendant also received a 3000 square foot dwelling, substantially

larger than the contracted 1828 square foot house. Second, Defendant received a house that was 55% completed and only paid 60% of value of the initial stages. But, any amount for these retained benefits is uncertain and will not awarded. RESTATEMENT (FIRST) OF CONTRACTS § 357 cmt. g (requiring reasonable degree of certainty as the value of the benefit to the non-breaching party).

8. The Court finds that Defendant is entitled to Nine Thousand Seven Hundred Ninety-Six Dollars and Three Cents ($ 9796.03) in quantum meruit. This represents Plaintiff's avoided costs, the value of the benefit retained by the Plaintiff. It is equitable that Plaintiff be required to pay at least the full contract price for a house that is significantly larger than the one for which he originally contracted.

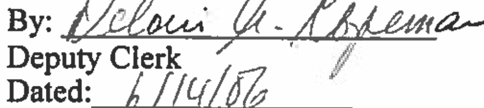
IV. CONCLUSION

The jury award on the liquidated damages clause is supported by the evidence. An action in quantum meruit, despite the liquidated damages clause is permissible. The quantum meruit award, however, should have been determined by a judge, not the jury. Accordingly, the judgment will be amended in an order of the Court to reflect a diminution in Defendant's award based on the Court's independent factual findings and conclusions of law.



MARIA M. CABRET
Presiding Judge of the Superior
Court of the Virgin Islands

ATTEST:
Denise Abramsen
Clerk of the Court

By: 
Deputy Clerk
Dated: 6/14/06