NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 11, 2020

LETTER OPINION

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Re: *Edward Cove, et al. v. Mil L. Wallen, III, et al.*, Case No. CL-2018-10390

Dear Counsel:

This matter came before the Court on October 21, 2019 for trial on Plaintiffs Edward and Pamela Cove's claims of Breach of Contract and Unjust Enrichment against Defendants Millard "Flip" Wallen, III and Dianna Wallen. At the conclusion of the trial on October 22, 2019, the Court set a briefing schedule for the parties to submit written briefs for their closing arguments. The final briefs were filed on December 20, 2019.

After considering the evidence presented at trial and the briefs submitted by the parties, the Court finds in favor of the Defendants on the Breach of Contract claim (Count II) and for the Plaintiffs on the Unjust Enrichment Claim (Count III). For the reasons set forth below, the Court orders judgment for the Coves in the amount of $1,797,995.44.

PROCEDURAL POSTURE

The Coves filed a Complaint against the Wallens on July 11, 2018 alleging three counts: (I) Equitable Contribution; (II) Breach of Contract; and (III) Unjust Enrichment. In an opinion issued July 31, 2019, the Honorable John M. Tran found that the Equitable Contribution claim was barred by the statute of limitations and that count was dismissed.

FACTUAL BACKGROUND

I. The Stonecroft Project

In 2007, Plaintiffs Edward Cove and Pamela Cove ("Plaintiffs" or the "Coves") entered into a business arrangement with Defendants Millard "Flip" Wallen, III and Dianna Wallen ("Defendants" or the "Wallens") and Jeff and Cathy Black (the "Blacks") to purchase and develop a piece of commercial real estate located in Chantilly, Virginia known as Stonecroft Business Park (the "Stonecroft Project"). The investors in the Stonecroft Project formed limited liability companies to establish their business venture. The Coves formed EPCO Investments, LLC and were its only two members and the Wallens and Blacks invested in the Stonecroft Project through ROCK Stonecroft, LLC. Together, these two entities formed and operated Stonecroft Business Park, LLC.[1]

In June 2007, Stonecroft Business Park, LLC borrowed $13,700,000.00 from La Jolla Bank to help finance the Stonecroft Project. This was memorialized in a Construction Loan Agreement, dated June 6, 2007 and signed by Mr. Wallen for Stonecroft Business Park, LLC. The loan was personally guaranteed by six individuals: the Coves, the Wallens, and the Blacks.

II. Eastern District of Virginia Lawsuit and Settlement

On September 10, 2010, One West Bank, a successor to La Jolla Bank, put Stonecroft Business Park, LLC and the six guarantors of the loan on notice that the loan was in default. On

[1] Under the terms of the Operating Agreement of Stonecroft Business Park, LLC, ROCK Stonecroft made an initial $200,000 contribution for a 50% membership interest and EDCO Investments contributed $300,000 for a 50% membership interest. (Pl. Ex. 1). At trial, Mr. Wallen testified that the parties made additional contributions at closing of the purchase of the Stonecroft Property. According to this testimony, the Coves were the overwhelming contributors to the project, contributing $2,700,000 while the Wallens contributed a total of $500,000. (10/22 Tr. pp. 7-9).

July 14, 2011, One West Bank provided a second notice of default and claimed damages of $13,854,169.40.

On July 29, 2011, One West Bank filed suit against all of the guarantors in the United States District Court for the Eastern District of Virginia seeking the full $13,854,169.40 owed under their loan payment obligation. Sometime in 2011, the Blacks filed for bankruptcy and were removed from active participation in the lawsuit. Settlement negotiations between the Coves, Wallens, and One West continued with the assistance of counsel and Steve Wexler, who assisted in negotiating a settlement, and on November 22, 2011, the parties entered into a settlement agreement.

One West, the Coves, the Wallens, Stonecroft Business Park, LLC, and ECPC&JD, LLC, were parties to the settlement agreement.[2] The terms of the settlement agreement released the Coves and the Wallens from liability to One West in exchange for $2 million in cash and foreclosure on the Stonecroft Property and the Cedar Lane Property owned by ECPC&JD, LLC (see footnote 2). The $2 million requirement was satisfied by a wire transfer made by the Coves on November 25, 2011.

On January 26, 2012, One West dismissed the Eastern District of Virginia lawsuit against the Coves and the Wallens. Pursuant to the terms of the settlement agreement, the Stonecroft Property was foreclosed on and sold at auction, with a Trustee's Deed executed on December 12, 2012, and the Cedar Lane Property was foreclosed on and sold at auction, with a Trustee's Deed executed on December 12, 2012. At foreclosure, the Cedar Lane Property sold for $1,075,000.00.

The Wallens did not contribute any money or property to the settlement. Nevertheless, by virtue of the settlement, they obtained dismissal of the lawsuit against them (see ¶ 9 of the Settlement Agreement, Pl. Ex. 11) and a release of their "obligations under the Guaranties." (see ¶ 11 of the Settlement Agreement, Pl. Ex. 11).

III. Post-Settlement Conduct

After the settlement, the Coves and the Wallens continued to communicate with each other regarding the Wallens' obligations to the Coves. When asked about this at trial, Mr. Cove provided the following testimony:

> *Q. Did there come a time when you and Mr. Wallen discussed the repayment of half of the amount you and your wife had paid to settle the One West Bank lawsuit?*
>
> *A. Yes, numerous times.*

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[2] ECPC&JD was owned entirely by Edward and Pamela Cove and existed for the purpose of holding real property located at 21606 Cedar Lane, Sterling, Virginia (the "Cedar Lane property") and was a passthrough entity with all profits and losses flowing directly to the Coves.

> *Q. Okay. If you could turn to Exhibit 24 in the book. This has already been admitted. This is essentially an e-mail [between] you and Flip setting a meeting to talk about Stonecroft; is that right?*
>
> *A. That is correct.*
>
> *Q. Did you have that meeting?*
>
> *A. Yes, we did.*
>
> *Q. Okay. And what was discussed at that meeting?*
>
> *A. Well, first, you know, I advised him, you know, just to reiterate what transpired through the whole thing. He already knew. Also, he said to me that at that time he didn't have any money, but he definitely acknowledged that he owed me money.*
>
> *And at that time, I was – The first thing that he said to me was, well, I can transfer the Shenandoah condo that I have down there to you to start things off. I took his word for it, but that never transpired.*
>
> *Q. That was just an idea; right?*
>
> *A. Yes.*
>
> *Q. You didn't actually accept that?*
>
> *A. No, I did not.*

On September 1, 2013, Mr. Cove met with Mr. Wallen and presented him with an accounting of the Coves' expenses associated with the Stonecroft Project. Mr. Cove testified that he presented the accounting to Mr. Wallen for the purpose of calculating a figure on the amount that the Wallens would repay to the Coves. No such figure was agreed upon during the September 1 meeting.

The Court finds, however, that Mr. Wallen and Mr. Cove did enter into an understanding on September 1, 2013 by which Mr. Wallen would begin to repay Mr. Cove for the benefit the Wallens derived through the settlement agreement. The understanding was as follows: Mr. Wallen, through his company Trinity Group Construction, Inc., would pay Mr. Cove's company, EFC Glass Systems, Inc., above-market prices on subcontract work that EFC did for Trinity. That understanding was later modified in 2015 when Mr. Wallen agreed to perform work to build a tenant fit-out, or build-out, for office space that EFC occupied at no cost. At trial, Mr. Cove described the September 1, 2013 meeting as follows:

Q. So, on September 1st, 2013, you presented [a document accounting for everything you paid with regard to the Stonecroft property] to Mr. Wallen; that's right?

A. That is correct.

Q. And at that time you requested that he repay you; is that right?

A. Yes. We sat down and the first thing I – because he knew the dollar amount and I asked him for a life insurance policy to offset the dollar amount fifty percent that he owes us.

Q. Okay.

A. He told me that a couple months prior he was rejected for a life insurance policy and he couldn't produce one to me.

Q. Were you discussing ideas of how he could repay?

A. Yes.

Q. Okay. One of the ideas that you all tossed around was that he could take out a life insurance policy with you as a beneficiary; is that right?

A. That's correct.

Q. But that didn't happen?

A. No, it did not.

Q. All right. What other matters were discussed in terms of repayment at the September 1st, 2013 meeting?

A. Again, [Mr. Wallen] said, well, he didn't have any money at the time, but we can – because we were doing glassing and glazing work for his construction company, that upon him receiving contracts he can give me above contract price to come up with a pay down of the money that he did owe me.

Q. All right. And how was this going to be executed? Would this be done on every subcontract?

A. As-job basis where, you know, if it was a $5,000 job, it might be nothing. If it was a $100,000 job, it could be $10,000, $20,000.

Q. So, as he was able to do it?

A. Yeah.

Q. Based on whatever his profits might have been?

A. That is correct.

Q. Was that agreement for repayment amended at some point?

A. Yes. I ended up moving in the same building – I was renting Unit C as my fabrication shop. I moved down to a unit called J and K.

Q. Okay. In what building?

A. In the same building, 13849 Park Center Road in Herndon.

Q. Okay. That's where your business was located?

A. Yes.

Q. And Trinity's business is also located?

A. It is located in the same condominium complex building.

Q. All right. So, you had other space in that complex?

A. Yes. Like I said, I was in Unit C as my fab shop and then I moved down to units called J and K.

Q. All right. Let's back up a second back to 2013. When you were speaking to Mr. Wallen, did you agree to do anything at that time?

A. I did mention to him that if we didn't come to some agreement and pay down on it, I would have to take some other actions. And I believe he was totally aware of what I was saying.

Q. What did you mean by that?

A. I was going to pursue legal action against him.

Q. Okay. So, was it your understanding then that the agreement was that you wouldn't do that if he repaid you in this way we just discussed?

A. In so many words. I mean, Flip and I never were confrontational to each other. We had a longstanding relationship. We didn't want to create

confrontation between each other. He's not a confrontational person. I'm not a confrontational person.

Q. But that was your understanding of the agreement?

A. That's correct.

Q. Going back to 2015, you were referring to this other space you had. How does that come into the picture with regard to the repayment obligation?

A. I'm sorry. Can you say that one more time?

Q. I'll rephrase the question. Did you ask Mr. Wallen to do anything with regard to that other space you had, Units J and K?

A. Yes. We moved in in late 2015 and it was what we call a cold dark shell without any office space in it. So, I went to Mr. Wallen and asked him to look into and also build the tenant fit-out for it so I can move my office down to that location.

Q. Okay. Did he agree to do that?

A. Yes, he did.

Q. Okay. And would that be – that work be a credit towards the debt that he and his wife owed?

A. Yes.
Q. And was he going to charge EFC or you for that work?

A. I never received an invoice, never received an estimate, never received anything like that at all. He wasn't –

Q. He wasn't going to charge you as part of the agreement; right?

A. That's correct.

Q. Did Trinity start to do that work?

A. Yes, they did.

Q. Okay. And when did that begin?

A. Late 2015.

Q. Okay. And continued for some time; is that right?

A. Yes.

Work on the build-out project commenced, but was stopped on January 4, 2018 when Trinity's president, Robert Nichols, called a meeting with Mr. Cove, Mr. Wallen and himself. At that meeting, Robert Nichols informed Mr. Cove that Trinity's work on the build-out project would cease immediately. At trial, Mr. Cove provided the following testimony describing these events:

Q. Okay. Did there come a time when the performance of the tenant build-out work stopped?

A. Yes, it did.

Q. When was that?

A. That was January 2, 2018.

Q. Okay. And what happened on January 4th, 2018?

A. I received an e-mail from Mr. Robert Nichols, the General Manager, that we would like to have a meeting with you to discuss the future of, I guess, EFC Glass Systems and Trinity Group Construction.

Q. And when you got to that meeting, what occurred?

A. We sat down and Mr. Nichols said that we would like you – since I was in their offices downstairs and because I didn't have any offices to work from doing my contract glass – I only had the fabrication warehouse with no offices – he said that he wants my company and the offices that I had – I believe four offices – to vacate the offices. And I said I need some time to vacate them and I will let you know when, you know, I'll be (coughing).

Q. Okay. And did they add anything further in that meeting regarding the build-out?

A. Then Mr. Wallen stood up and he handed me – he put the drawings on the table and he says, here's all the work that has been done to date on the project, and he says, we will not be doing your build-out anymore.

Q. Did he say why?

A. He says, basically, because his attorney said he does not owe me any money anymore.

ANALYSIS

I. Breach of Contract

"To prove a breach of an oral contract, [the plaintiff] must first prove that a valid oral contract existed. To prove a contract's existence, all of the essential elements must be proven. There must be a complete agreement which requires acceptance of an offer, as well as valuable consideration. *Dean v. Morris*, 287 Va. 531, 536 (2014) (quoting *Montagna v. Holiday Inns, Inc.*, 221 Va. 336, 346 (1980)). "The proponent of an oral contract has the burden of proving all the elements of a valid and enforceable contract." *Adams v. Doughtie*, 63 Va. Cir. 505 (Portsmouth 2003).

In assessing the enforceability of an oral agreement, the Supreme Court of Virginia has stated that "there must be a mutual assent of the contracting parties to terms reasonably certain under the circumstances in order to have an enforceable contract." *Allen v. Aetna Cas. and Sur. Co.*, 222 Va. 361, 364 (1981). For the following reasons, the Court finds that the Plaintiffs in this case have not satisfied their burden of proving a valid and enforceable contract.

Here, the parties agree that no written agreement between the parties exists, so any finding of a contract would have to be an oral contract. The Coves argue that they had a valid and enforceable oral contract with the Wallens because on September 1, 2013, Mr. Wallen agreed to use his company, Trinity Group Construction, Inc., to pay Mr. Cove's company, EFC Glass Systems, Inc., above-market prices on subcontract work. The Coves also argue that this agreement was later amended to include the tenant fit-out or build-out work that Mr. Wallen would perform for Mr. Cove at no cost.

The fundamental problem with the Coves' position is that the oral agreement that the parties entered into was incomplete as to a material term—the specific amount to be repaid by the Wallens to the Coves.[3]

The Coves argue that reasonably definite terms of the contract were established during the September 1, 2013 meeting because Mr. Cove presented Mr. Wallen with an accounting of the Coves' expenses relating to the Stonecroft Project and asked the Wallens to compile their expenses to come up with a final number to be repaid to the Coves. The Wallens never compiled their expenses, and instead, the parties entered into the above-market pricing agreement. The Coves therefore argue that the price for the contract was established by the accounting that Mr. Cove presented to Mr. Wallen on September 1, 2013.

The Court does not agree with the Coves' position that the Wallens' failure to counter with their own expenses during the September 1, 2013 meeting shows that there was "mutual

[3] The Court in *Allen* found an oral agreement unenforceable where "[n]o sum was specified in the agreement, nor was any method or formula alleged for determining the amount payable in settlement." *Id.*

assent of the contracting parties to terms reasonably certain under the circumstances," as required by *Allen*. *Id.* at 364. Therefore, the Court does not find that the September 1 meeting established "terms reasonably certain under the circumstances in order to have an enforceable contract." *Id.* at 364. To have an enforceable contract, each of the material terms of the contract must be clear, certain, and specific. This contract was incomplete because one of the most material of terms, if not the most material term—the specific amount to be repaid—was missing.[4]

For the foregoing reasons, the Court finds that an enforceable contract between the Plaintiffs and Defendants in this case did not exist and rules in the Defendants' favor on Count II of the Complaint.[5]

II. Preliminary Issues Regarding Unjust Enrichment

There are three preliminary issues that must first be resolved before turning to the merits of the Unjust Enrichment claim.

Statute of Limitations

The Court finds that the statute of limitations issue was fully resolved by Judge Tran's July 31, 2019 opinion. However, the Court finds that even if the statute of limitations matter were before the Court today for the first time, the Court would reach the same result.

Judge Tran denied the Defendants' Plea in Bar in his July 31, 2019 opinion based on the reasoning in *Primrose Development Corp., et al. v. Benchmark Acquisition Fund I Limited Partnership*, 47 Va. Cir. 296 (1998). As the court in *Primrose* found, "a cause of action for unjust enrichment accrues when the unjust enrichment of the defendant actually occurs; that is, at

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[4] In *Dean v. Morris*, 287 Va. 531, 537 (2014), the Supreme Court of Virginia stated that, "[s]imply because the evidence is clear and convincing to prove that an oral agreement existed, however, does not mean that the evidence is sufficient to prove the terms of that agreement. Without specificity of terms, there is no contract." The Court in *Dean* went on to quote *Mullins v. Mingo Lime [& Lumber] Co.*, 176 Va. 44, 49 (1940) for the proposition that: "It is a necessary requirement in the nature of things that an agreement in order to be binding must be sufficiently definite to enable a court to give it an exact meaning. Another essential element of a valid contract is certainty and completeness. The element of completeness denotes that the contract embraces all the material terms; that of certainty denotes that each one of those terms is expressed in a sufficiently exact and definite manner. An incomplete contract, therefore, is one from which one or more material terms have been entirely omitted. An uncertain contract is one which may, indeed, embrace all the material terms, but one of them is expressed in so inexact, indefinite or obscure language that the intent of the parties cannot be sufficiently ascertained to enable the court to carry it into effect."

[5] Because the Court finds that a valid contract between the parties did not exist in this case, the Defendants' arguments regarding the statute of limitations, liability of Dianna Wallen, and ownership of the Cedar Lane Property are moot as to this Count.

the moment the expected compensation is not paid." *Id.* at *2. In ruling on the Defendants' Plea in Bar, Judge Tran found that the statute of limitations for a claim of unjust enrichment did not accrue in this case until 2018 when the Wallens repudiated on their agreement with the Coves to provide construction for the real estate build-out.

The Court agrees with Judge Tran's application of *Primrose* to this case and finds that the Coves' cause of action for unjust enrichment occurred when work on the build-out ceased on January 4, 2018. The testimony presented at trial shows that in September 2013, the Wallens committed to repayment through above-market pricing on Trinity and EFC Glass contracts. Although that repayment plan did not come to fruition, the parties amended the plan in 2015 such that the Wallens would repay the Coves by constructing a build-out for EFC. As with the 2013 agreement, under *Primrose*, a cause of action would not accrue until work on the build-out was not performed. Therefore, the three-year statute of limitations on the unjust enrichment claim had not expired when the Coves filed this lawsuit because a cause of action did not accrue until work on the build-out ceased on January 4, 2018.

Liability of Dianna Wallen

The Defendants argue that Dianna Wallen should not be held liable because there is no evidence that Mr. Wallen had the authority to negotiate any repayment on her behalf and that Mr. Wallen's only authority to act as her agent was in handling negotiations concerning the lawsuit in 2011, which was wholly separate from the claims at issue in this case.

The Court finds that it is not necessary to hold that Mr. Wallen was Mrs. Wallen's agent in order to find her liable under an unjust enrichment claim. A claim of unjust enrichment must show that: (1) the plaintiff conferred a benefit on the defendant; (2) that the defendant knew of the benefit and reasonably should have expected to repay the plaintiff; and (3) that the defendant accepted and retained the benefit without paying for its value. *Schmidt v. Household finance Corp., II*, 276 Va. 108, 116 (2008). As set forth in more detail below, the Court finds that the evidence in this case shows that Dianna Wallen's actions satisfy all of these elements, making a finding of agency unnecessary.

Moreover, the Court disagrees with the Defendants' position regarding agency based on the following deposition testimony of Mrs. and Mr. Wallen, which was read into evidence during the trial.

Testimony of Dianna Wallen read into evidence during trial October 21, 2019:

Q. Is it your understanding that your husband took care of all the settlement and hiring the lawyer, and all of that, for the EDVA lawsuit?

A. I would say, yes, he mostly.

Q. Mostly?

A. Yes, I guess he did.

Q. So, your husband was responsible for hiring counsel for both him and yourself?

A. Yes.

Q. And he would have been involved in the settlement negotiations?

A. I assume, yes.

Q. He would have interfaced with your counsel about that?

A. Yes.

Q. Okay. So, your husband hired a lawyer to defend you, right, and then agreed to a settlement, right? If you didn't have any role in negotiations, was your husband acting on your behalf in that regard?

A. Yes.

Testimony of Flip Wallen read into evidence during trial October 21, 2019:

Q. You talked earlier about the agreement to do – I guess you were discussing the build-out, and you said that that would basically wipe out any discussion of debt.

A. It would cease discussions about anybody owing anything.

Q. All right. If you do the build-out; right?

A. Uh-huh.

Q. And that would have included – When you say anybody owing anything, that would have included your wife; right?

A. Yeah. Trinity, wife, anybody and anything.

Q. But I just want to be clear, when you were agreeing with this it was on behalf of you and your wife?

A. Yeah, and Trinity.

Based on the foregoing testimony, the Court finds that Mr. Wallen was acting on Dianna Wallen's behalf when negotiating with the bank and the Coves and that she may be found liable to the Coves.

Ownership of Cedar Lane Property

The Defendants argue that the Coves lack standing to assert claims regarding the Cedar Lane Property because it was ECPC&JC that owned the Cedar Lane Property, not the Coves. After reviewing the respective briefs presented, the Court adopts the Plaintiffs' position on this matter.

The testimony presented at trial established that ECPC&JD served only as a pass-through, single asset entity, with all profits and losses being incurred by the Coves. Accordingly, the Court finds that the Coves may recover damages for the loss of the Cedar Lane Property.

III. Unjust Enrichment Claim

"To state a cause of action for unjust enrichment [the plaintiff] had to allege that: (1) he conferred a benefit on [the defendant]; (2) [the defendant] knew of the benefit and should reasonably have expected to repay [the plaintiff]; and (3) [the defendant] accepted or retained the benefit without paying for its value." *Schmidt v. Household finance Corp., II*, 276 Va. 108, 116 (2008). For the reasons set forth below, the Court finds that the Coves have satisfied each of these elements.

i. Benefit Conferred

The benefit that the Coves conferred upon both of the Wallens in this case is clear. By paying $2,000,000 and transferring the Cedar Lane Property to One West, the Coves relieved the Wallens of all liability in a lawsuit against them valued at $13,854,169.40. Release of all liability under the lawsuit thus protected all assets owned by the Wallens. The Court therefore finds that the Coves' actions in settling the lawsuit with One West conferred a benefit upon the Wallens.

ii. Knowledge of Benefit

It is equally clear that the Wallens knew of the benefit conferred upon them. During deposition testimony read into the record at trial, Mr. Wallen confirmed that both he and his wife signed the settlement agreement that released them from liability to One West. That agreement contained the benefits paid by the Coves to induce One West to dismiss the lawsuit and release not only the Coves, but the Wallens, from liability.[6]

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[6] Under the terms of the settlement agreement: "On or before November 28, 2011, the Guarantors shall deliver to the Bank a payment in the amount of Two Million and 00/100 Dollars ($2,000,000.00) in immediately available funds by wire payable to One West Banks, FSB." The settlement agreement goes on to provide that: "The Obligors agree to cooperate with the Bank in connection with the foreclosure of the Bank's liens encumbering the Properties [which included the Cedar Lane property]." Based on these agreements, the settlement agreement held that

iii. Expectation of Repayment

The Court finds that given the facts of the case and the evidence presented at trial, the Wallens should have reasonably expected to repay the Coves. The Wallens were faced with a $13,854,196.40 lawsuit but were absolved of all liability due to actions taken by the Coves.[7] Those actions came at a significant cost to the Coves and conferred a significant benefit on the Wallens. The Court finds that someone in both Mr. and Mrs. Wallens' position should have reasonably expected to repay the Coves.

Second, evidence presented at trial indicates that the Wallens did, in fact, expect to repay the Coves. At trial, Mr. Cove testified that during a meeting in July 2011, the Wallens acknowledged Steve Wexler's comment that they "owe the Coves big time."[8] This testimony was not refuted by the Wallens.

"effective upon the later of 100 days after (a) the delivery of the Payment, or (b) the closing on the foreclosure sales of the Properties, the Guarantors shall be released from their obligations under the Guaranties, exclusive of any of their obligations and agreements under this Agreement." (Pl. Ex. ¶¶ 4, 5, and 11).

[7] The suit styled *One West Bank, FSB, successor-in-interest to La Jolla Bank, FSB v. Edward F. Cove, Pamela D. Cove, Jeffrey S. Black, Cathy S. Black, Mil L. Wallen, III, and Dianna L. Wallen*, Civil Action No. 1:11cv805-LO/TCB, United States District Court for the Eastern District of Virginia, included numerous allegations against Mr. and Mrs. Wallen regarding their guarantee of the indebtedness of Stonecroft to One West. *See Id.* ¶¶ 13-14 and Counts 5, 6.

[8] At trial, Mr. Cove provided the following testimony:

> *Q. Okay. And did you all discuss how any payment to the bank would be made at that meeting?*
>
> *A. Well, the conversation went there was that by the statements of Mr. Wallen that he stated many times that he didn't have any money to put into it, was that Pam and I would put in the case pay-out and then he would reimburse me in one way or anotherway. And he commented to the, you owe the Coves big time, and they acknowledged that.*
>
> *Q. Who said that?*
>
> *A. Mr. Wexler.*
>
> *Q. Okay. And who acknowledged that they owed you money?*
>
> *A. The Wallens.*
>
> *Q. The Wallens did?*
>
> *A. Yes.*

Moreover, actions taken by Mr. Wallen after the settlement with One West demonstrate their expectation of repayment to the Coves. The evidence presented at trial and set forth in this opinion shows that: (1) Mr. Wallen offered to sign the deed to their "Shenandoah condo" over to the Coves; (2) Mr. Wallen discussed taking out a life insurance policy with Ed Cove as the beneficiary; (3) Mr. Wallen's company, Trinity Group Construction, Inc., and Mr. Cove's company, EFC Glass Systems, Inc., reached an agreement where Trinity would pay EFC above-market prices on subcontract work, although that never actually happened[9]; and (4) in 2015, Mr. Wallen and Mr. Cove agreed that Trinity would complete work on a tenant fit-out space that EFC was leasing at no charge.

The Court finds that these are actions consistent with someone who has a belief that they are indebted to another. Accordingly, the second element of unjust enrichment has been satisfied.

The Wallens argue, however, that the settlement with One West would never have occurred without their participation in the settlement and that this was, in essence, their contribution to the settlement. The Court is not persuaded by this argument.

The Wallens benefited enormously from this settlement. They were dismissed from a multi-million dollar lawsuit that, as they acknowledge in one of their briefs, would have "forced [them] into bankruptcy if the Banks succeeded in its lawsuit." (Def. Closing Arguments at 22). Mr. Wallen asserted at trial that he entered into the settlement agreement essentially as an accommodation to the Coves and that he wanted to fight the lawsuit but that the "option of fighting was taken away" from him because Mr. Cove wanted to settle. (10/22 Tr. pp. 15-16). Yet, when challenged by Plaintiffs' counsel as to how he would have fought the lawsuit and a potential $14 million judgment against he and his wife, his answers were vague and nonspecific and really only amounted to an expression of hope that some resolution with One West might be arranged.[10]

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[9] When asked during trial if he "ever ask[ed] [Mr. Wallen] why there was no premium payment?" Edward Cove provided the following response: "The process in [Mr. Wallen's] company or pretty much any other general contractor's company is that you work with the estimator and the project manager. It was his responsibility to go to the estimator or project manager to put that premium pricing on. He never did that. I wasn't going to go to the project manager and the estimator and tell them I'm getting another $20,000 or $30,000 on this job. They would have looked at me cross sided. Because it was never explained it to them, I'm supposed to institute it to the project manager or estimator? No. That's not the way it works."

[10] For example, Mr. Wallen provided the following testimony when asked about potential defenses:

> *Q. What were your defenses to the personal guarantee that you were sued on? How were you going to defend on that personal guarantee?*

Finally, the Court would add this obvious point: the fact that the Coves benefited from the settlement agreement does not undermine the significance of the fact that the Wallens—without any contribution on their part—benefited as well and, therefore, would have and, as the evidence established, did recognize an obligation to repay the Coves.

iv. Acceptance of Benefit

Finally, the evidence in this case shows that the Wallens accepted or retained the benefit of the Coves' actions without paying for their value. The parties in this suit reached a settlement agreement with One West because the Coves paid $2,000,000 and allowed the bank to foreclose on the Cedar Lane Property. The Wallens signed the settlement agreement and were thereby released from liability in a $13,854,169.40 lawsuit. The Wallens clearly accepted and retained the benefit of the Coves' actions. The Court finds that the Plaintiffs have satisfied all of the required elements for a claim of unjust enrichment and find in their favor on Count III of the Complaint.

IV. Damages

There are two key damages in this case: (1) the $2,000,000 that the Coves paid to settle the lawsuit; and (2) the value of the Cedar Lane Property. The Court finds that half of the value of each of these should be treated as unjust enrichment to the Wallens.

a. Value of the Cedar Lane Property

In the statement of losses associated with the Stonecroft Property that Mr. Cove presented to Mr. Wallen during the September 1, 2013 meeting, Mr. Cove listed the Cedar Lane Property's value as $1,950,000.00. (Pl. Ex. 25). However, at trial, the Plaintiffs' expert appraiser, Stephen Kirk Johnson, testified that, based on his research and findings, Cedar Lane Property's value in December 2012 was $1,750,000. In contrast, the Defendants argue that the Cedar Lane Property's value as of November 2012 was $1,075,000.00, which is the amount that it sold for at auction. (Def. Closing Arguments at 24, ft. note 19).

The Court is not persuaded that the value it should adopt is the auction price rather than the appraiser's expert opinion as to the value of the property at the time of the settlement

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A. Well, if we could have put it off long enough, and talked to friends and family and whatever to try to work a way out around it, that could have been a possibility.

Q. So, you believe you could put off a lawsuit in the Eastern District of Alexandria?

A. No. I believe there could have been a way that we could've solved the problem by going out to friends, family, clients, people we've known over the years, and try to make good on the loan.

agreement. The Court finds that Mr. Johnson's testimony is the best measurement of the value of what would have been its appraised price at the time of the settlement agreement.

b. Deduction for Uncharged Rent for the Coves and EFC

Undisputed testimony at trial established that Mr. Wallen, through Trinity, provided office space to Mr. Cove and EFC rent-free for a period of time from late-2012 to 2018. This is established through Mr. Cove's testimony below.

Q. At that time, where was your glass workshop located?

A. At J and K in the building.

Q. Were you maintaining office space at Trinity at that time?

A. Yes, I was.

Q. Were you paying rent for that?

[Objection as to relevance overruled]

Q. For how long were you occupying space at Trinity's headquarters?

A. Approximately from 2012 through – October or November of 2012 to 2018.

Q. And during –

A. And that would have been about March, I believe, 2018.

Q. And during that time did Mr. Wallen ever ask you to pay for the use of that space?

A. No.

Based on this fact, the Court holds that the award of damages in favor of the Coves should be reduced by the benefit they received from the Wallens in the form of free rent.

In calculating the value of the free rent, the Court relies on the following testimony from Mr. Cove and Mr. Wallen.

Testimony from Mr. Cove establishing square footage of actual office space and payment for common area:

Q. Do you know how much space you occupied while you were at Trinity, approximately?

A. Well, each – I had four offices, twelve-by-twelve. That's 144 time 4, so the square footage of that, plus a little bit of a common space. There was two small offices out in front about six-by-six. So, that's 36 – that's 72 square feet – and that's the number of square footage that we used. We used the common area a little but, in which I did pay for common expenses out in the kitchen area.

Q. You did pay for those?

A. Yes, I did.

Q. How much did you pay for those?

A. It was $50 a month.

Q. All right.

Further testimony from Mr. Cove providing details of tenancy:

Q. Okay. You heard Mr. Wallen's testimony here today about the space your company was occupying at the Trinity space. Do you recall that testimony?

A. Yes.

Q. What space were you actually occupying in his building?

A. We had four offices along the end of the building. First – I'll start over. For about a year-and-a-half we had one large office in his downstairs that my one project manager and myself occupied. The dimension was about twelve foot by eighteen foot.

Q. That was a year-and-a-half you said?

A. Approximately, yes.

Q. Okay. And that would have been what, 2013 to sometime in 2014?

A. Correct.

Q. Okay.

A. Then we moved our offices across the open area and we occupied four spaces there of about twelve by twelve approximate sized offices, and that we increased to have two little cubicles of six foot by six foot open cubicles in an open area.

Q. Okay. So, that's all the space you occupied exclusively, right?

A. That's correct.

Q. And you paid $50 a month for use of the common spaces?

A. For the coffee bar and the copier, yes.

Testimony from Mr. Wallen establishing total amount of space that EFC occupied:

Q. Do you know how many square feet, approximately, Mr. Cove utilized while he was at Trinity?

A. The actual space if you just counted the offices, the corridor between the offices that he had full control of, and a couple of the cubes, somewhere around 1,300 square feet.

Q. So, 1,300 square feet? And did he have access to any other place?

A. Yeah. He had access to, you know, basically all the common areas, which is bathrooms, break rooms, conference rooms, reception.

Q. Are you able to apportion the amount of common space that he had access to in relation to the amount of space he used at Trinity's –

A. Well, like I do for the other sub-tenant who actually was paying is we arrived at, okay, here's the space you're occupying, here's the space I'm occupying, here's the common area, so you have a pro rata share.

Q. So, how much square footage would you say that Mr. Cove enjoyed in total?

A. Maybe 1,800 to 1,900 as a pro rata share of those common areas.

Based on the foregoing testimony from Mr. Cove and Mr. Wallen, the Court makes the following conclusions. For one-and-a-half years (18 months), Mr. Cove and EFC occupied one 12 by 18-foot office, totaling 216 square feet.[11] After those eighteen months, Mr. Cove and EFC occupied 1,300 square feet of office space, corridors, and cubes until March 2018 (48 months). The first figure is based upon Mr. Cove's testimony that for a year-and-a-half, he and his project manager occupied just one office in the downstairs of the office space. The second figure is based upon a combination of Mr. Cove's testimony stating that he paid $50 per month for the use of common spaces and Mr. Wallen's testimony that the actual space that Mr. Wallen had control of (excluding common spaces) totaled 1,300 square feet.

[11] According to the testimony of Mr. Cove, he began this period of free rent in October or November of 2012. The Court, therefore, adopts the starting month as October 2012.

To calculate the value of the office space described above, the Court again turns to the testimony of Mr. Cove and Mr. Wallen.

Testimony from Mr. Wallen on property's value:

Q. Are you aware what the market value per square foot is for office space such as Trinity's?

A. I'm aware that many, many spots on down out street were going for about $25 a square foot.

Testimony from Mr. Cove on Property's value:

Q. Okay. You heard Mr. Wallen's testimony that – his testimony was that about $25 a square foot was what he considered to be a rental value; is that right?

A. I believe he said that, yes.

Q. Would you have paid $25 a square foot for that space?

A. No.

Q. In fact, you're currently renting a space in the same building, are you not?

A. Yes, three doors down in the same building, yes.

Q. And you started renting that space after Mr. Wallen kicked you out of his space, correct?

A. That is correct.

[Plaintiff's Counsel offered Exhibit 77, Defense Counsel objected]

Q. How much space are you leasing. Well, let me first back up. It's unit E in the same building as Trinity?

A. That's correct.

Q. And Trinity is in unit A, right?

A. That's correct.

Q. So, it's just a few doors down, right?

A. Correct.

Q. And how similar are the two spaces in terms of amenities and fit-outs?
A. About the same. I mean when you come into Trinity's offices their lobby is a little more upscale, but when you go back to an office it's painted walls and desks. Pretty much the same.

Q. Okay. How much are you paying per square foot? I should say how much square footage are you leaving in unit E?

A. I have 2,040 square feet and that includes everything in the space.

Q. Okay. And what are you paying a month for that?

A. Per month I'm paying $2,370 a month.

Q. How much is that per square foot?

A. That equals out to $13.94 per square foot.

Q. Okay. And you negotiated this lease in an arm's length transaction with the landlord; is that right?

A. That is correct. There's a lease here that I did sign.

The Court finds Mr. Cove's testimony more persuasive for the purpose of calculating the value per square foot of the property that EFC occupied rent-free from October 2012 to March 2018. The value that Mr. Cove provided is the current value, in the same building, recently negotiated in an arm's length deal. This Court finds this figure more persuasive than the value proposed by Mr. Wallen, which was based on other, nearby properties. Therefore, the Court assigns a value of $13.94 per square foot to the property that EFC occupied rent-free.

Based on the foregoing conclusions drawn by the Court, the Court finds that the Wallens should be credited $4,516.56 for the eighteen months of free rent for 216 square feet of office space and $72,488.00 for the forty-eight months of free rent for 1,300 square feet of office space. This comes to a total of $77,004.56 that the Wallens should be credited.

CONCLUSION

Based on the above findings, the Court Orders that the Coves are entitled to an award of $1,797,995.44 in damages. This figure constitutes half of the $2,000,000 that the Coves paid to One West as part of the settlement and the appraised value of the Cedar Lane Property at the time of the settlement agreement of $1,750,000, reduced by the $77,004.56 worth of rent that the Coves received. Additionally, the Court finds that the Coves are entitled to pre- and post-judgment interest to be calculated by the parties from January 4, 2018.

The Coves' counsel should prepare an order within 10 calendar days, circulate it to the Wallens' counsel, and submit it to the Court. Each party may note their objections on the Order itself above the signature block or on an attached page or pages.

Sincerely,

[redacted]

Randy I. Bellows
Circuit Court Judge