Court of King's Bench of Alberta

Citation: 1361556 Alberta Ltd v Ristorante Cosa Nostra Inc, 2023 ABKB 590

Date: 20231018
Docket: 1603 01497, 1603 02749
Registry: Edmonton

Docket: 1603 01497

Between:

1361556 Alberta Ltd

Plaintiff

- and -

Ristorante Cosa Nostra Inc, Haxton Holdings Ltd, Keith D Haxton and Mark Hobson

Defendants

Docket: 1603 02749

Designs by Marlynn Ltd

Plaintiff

- and -

Ristorante Cosa Nostra Inc, Haxton Holdings Ltd and 1361556 Alberta Ltd

Defendants

Reasons for Judgment
of the
Honourable Justice D. J. Kiss

I. Introduction

[1] The parties were involved in an attempt to renovate a commercial space and operate an upscale Italian restaurant in Fort McMurray, Alberta, between 2014 - 2016. The project ultimately failed. That failure led to two separate civil actions, which were tried together. As will become evident, this case reveals the risks that may, and often do, ensue in the absence of written contracts that clearly identify and confirm the intentions and obligations of the parties.

[2] The parties to the proceedings are as follows:

(a) Haxton Holdings Ltd. ("**Haxton Holdings**") is an Alberta corporation, the registered owner of a commercial building in Fort McMurray, municipally described as 10020 Franklin Avenue, Fort McMurray, where the Italian restaurant was situated;

(b) Keith D. Haxton ("**Haxton**") is a local businessman, the President, sole director, and shareholder of Haxton Holdings;

(c) Ristorante Cosa Nostra Inc. ("**Cosa Nostra**") is an Alberta corporation that briefly operated the Italian restaurant, Ristorante Cosa Nostra, in commercial space rented from Haxton Holdings;

(d) Mark Hobson ("**Hobson**") is a trained chef and is the sole director and shareholder of Cosa Nostra;

(e) 1361556 Alberta Ltd. ("**1361556**") is an Alberta corporation that was involved as a project manager and construction manager for the design and construction of the Italian restaurant, Ristorante Cosa Nostra;

(f) Timothy Gushue ("**Gushue**") is the President, sole director, and shareholder of 1361556, and is a journeyman carpenter and scaffolder;

(g) Designs by Marlynn Ltd. ("**Designs by Marlynn**") is an Alberta corporation that assisted in the design and construction of Ristorante Cosa Nostra;

(h) Marlynn Christensen is a director and the sole voting shareholder of Designs by Marlynn. Her daughter, Jenai Christensen, is also a director of Designs by Marlynn and works there part-time; and

(i) Karen Collins and her husband, George Collins, were initially just investors in the restaurant, but ultimately ended up purchasing the assets of the restaurant and taking over its operation in February 2016, through 1944078 Alberta Ltd, a company incorporated for that purpose ("**1944078**").

[3] Pursuant to the terms of a Consent Order granted April 16, 2021, the parties consented to the two actions being tried together and agreed that the evidence in each action would apply to the other action *mutatis mutandis*.

[4] In Action 1603 02749 ("Designs Claim"), the Plaintiff, Designs by Marlynn, seeks judgment in the amount of $84,455.92 for work it completed in relation to the design and construction of Ristorante Cosa Nostra. Designs by Marlynn alleges that it entered into a contract in October 2014 with one or more of the Defendants, Cosa Nostra, Haxton Holdings and 1361556, to perform these services. Designs by Marlynn claims that it performed the work and fulfilled its obligations under the contract until it was refused entry to the restaurant premises on November 21, 2015, and was not allowed to complete the remaining work.

[5] In Action 1603 01497 ("1361556 Claim"), the Plaintiff, 1361556, seeks judgment in the amount of $153,000 against the four Defendants, Cosa Nostra, Haxton Holdings, Haxton and Hobson for services it provided as project coordinator for the development of Ristorante Cosa Nostra. 1361556 also initially sought an additional judgment against Hobson personally for the further sum of $11,100 for unpaid rent and the cost of cleaning a rental home that Hobson subleased from 1361556, however 1361556 confirmed during the trial it was abandoning that portion of its claim.

[6] The Defendants, Hobson and Cosa Nostra, filed a Demand for Notice in March 2016, but did not file Statements of Defence. They are not contesting their liability to the Plaintiffs. However, as Cosa Nostra closed in February 2016 and was struck from the corporate registry in 2017, a judgment against Hobson or Cosa Nostra is of little assistance to the Plaintiffs. Since the restaurant and its principal are judgement-proof, both Plaintiffs are seeking to recover their unpaid invoices from Haxton, the owner of the building, the financier and apparent proponent of the restaurant project. Accordingly, this case analyzes the claims against the remaining Defendants, Haxton Holdings and 1361556.

[7] The Court heard evidence from five witnesses during the 4-day trial. The Plaintiff, Designs by Marlynn, called one witness - Jenai Christensen. The Plaintiff, 1361556, called three witnesses - Timothy Gushue, Mark Hobson and Karen Collins. The Defendants, Haxton Holdings and Haxton, called one witness - Keith D. Haxton.

[8] There was insufficient trial time booked by counsel for these two actions. Rather than delay the matter further in order to secure additional Court time for oral argument, counsel requested leave to file their submissions in writing. This request was granted.

II. Timeline of Events

[9] The evidence at trial relating to various key discussions that took place between the parties (and certain other players), and representations that may or may not have been made during those conversations, is conflicting. However, the timeline of the most significant events leading up to the commencement of these proceedings is, for the most part, not in dispute.

[10] In early 2014, Hobson approached Haxton about becoming involved with Tavern on Main, a pub style restaurant which Haxton owned in Fort McMurray. Hobson had never met Haxton before but knew him to be a local businessman and was aware of his involvement in Tavern on Main. Haxton advised Hobson that he did not have an opening for him at Tavern on

Main, but when Hobson indicated that he was interested in opening his own restaurant, Haxton mentioned that he might have another property coming available shortly.

[11] A few months later, Haxton and Hobson reconnected. Haxton advised Hobson that he had space coming available in one of his buildings as the current tenant, a labour union, was moving to new premises. This space was on the second floor of 10020 Franklin Avenue, Fort McMurray. It was a described as a great location, with panoramic views and close to where the City was planning to build an arena complex. Hobson advised Haxton that his business concept was a fine dining Italian restaurant.

[12] After this second discussion between Haxton and Hobson, Hobson contacted Gushue to see if he would be interested in being the general contractor and overseeing the construction work for this project. Hobson and Gushue had never worked together before but knew of each other. Gushue agreed. Hobson was excited and began doing research and making plans for the restaurant.

[13] On July 16, 2014, Haxton provided Hobson with a letter addressed to the Rural Municipality of Wood Buffalo, on Haxton Holdings letterhead, advising that Hobson was the new tenant for Suite 201, 10020 Franklin Avenue, and that Hobson was authorized to conduct business in this space. The letter indicated that the current tenant would occupy the space until October 31, 2014. This authorization letter was submitted by Hobson with an application for a Development Permit on July 17, 2014.

[14] In early September 2014, Haxton, Gushue and Hobson met at Tavern on Main. This was the first time Haxton and Gushue had ever met. There were further discussions about moving forward with this business opportunity and how this was going to be funded. The general plan involved Haxton loaning money to Hobson, Hobson putting in some of his own money, and Hobson having to find other investors to finance the rest. Gushue would not be involved in funding the project.

[15] Hobson had advised Gushue that the City of Fort McMurray had a concern about whether the second floor of the building could support the weight of kitchen equipment and patrons. After the meeting at Tavern on Main with Haxton and Hobson, Gushue hired an engineer. The engineer prepared a report dated October 3, 2014, that concluded the existing structural system was adequate.

[16] On September 25, 2014, the Rural Municipality of Wood Buffalo approved Hobson's application for a Development Permit to construct the fine dining Italian restaurant.

[17] In October 2014, Hobson and Gushue met with Marlynn and Jenai Christensen to discuss involving their company, Designs by Marlynn, in the design concept for the restaurant. On October 27, 2014, Marlynn Christensen sent a letter to Hobson on behalf of Designs by Marlynn outlining her fees for the project and requesting that Hobson confirm his agreement to these terms.

[18] At the end of October 2014, Hobson obtained a key to the premises from the former tenant, and Gushue and Hobson began demolition work at the beginning of November 2014.

[19] Hobson incorporated Cosa Nostra on November 7, 2014.

[20] Around November 18, 2014, Haxton advised Hobson and Gushue that all work at the restaurant site must cease immediately, and could not recommence until Hobson had his

financial investors lined up and Hobson had signed all of the required legal documents with Haxton Holdings concerning the lease and the proposed loan.

[21] By January 2015, Hobson had found two investors and had also obtained a line of credit through Silver Chef Rentals Inc. to acquire dishes. The investors included George and Karen Collins and another individual referred to only as “Freddy”. Haxton then instructed his lawyer to prepare the necessary documentation to formalize a loan and a rental agreement between Haxton Holdings and Cosa Nostra.

[22] Hobson and Gushue resumed the demolition and construction work in January 2015. Designs by Marlynn was also involved, working on the design concept and purchase of furnishings, light fixtures and other related items.

[23] On March 1, 2015, the following documents were executed:

(a) Commercial Lease between Haxton Holdings and Cosa Nostra for a five-year period commencing March 1, 2015. Rent was set at $19,000 per month plus GST, for the first year, increasing each year. Rent for the months of March to May 2015 was agreed to be delayed such that no rent was required to be paid during those three months, but, commencing June 1, 2015, Cosa Nostra was required to pay an additional $4,750 per month plus GST, in addition to the regular rent for a 12-month period to make it up;

(b) Loan Agreement between Haxton Holdings, Cosa Nostra and Hobson, whereby Haxton Holdings agreed to loan $400,000 to Cosa Nostra for the purpose of conducting leasehold improvements at the restaurant site. The term of the loan was 5 years, with only interest payments being required for the first year. The security for the loan was a General Security Agreement and the personal Guarantee from Hobson;

(c) Continuing Guarantee signed by Hobson in favour of Haxton Holdings in relation to the $400,000 loan;

(d) Promissory Note for $400,000 executed by Cosa Nostra in favour of Haxton Holdings; and

(e) General Security Agreement over all present and after acquired property executed by Cosa Nostra in favour of Haxton Holdings.

[24] Haxton Holdings subsequently issued four cheques to Cosa Nostra on March 9, March 15, April 16 and May 29, 2015, each in the amount of $100,000.

[25] Construction of the restaurant continued during the spring of 2015.

[26] In May 2015, Hobson, Gushue, Haxton, as well as Jenai and Marlynn Christensen had a meeting on the site of the restaurant during which paint colours for the restaurant and restrooms were discussed. This was the only in-person meeting between Haxton and the Christensen’s.

[27] Ristorante Cosa Nostra held a Gala in mid-June 2015 and opened fully for business on June 22, 2015.

[28] Designs by Marlynn did not perform any work on site after June 16, 2015, and did not perform any further design work at all after June 22, 2015. Designs by Marlynn did hire a company to install some replacement parts for two blinds in the restaurant, but when the installer

arrived on November 21, 2015, he was denied access to the restaurant and was unable to complete the repair.

[29] Designs by Marlynn issued its final Invoice to Cosa Nostra on July 17, 2015 for $112,506.58 and subsequently received two partial payments on September 2 and 24, 2015, leaving an outstanding balance of $84,455.92.

[30] 1361556 did not complete any further work on the project after August 2015. 1361556 issued a final invoice to Cosa Nostra on October 19, 2015, for the sum of $153,000, inclusive of GST. That invoice remains outstanding.

[31] In July 2015, Karen and George Collins assumed a much more significant role in the day-to-day operation and overall financial management of the restaurant. They did so at the request of Haxton, after Hobson advised him that he was going to have difficulty making his loan and rent payments. Karen Collins was added as a signatory with Hobson on all cheques for Cosa Nostra. Hobson focussed his efforts on running the kitchen. At some point, Hobson was completely removed as a signatory on the Cosa Nostra cheques.

[32] On December 8 and 9, 2015, 1361556 filed three Builders' Liens under the then *Builders' Lien Act*. In brief, two were filed against the fee simple estate of Haxton Holdings in 10020 Franklin Avenue, Fort McMurray; the final one was filed against the leasehold interest of Cosa Nostra in the same commercial building.

[33] On December 9, 2015, Designs by Marlynn likewise filed a Builders' Lien under the then *Builders' Lien Act*, RSA 2000, c. B-7 ("*Builders' Lien Act*") against the fee simple estate of Haxton Holdings in 10020 Franklin Avenue, Fort McMurray, the commercial building where Ristorante Cosa Nostra was a tenant.

[34] On January 14, 2016, Karen Collins incorporated 1944078.

[35] The 1361556 Claim was commenced by the filing of a Statement of Claim on January 26, 2016.

[36] In early February 2016, George Collins contacted Hobson and requested he attend a meeting at the restaurant. On Sunday February 7, 2016, the meeting proceeded with George Collins, Hobson, Haxton, Michael Allen (who acted solely as a witness), and a Commissioner for Oaths in attendance. During the meeting, Hobson, on behalf of Cosa Nostra, and Haxton, on behalf of Haxton Holdings, executed the following documents:

(a) Bill of Sale between Cosa Nostra and Haxton Holdings. In the Bill of Sale, Cosa Nostra acknowledges that it is in breach of its loan dated March 1, 2015, with Haxton Holdings and owes $360,000, plus interest. For the sum of $300,000, Cosa Nostra agrees to transfer to Haxton Holdings all equipment, assets and leasehold improvements, and inventory of the restaurant entitled Ristorante Cosa Nostra located in the leased premises at 10020 Franklin Avenue;

(b) Surrender of Lease between Haxton Holdings and Cosa Nostra acknowledging that Cosa Nostra has breached its lease as of February 7, 2016, as it has been unable to make its lease payments and other loan payments to Haxton Holdings. Cosa Nostra further acknowledges that it continues to be liable to Haxton Holdings for the entire balance of the lease term. Haxton Holdings is required to make efforts to mitigate the damages associated with the breach, including

making efforts to obtain a replacement tenant for the property immediately, and Cosa Nostra agrees to cooperate and surrender the premises immediately so that steps to mitigate can commence.

[37] The following day, on February 8, 2016, Haxton Holdings entered into an agreement with 1944078 to sell to it all of the equipment (excepting any items owned by Silver Chef Rentals Inc.), assets and leasehold improvements, and inventory of Ristorante Cosa Nostra. The documents executed by Haxton, on behalf of Haxton Holdings, and Karen Collins, on behalf of 1944078, included the following:

(a) Bill of Sale for $300,000 attaching a list of the equipment included in the sale. The Bill of Sale includes covenants from the Grantor, Haxton Holdings, that it is rightfully possessed of the chattels and has the right to sell them and that the chattels are free from any charge or encumbrance;

(b) Loan Agreement between Haxton Holdings, 1944078 and Karen Collins, whereby Haxton Holdings agrees to loan $300,000 to 1944078 for the purpose of conducting leasehold improvements for a new restaurant at the same site as Ristorante Cosa Nostra. The term of the loan was five years. The security for the loan was a General Security Agreement and the personal Guarantee from Karen Collins;

(c) Commercial Lease between Haxton Holdings and 1944078 for a five-year period commencing April 1, 2016. Rent was set at $9,000 per month, plus GST. The space was to be turned over to 1944078 “as is”;

(d) Continuing Guarantee signed by Karen Collins in favour of Haxton Holdings in relation to the $300,000 loan;

(e) Promissory Note for $300,000 executed by 1944078 in favour of Haxton Holdings; and

(f) General Security Agreement over all present and after acquired property executed by 1944078 in favour of Haxton Holdings. 1944078 covenants that as of the date of the Agreement, there are no encumbrances affecting its collateral.

[38] The Designs Claim was commenced by the filing of a Statement of Claim on February 16, 2016.

[39] Ristorante Cosa Nostra closed on February 27, 2016. It re-opened in March 2016 and commenced operations under the new name “Asti Trattoria Italiana”. Unfortunately, its bad fortune continued. The wildfire in Fort McMurray in May 2016, resulted in its closure and the evacuation of the City for a period of time. In 2018, George Collins passed away. In the summer of 2019, Karen Collins required hip surgery and experienced complications in her recovery.

[40] In the fall of 2019, a sign was posted on the door of the restaurant, at the direction of Karen Collins, stating it was “temporarily closed”. The restaurant never re-opened.

[41] Haxton Holdings eventually contacted a civil enforcement agency, and a Notice of Seizure was issued against the assets of the restaurant. The agency completed an inventory, had the assets valued and then sold. The net proceeds of sale, $52,904.53, were ultimately paid to Haxton Holdings.

[42] The restaurant space in the building remained vacant until it was released to a new tenant, a medical doctor, in 2021.

III. Designs Claim

[43] The Statement of Claim filed by the Plaintiff, Designs by Marlynn makes the following claims:

(a) That Designs by Marlynn entered into "an oral and written agreement, or either of them" with one or more of the Defendants, Cosa Nostra, 1361556 and Haxton Holdings, which has been breached by the Defendants and pursuant to which, there is still due and owing to it the sum of $84,455.92, inclusive of GST;

(b) That the Defendants, and each of them, should reimburse Designs by Marlynn the sum of $84,455.92 on a *quantum meruit* basis, with this amount being a fair and reasonable compensation for the value of the labour and materials supplied to the Defendants;

(c) That two of the Defendants, Cosa Nostra and Haxton Holdings, or either of them, have been unjustly enriched as a result of the services provided by Designs by Marlynn and hold the sum of $84,455.92 in trust in its favour; and

(d) That Designs by Marlynn is entitled to a valid builders' lien against the lands owned by Haxton Holdings in the amount of $84,455.92 and in default of payment, Haxton Holdings' interest in the lands should be sold and the proceeds used to pay this sum to Designs by Marlynn.

A. Breach of Contract

[44] Designs by Marlynn alleges that it entered into an oral and/or written contract with one or more of Cosa Nostra, Haxton Holdings and 1361556. It claims that the terms of the contract, express or implied, were that it would provide its services for the design and construction of Ristorante Cosa Nostra at the direction of, and subject to the approval of, one or more of Cosa Nostra, 1361556 and Haxton Holdings, and that Designs by Marlynn's invoices would be paid on receipt. With respect to Haxton Holdings, specifically Designs by Marlynn, alleges that Haxton, on behalf of Haxton Holdings, represented that it would finance the construction of the restaurant and the associated work, and that Haxton Holdings would arrange for all invoices it issued to Cosa Nostra, 1361556 or Haxton Holdings to be paid within a reasonable time.

[45] The position of 1361556 is that it did not enter into any type of contract with Designs by Marlynn. 1361556 does not dispute the amount claimed by Designs by Marlynn, but states that the debt is owed by Cosa Nostra and/or Haxton Holdings.

[46] The position of Haxton Holdings is similarly that there is no evidence that it entered into any type of contract directly with Designs by Marlynn. Further, there is no evidence that Haxton's approval was sought and/or given for any of the services provided by Designs by Marlynn.

[47] In order to conclude that parties have formed a legally enforceable contract, whether oral or written, the following elements must exist: (1) offer and acceptance; (2) certainty of (essential) terms; (3) an intention to create legal relations; and (4) some consideration must be exchanged: see, for example, ***Ethiopian Orthodox Tewahedo Church of Canada St. Mary***

Cathedral v Aga, 2021 SCC 22 at paras 35-36 (***Aga***); see also John D McCamus, *The Law of Contracts*, 3rd ed (Toronto: Irwin Law, 2020); S M Waddams, *The Law of Contracts*, 8th ed (Toronto: Thomson Reuters, 2022).

[48] The offer "sets out the offeror's willingness to enter into an agreement on certain terms; this is then matched with a corresponding agreement or 'acceptance' …from the other party, the offeree, which also communicates a willingness to enter into an agreement" on the same terms: McCamus at 31. At the outset, the parties ought to be certain about their rights and responsibilities under the contract.

[49] An intention to create legal relations can be thought of as "an aspect of valid offer and acceptance, in the sense that a valid offer and acceptance must objectively manifest an intention to be legally bound": ***Aga*** at para 36, citing ***Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp***, 2020 SCC 29 (***Crystal Square***).

[50] Consideration refers to an exchange of value – "something must be given or promised in exchange for the promise sought to be enforced": Waddams at 120, citations omitted.

[51] The test for finding that an agreement exists at common law is "objective, and the offer, acceptance, consideration and terms may be inferred from the parties' conduct and from the surrounding circumstances": ***Crystal Square*** at para 37. The parties' "subjective intentions are *not* relevant to the determination of whether a contract was formed": ***Shannon v Shannon***, 2023 ABCA 79 at para 7 (emphasis added).

[52] Jenai Christensen gave the following evidence on behalf of Designs by Marlynn:

- After an initial meeting with Hobson and Gushue in October 2014 to discuss Designs by Marlynn's potential involvement in designing Ristorante Cosa Nostra, her mother, Marlynn, sent a letter dated October 27, 2014, on company letterhead addressed to Hobson stating: "It was wonderful to meet with you last night and to make a commitment to this project. At this time, I would like to affirm our conversation." The letter goes on to outline Designs by Marlynn's fees for the project and to request some additional information so that design plans could be finalized. The letter concludes with "Please confirm your agreement to this letter by email". No evidence was led as to whether a reply from Hobson was ever received.
- It was always her understanding that the work of Designs by Marlynn and any materials were being provided for the corporate entity, Cosa Nostra. All invoices from Designs by Marlynn were sent only to Cosa Nostra and all payments received were from Cosa Nostra.
- With respect to Gushue, she thought that his company, 1361556, was just providing labour for the project. She did not understand him to be the general contractor.
- She was led to believe by Hobson and Gushue that the financers of the restaurant, which she understood included Haxton Holdings, would pay for the Designs by Marlynn invoices; however, she confirmed that she had never received any communication which would indicate that Haxton Holdings agreed to pay these invoices.

- Designs by Marlynn did not provide Haxton Holdings with a notice in writing of the work it intended to perform or the materials it intended to supply for the project.
- The only time that she or her mother, Marlynn, met with Haxton in person was on May 3, 2015. She and her mother met at the restaurant with Hobson, Gushue and Haxton. They discussed paint colours for some of the common areas of the building including the stairwell and bathrooms. The meeting lasted 15 – 20 minutes. She believed that Haxton would have seen their design boards that were posted on the walls of the restaurant space.
- The only other communications that Designs by Marlynn had with Haxton were a couple of emails providing him with follow-up information about the paint selections and information about the designs for the restrooms. Initially, she testified that she did not recall ever receiving a reply from Haxton to any of her emails. In cross-examination, she was provided a copy of an email dated May 19, 2015, sent from Haxton to her which states "Thank you for the information. I did not agree to be financially responsible for any restroom renovations. Marco is aware of this. Keith.". Ms. Christensen testified that if it says it was sent, then she "probably received it".
- Haxton never told Designs by Marlynn what paint or other items to select for the restaurant itself. Rather, she and her mother worked in consultation with Hobson and Gushue. She recalled that Haxton was involved in selecting the flooring and door for the front entrance of the restaurant. When it was suggested to her that Haxton never agreed to pay for the flooring, her response was "okay". Ms. Christensen also confirmed that she was aware that Haxton paid to paint the stairwell and hallway himself.
- The total amount invoiced by Designs by Marlynn for its labour, materials, and travel costs related to the project was $192,620.72. Payments totalling $108,164.80 were made by Cosa Nostra. The last payment of $16,800.00 was deposited on September 24, 2015, leaving a balance outstanding of $84,455.92.

[53] Gushue, on behalf of 1361556, testified that during the meeting with Hobson and Haxton that took place at Tavern on Main in September 2014, he was the one who suggested Designs by Marlynn as he had done work with Marlynn Christensen on other projects. Haxton's only response to this suggestion was to "be careful of designers". Gushue confirmed that while he did attend some meetings where both Marlynn Christensen and Hobson were present, he had no idea of the fees that Designs by Marlynn was charging for its services. He understood that the direction for the project was coming from Hobson.

[54] Haxton's only testimony at trial relevant to this issue was that he recalled Designs by Marlynn being mentioned during his meeting with Hobson and Gushue at Tavern on Main. However, at his earlier questioning for discovery in 2017, he did not recall Designs by Marlynn being discussed.

[55] I found Jenai Christensen to be a very credible witness. She answered questions directly. If she could not recall a particular event or was uncertain about something, she admitted this. She did not avoid answering questions even when her evidence was unhelpful to her claim. However,

even if I fully accept the evidence given by Jenai Christensen, Designs by Marlynn has failed to establish, on a balance of probabilities, that it had a contract with any entity other than Cosa Nostra for the services and materials it provided in relation to the design and construction of Ristorante Cosa Nostra.

[56] With respect to 1361556, there is absolutely nothing in the evidence of Ms. Christensen that would support a finding that Designs by Marlynn entered into a contract of any sort with Gushue's company. Ms. Christensen thought Gushue was just a labourer. Gushue was never involved in any fee discussions with Designs by Marlynn and Ms. Christensen was clear that she had no expectation that 1361556 was going to be paying their invoices.

[57] With respect to Haxton Holdings, I accept Ms. Christensen's evidence that she understood that the financers of the project, which included Haxton Holdings, were going to be paying her invoices. However, the problem is that this information was not relayed to her by Haxton Holdings, but instead by Hobson and/or Gushue. Neither Hobson nor Gushue had the authority to enter into contracts on behalf of, or otherwise bind Haxton Holdings.

[58] Further, these representations alone fall short of constituting the offer, acceptance and consideration that is essential to contract formation. Designs by Marlynn had no dealings at all with Haxton until after the project was already well underway. Their interactions were limited to one on-site meeting in May 2015, where paint colours were discussed and a few emails exchanged thereafter on which Haxton was copied. On the one occasion that Haxton replied to an email from Designs by Marlynn, it was to confirm that he was not the one responsible for paying for the renovations. Ms. Christensen's subjective belief and intentions are not sufficient to find the existence of a contract when none of the requisite elements were present.

[59] In contrast, the relationship between Designs by Marlynn and Cosa Nostra was significantly different. After a meeting between Hobson, Gushue and Marlynn Christensen to discuss the scope of the project, Designs by Marlynn outlined its fees for the project in a letter addressed only to Hobson on October 27, 2014. Thereafter, Designs by Marlynn commenced work and issued invoices only to Cosa Nostra, based on the fee structure outlined in its October 27, 2014 offer. Payments received by Designs by Marlynn came from Cosa Nostra, and no one else. Designs by Marlynn only took directions throughout the project from Hobson and Gushue.

[60] I am satisfied that there was an oral contract between Cosa Nostra and Designs by Marlynn and that the sum of $84,455.92 remains due and owing under the terms of this contract. However, the evidence does not satisfy me that any such contract existed between Designs by Marlynn and either of the remaining Defendants, 1361556 or Haxton Holdings.

B. Unjust Enrichment and *Quantum Meruit*

[61] In its Statement of Claim, Designs by Marlynn sought a declaration that Haxton Holdings and Cosa Nostra have been unjustly enriched as a result of the services it provided and for which it remains unpaid, in the sum of $84,455.92. The remedy sought by Designs by Marlynn is reimbursement of $84,455.92 on a *quantum meruit* basis.

[62] In the written submissions received after trial, Designs by Marlynn indicated it is pursuing this claim now against only Haxton Holdings. The decision to abandon this claim against Cosa Nostra is appropriate as it is well established that "where the parties have occupied the field with contracts, the court should be slow to find a gap to fill with unjust enrichment": ***Harris v Cinabar Enterprises Ltd***, 1996 ABCA 388, leave to appeal dismissed [1997] SCCA No

77 at para 40. Where a contract exists, the courts should only intervene where the provisions dealing with compensation are deficient or do not exist, the contract has been abandoned, or was terminated without reason: ***677960 Alberta Ltd v Petrokazakhstan Inc***, 2013 ABQB 47, aff'd 2014 ABCA 110 at para 85 (***677960 Alberta Ltd***).

[63] Cosa Nostra does not dispute its liability to Designs by Marlynn under contract and so there is no need to address this alternative cause of action.

[64] The position of Haxton Holdings is that any benefit it received was indirect, resulting from its lease with Cosa Nostra, and not through any direct dealings with Designs by Marlynn. Haxton Holdings argues that the requirement that there be a direct nexus between any enrichment of Haxton Holdings and the deprivation of Designs by Marlynn is missing and fatal to its claim.

[65] In ***677960 Alberta Ltd***, Justice Stevens observed (at paras 75-77):

> … The terms unjust enrichment and *quantum meruit* are not synonymous. While the terms are certainly related, they are not the same.
>
> Whereas *quantum meruit* is a remedy, unjust enrichment is a principle or a cause of action.
>
> *Quantum meruit* can be either (1) contractual (where the court determines reasonable remuneration for services provided under a contract that did not specify a sum) or (2) restitutionary (where a remedy is available through unjust enrichment). The relationship between the two terms is that *quantum meruit* is one of the remedies to a claim for unjust enrichment.
> [Citations omitted.]

[66] The elements of a cause of action for unjust enrichment are: (i) the defendant has been enriched, (ii) the plaintiff has suffered a deprivation that corresponds to the defendant's enrichment, and (iii) the absence of any juristic reason justifying the defendant's retention of that transfer of value: ***Pettkus v Becker***, [1980] 2 SCR 834 at 848; ***Garland v Consumers' Gas Co***, 2004 SCC 25 at 30 (***Garland***); ***Kerr v Baranow***, 2011 SCC 10 at para 3 (***Kerr***); see also Mitchell McInnes, *Unjust Enrichment*, 2nd ed (Toronto: LexisNexis Canada, 2022) at 5. The elements are cumulative such that a party seeking relief on the basis of unjust enrichment must establish all three elements.

[67] The first two elements of the action – enrichment and corresponding deprivation – require "proof of a transfer of wealth between the parties. The defendant's enrichment is relevant only insofar as it was acquired from the plaintiff; the plaintiff's deprivation is relevant only insofar as it resulted in a gain to the defendant": McInnes at 5-6. The plaintiff must have either made a direct contribution causing the defendant's unjust enrichment or an indirect contribution that is causally connected to the defendant obtaining a benefit that rightfully ought to have accrued to the plaintiff: ***Moore v Sweet***, 2018 SCC 52 at para 41 (***Moore***)

[68] Canadian courts have consistently taken a "straightforward economic approach" to the first two elements: ***Peter v Beblow***, [1993] 1 SCR 980; ***Moore*** at para 41 (***Moore***); ***Garland*** at para 41; ***Kerr*** at para 37. Moral, policy based, or other considerations are dealt with at the juristic reason step of the analysis: ***Kerr*** at para 37; ***Garland*** at para 35.

[69] Under the third element – absence of juristic reason – the plaintiff must show that there is "no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff": ***Kerr*** at para 40. The Supreme Court of Canada in ***Garland*** held that the analysis of this third element has two parts. In ***Moore***, at paras 57-58, this two-part test was summarized as follows:

> The first stage requires the plaintiff to demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the "established" categories of juristic reasons: a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations. If any of these categories applies, the analysis ends; the plaintiff's claim must fail because the defendant will be justified in retaining the disputed benefit....
>
> If the plaintiff successfully demonstrates that none of the established categories of juristic reasons applies, then he or she has established a *prima facie* case and the analysis proceeds to the second stage. At this stage, the defendant has an opportunity to rebut the plaintiff's *prima facie* case by showing that there is some residual reason to deny recovery. The *de facto* burden of proof falls on the defendant to show why the enrichment should be retained. In determining whether this may be the case, the court should have regard to two considerations: the parties' reasonable expectations and public policy.
> [Citations omitted.]

[70] Designs by Marlynn argues that Haxton Holdings was enriched when it received and retained materials from Cosa Nostra that had been purchased by Designs by Marlynn for Ristorante Cosa Nostra and for which it had not yet been paid. However, as noted by Gill J in ***Evanoff Enterprises Ltd v Pioneer Hi-Bred Limited***, 2009 ABQB 223 at para 60:

> Unjust enrichment does not extend to permit recovery where the alleged benefit is indirect or incidentally conferred; cases where unjust enrichment has been made out generally deal with benefits conferred directly and specifically on the defendant, such as goods or services purchased directly from the defendant or money paid to the defendant.

[71] The underlying rationale for the requirement was explained by McLachlin J in ***Peel (Regional Municipality) v Canada; Peel (Regional Municipality) v Ontario***, [1992] 3 SCR 762 at para 47:

> ... To permit recovery for incidental collateral benefits would be to admit of the possibility that a plaintiff could recover twice – once from the person who is the immediate beneficiary of the payment or benefit (the parents of the juveniles in group homes in this case), and again from the person who reaped the incidental benefit ... It would also open the doors to claims against an undefined class of persons who, while not the recipients of the payment or work conferred by the plaintiff, indirectly benefit from it. This the courts have declined to do. The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant, such as the services rendered for the defendant or money paid to the defendant....

[72] In this case, Haxton Holdings did not receive anything at all directly from Designs by Marlynn. Everything acquired by Haxton Holdings was the result of the contract it entered into with Cosa Nostra on February 7, 2016, to purchase the assets, inventory, equipment and leasehold improvements of Ristorante Cosa Nostra. Therefore, the first element of enrichment has not been made out.

[73] The deprivation suffered by Designs by Marlynn was a result of Cosa Nostra not fully paying for the goods and services Designs by Marlynn delivered in accordance with their contract. Haxton Holdings acquired the goods indirectly through its own dealings with Cosa Nostra, not from Designs by Marlynn. The requirement of a direct nexus between the enrichment and deprivation of the parties is also absent here.

[74] Even if these first two requirements were met, there is a juristic reason for any enrichment retained by Haxton Holdings – its lease, loan and ultimately, the sale documents entered into between Haxton Holdings and Cosa Nostra. There is no dispute that Haxton Holdings loaned $400,000 to Cosa Nostra. Haxton Holdings took security for that loan. The General Security Agreement charged all present and after acquired property of Cosa Nostra. Cosa Nostra also entered into a lease agreement with Haxton Holdings. It is not disputed that Cosa Nostra was delinquent in terms of its obligations under both the loan and the lease at the date of the transfer of the assets of Cosa Nostra to Haxton Holdings on February 7, 2016.

[75] Admittedly, the Bill of Sale signed by Cosa Nostra in favor of Haxton Holdings is flawed since it improperly omitted the outstanding debt owed to Designs by Marlynn. I will elaborate on this flaw in my analysis of 1361556's parallel claim of unjust enrichment. Regardless, in my view, the overall circumstances generally favour finding the presence of a juristic reason. In any case, the test is cumulative so that the absence of a juristic reason would be unable to overcome the absence of the first two elements.

[76] I therefore find that Designs by Marlynn has failed to prove its claim of unjust enrichment against Haxton Holdings.

C. Builders' Lien

[77] Designs by Marlynn seeks a declaration that it is entitled to a valid builders' lien ("Designs Lien") in the fee simple interest of Haxton Holdings in 10020 Franklin Avenue, Fort McMurray, the commercial building where Cosa Nostra was a tenant.

[78] In terms of the applicable legislation, on August 29, 2022, amendments to the renamed *Prompt Payment and Construction Lien Act*, RSA 2000, c P-26.4 ("*PPCLA*") came into force. The *Builders' Lien (Prompt Payment) Amendment Act, 2020*, SA 2020, c 30, includes the following transitional provisions:

> Transitional
>
> 74(1) In this section,
>
> (a) "former provisions" means the provisions of this Act as they read immediately before the coming into force of the *Builders' Lien (Prompt Payment) Amendment Act, 2020*;
>
> (b) "new provisions" means the provisions of this Act as they read on the coming into force of

> the *Builders' Lien (Prompt Payment) Amendment Act, 2020*.
>
> (2) Any contract or subcontract entered into on or after the coming into force of the *Builders' Lien (Prompt Payment) Amendment Act, 2020* must conform to the new provisions.

[79] (3) Subject to the regulations, any contracts or subcontracts entered into prior to the coming into force of the *Builders' Lien (Prompt Payment) Amendment Act, 2020* are governed by the former provisions until expired, terminated or amended in order to conform to the new provisions.[Emphasis added.]Section 37 of *Prompt Payment and Adjudication Regulation*, Alta Reg 23/2022 reads:

> 37 For the purpose of section 74(3) of the Act, any contracts entered into prior to the coming into force of the *Builders' Lien (Prompt Payment) Amendment Act, 2020* and scheduled to remain in effect for longer than 2 years after the coming into force of that Act shall be given 2 years from that date to be amended so that their terms are in compliance with the new provisions and this Regulation.

[80] The Designs Lien was registered against the fee simple estate of Haxton Holdings on December 9, 2015. At trial, all parties agreed that the contracts and relevant underlying events alleged by Designs by Marlynn arose and came to (or would have come to) a conclusion before August 29, 2022, and therefore, the "former provisions" under the *Builders' Lien Act* apply.

[81] The *Builders' Lien Act* creates an extraordinary statutory remedy: ***Tervita Corporation v ConCreate USL (GP) Inc***, 2015 ABCA 80 at para 8 (***Tervita***); ***K & Fung Canada Ltd v NV Reykdal & Associates Ltd***, 1998 ABCA 178 at para 5, leave to appeal dismissed, [1998] SCCA No 349 (***Fung***). The purpose of the *Act* is to provide a simple and inexpensive method for a person to collect money due for work done at or material supplied to a construction site. It authorizes anyone who did work or supplied materials used to improve land for an owner, contractor or subcontractor to register a lien on the interest of the owner of the land being improved. Liens attach only to the owner's equity in the land. While a liberal approach may be taken to determining whether a claimant has lien rights, a strict interpretation is placed on the procedure for registering and enforcing a lien: ***Tervita*** at paras 5, 25; see also Bryan West & Allyson L Hopkins, *Prompt Payment, Adjudication and Construction Liens in Alberta, 2021-2022* (Toronto: Thomson Reuters, 2022) at 291 (*Construction Liens 2021-2022*).

[82] Haxton Holdings argues that the Designs Lien should fail for several reasons. In my view, two of these arguments are determinative of the issue. Haxton Holdings submits that (1) the Designs Lien was registered outside of the 45-day deadline set out in s 41 of the *Builders' Lien Act*, and (2) Designs by Marlynn did not provide Haxton Holdings with the notice required by s 15 of the *Builders' Lien Act*. I agree with both of these arguments and for the reasons that follow, I conclude that the Designs Lien must fail.

[83] In its written submissions, Haxton Holdings also argued that insufficient evidence had been presented by Designs by Marlynn at trial to prove that its Builders' Lien had actually been registered. I wish to address this technical issue first as it is worth commenting on the procedural aspect of this technical challenge.

i. Evidence of Lien

[84] Closing arguments or written submissions at the end of a trial are not an opportunity for parties to raise novel issues that are outside the scope of the filed pleadings (see ***Lisitza Estate v Van Oirschot***, 2003 SKQB 162 at paras 269-71, varied 2004 SKCA 21). If an issue only becomes apparent after the initial pleadings are filed, the proper procedure is to bring an application to amend the pleading.

[85] I find that, by accepting the validity of the Designs Lien throughout the many years of litigation and several days of trial, Haxton Holdings acquiesced in its validity and is estopped from challenging it now. Further, a challenge at this late stage deprives the Court of the necessary factual matrix in which to determine the issue – if the challenge had been raised earlier, then evidence, whether by affidavit or *viva voce* testimony, could have been led to shed light on it. Beyond this, Designs by Marlynn did submit some evidence to substantiate its lien. While Designs by Marlynn could have obtained a copy of the registered lien from the Land Titles Office as claimed by Haxton Holdings, its failure to do so is not inherently fatal. Neither s 33 of the *Alberta Evidence Act*, RSA 2000, c A-18, nor s 56.4 of the *Land Titles Act*, RSA 2000, c L-4, which each facilitate proof of documentary evidence, alter that conclusion. This challenge is dismissed.

ii. Time for filing the Lien

[86] Subsections 41(1)-(2) of the *Builders' Lien Act* require that a lien for materials or the performance of services must be registered within 45 days from "the day that the last of the materials is furnished or the contract to furnish the materials is abandoned" or "the day that the performance of the services is completed or the contract to provide the services is abandoned."

[87] The *Builders' Lien Act* therefore, provides that the 45 days to file a lien starts running from the (i) completion of the contract, or (ii) "abandonment" of the contract: ***Tervita*** at para 6. This date is not necessarily the last day on which work was done: see West & Hopkins, *Construction Liens 2021-2022* at 291, citing ***CANA Management Ltd v Condominium Corporation No 0513341***, 2021 ABQB 470 at para 47.

[88] Marlynn Christensen did not testify at trial due to poor health. However, Marlynn signed the Statement of Lien on behalf of Designs by Marlynn in December 2015 and the Affidavit verifying its claim. Marlynn was also the officer produced by Designs by Marlynn for the purpose of questioning for discovery. A portion of the transcript from Marlynn's questioning for discovery was read in at trial by counsel for Haxton Holdings. When responding to questions from Haxton Holdings' counsel related to the Designs Lien, Marlynn gave the following evidence:

> Q: So let's look at the second page of this document. Does it accurately set out for whom you believe your company provided the services? They are about two-thirds of the way down, it says which work or material were or are to be provided for, and then it says Ristorante Cosa Nostra Inc. Do you believe that to be accurate and true?
>
> A: Yes.
>
> Q: Now the next box indicates that the work is not yet completed or all of the materials have not yet been furnished. Why was that statement put in that document?

A: Because we hadn't installed the last two blinds.

Q: And that is the only thing that had not been done?

A: That is the only thing.

Q: And other than the replacement of the deficient blinds, what was the last day that work was done by or on behalf of your company?

A: Prior to the blinds you are asking me?

Q: Well, you have indicated that when you signed this builders' lien, which bears the date December 7th, 2015, that the only thing that had not been done was the replacement of the defective blinds, correct?

A: Correct.

Q: So other than that work what was the date that the last work was done or the last date that the materials were supplied?

A: It would have been the opening of the restaurant.

Q: Which would have been June 22nd, 2015, correct?

A: Correct.

[89] At trial, Jenai Christensen testified on behalf of Designs by Marlynn. The evidence of both Jenai at trial and Marlynn at questioning was that they sent an installer to the restaurant in mid-November 2015 to replace the parts for two of the blinds. Jenai believed they had learned of the deficiency when they initially installed the blinds in May 2015, and it took a while to get in the parts. She confirmed that the installer was denied entry to the restaurant, so the repairs were never completed.

[90] However, in terms of the last day when Designs by Marlynn did any work for Cosa Nostra, Jenai's evidence was slightly different from that of her mother. Jenai thought that they received a request from Cosa Nostra before June 15, 2015, to do some additional design work and that Designs by Marlynn did continue to do some additional work after the restaurant opened.

[91] Where Jenai's evidence differs from that of her mother, Marlynn, I accept the evidence of Marlynn. Jenai's involvement with this project, and with Designs by Marlynn, was much more limited that her mother's. Jenai worked part-time as a teacher and part-time with Designs by Marlynn. Marlynn's evidence at questioning was much closer in time to the relevant events and memories typically do not improve with the passage of time. Further, Jenai was unable to provide any details about the nature of the additional work, the value of the work that was completed, or the period of time during which they did any additional work. Jenai confirmed as well that Designs by Marlynn never issued an invoice for this additional work. I am also of the view that it does not make sense that there would have been any need for additional design work once the restaurant was fully open.

[92] I therefore accept Marlynn's evidence and find that Designs by Marlynn completed its contract with Cosa Nostra on June 22, 2015. Designs by Marlynn issued its final invoice to Cosa Nostra on July 17, 2015, for $112,506.58, and subsequently, received two partial payments on September 2 and 24, 2015, leaving an outstanding balance of $84,455.92. The 45-day time

period to file its lien therefore commenced on June 22, 2015, and expired well before the lien was filed on December 9, 2015.

[93] I also find that the efforts made by Designs by Marlynn in November 2015 to install replacement parts in two of the blinds at the restaurant do not extend the 45-day time period it had to file its lien. Section 41(5) of the *Builders' Lien Act* confirms that the time period in s 41 is "not extended by reason only that something improperly done or omitted to be done in respect of work done or materials furnished is corrected or done, as the case may be, at a later date". In other words, "deficiency work" will not extend the time limit for registering a lien: West & Hopkins, *Construction Liens* 2021-2022 at 292.

[94] I am satisfied that replacement of the parts in the two blinds is exactly the type of deficiency work referenced in s 41(5). I also note that the final invoice rendered by Designs by Marlynn, in July 2015, included the cost of the roller blinds and other window coverings, as well as charges for labour and installation.

[95] Section 42 of the *Builders' Lien Act* indicates that if a lien is not registered within the time limit set out in s 41, the lien ceases to exist. I find that the Designs Lien was filed outside of this 45-day deadline and therefore must fail.

iii. Failure to provide s 15 notice

[96] Section 15 of the *Builders' Lien Act* requires a lien claimant to provide notice in writing to the landlord and describe the nature of the work to be done, or the kind or quantity of materials to be supplied. The landlord must be put on notice that it may be liable if the tenant does not pay an outstanding debt: West & Hopkins, *Construction Liens 2021-2022* at 225. Once a landlord receives the requisite notice, then the landlord has five days within which to notify the lien claimant that it will not be responsible for the work or materials, failing which the lien may attach to the landlord's fee simple interest.

[97] Section 15 creates a mandatory requirement which demands strict compliance: ***West Edmonton Mall Ltd v DI Retail Planning and Design Ltd*** (1982), 49 AR 241 at paras 15-16, 1982 CarswellAlta 518 (QB). The written notice does not necessarily have to say that a lien will be claimed, but it must give such notice at least by necessary implication: ***Byersbergen Construction Ltd v Edmonton Centre Limited***, 1977 ALTASCAD 165 at para 7, 78 DLR (3d) 122 (CA). Where no notice is provided, the lien will be held to be invalid.

[98] Designs by Marlynn had no interaction with Haxton until after the project was well underway. Their interactions were limited to a meeting where paint colours were discussed as well as an email in which Haxton denied any responsibility for the cost of the renovations. There is no evidence that the requisite statutory notice was ever provided to Haxton Holdings.

[99] The *Builders' Lien Act* creates an alternate route for making landlords subject to liens for unpaid invoices. Failure to provide s 15 notice is not fatal provided a landlord qualifies as an "owner" under the *Act* and is found to have requested the work or materials: ***Encore Electric Inc v Haves Holdings***, 2017 ABQB 803 at para 15 (***Encore Electric***). This alternate route was considered in ***LT Interior & Drywall Ltd v Sota Centre Inc***, 2003 ABQB 552 at para 26, where no notice had been provided, and where Greckol J upheld the dismissal of a lien because the claimant did not allege that the registered owner was an "owner" within the meaning of the *Act*, nor that the work was prepared at the request of the registered owner.

[100] Designs by Marlynn did not argue that Haxton Holdings was an owner, and thus did not present evidence to try to substantiate such a claim. Given the limited interactions between Designs by Marlynn and Haxton Holdings, trying to establish such a claim would have met with significant obstacles.

[101] I find that the failure to provide the requisite notice under s 15 is fatal to the Designs Lien.

D. Conclusion – Designs Claim

[102] Designs by Marlynn clearly suffered losses by reason of unpaid invoices of $84,455.92. However, as the above analysis shows, its claims to be made whole by Haxton Holdings or 1361556 have not been made out.

[103] Designs by Marlynn entered into an oral agreement with Cosa Nostra. However, there is no basis to find that Designs by Marlynn entered into any type of agreement with either Haxton Holdings or 1361556.

[104] Designs by Marlynn's Claim for compensation for unjust enrichment is dismissed.

[105] The Designs Lien is fatally flawed since it was filed out of time, and the requisite statutory notice was not provided.

[106] In sum, all of Designs by Marlynn's claims are dismissed.

IV. 1361556 Claim

[107] The Plaintiff, 1361556, alleges:

(a) That 1361556 entered into an oral contract with all four Defendants, Cosa Nostra, Hobson, Haxton Holdings and Haxton, which has been breached by the Defendants, and pursuant to which there is still due and owing to it the sum of $153,000, inclusive of GST;

(b) That 1361556 is entitled to damages from two of the Defendants, Haxton and Haxton Holdings, in the sum of $153,000, as a result of its reliance on misrepresentations made by these Defendants when the oral contract was entered into;

(c) That two of the Defendants, Haxton Holdings and Cosa Nostra, or either of them, have been unjustly enriched as a result of the services provided by 1361556 and hold the sum of $153,000, pursuant to a constructive trust in its favour;

(d) That 1361556 is entitled to reimbursement of $153,000, from the Defendants for its performance of services on a *quantum meruit* basis; and

(e) That 1361556 holds valid builders' liens against the lands owned by Haxton Holdings and against the leasehold interest of Cosa Nostra, in the amount of $153,000, and in default of payment, Haxton Holdings' and Cosa Nostra's interest in the lands should be sold and the proceeds used to pay this sum to 1361556.

A. Breach of Contract

[108] 1361556 claims that it entered into an oral contract with all four Defendants to act as a project coordinator for the development of Ristorante Cosa Nostra. 1361556 submits that the

terms of the contract provided (1) that it would be reimbursed for services provided on a time and disbursements basis; (2) that it would provide services at the direction of Haxton, Haxton Holdings, Cosa Nostra and Hobson; (3) that it would invoice for its services at an hourly rate of $100 per hour plus disbursements, on a cost plus 10% mark-up basis; and (4) that its invoices would be due on receipt.

[109] Haxton and Haxton Holdings argue that none of the elements necessary to establish that there was an enforceable agreement between 1361556 and Haxton and/or Haxton Holdings are present in this case. These Defendants suggest that the evidence at trial confirms that no offer was ever made by 1361556 to these Defendants, or vice versa; that there was never an unqualified acceptance of any offer; that the parties never evinced an intention to enter into a legally binding agreement; that there was no consideration exchanged between these parties at the time of the alleged agreement; and that the terms of any such agreement are too vague and incomplete to constitute a binding contract. Haxton and Haxton Holdings further submit that they were never even informed of the terms of the contract that was purportedly discussed between Gushue and Hobson (i.e., between Cosa Nostra and 1361556).

[110] Gushue testified at trial that:

- In May 2014, Hobson contacted him and told him that he had an opportunity to open a restaurant in Fort McMurray in a building owned by Haxton. Hobson told him that Haxton was prepared to provide financing. Over the next few months, he spoke to Hobson a number of times, but finally, at the beginning of September 2014, he told Hobson not to waste any more of his time until Hobson had the money for the project lined up. He told Hobson that before they went any further, he wanted to talk to the people who would be financing the project as he knew that Hobson had no money.
- Hobson arranged for the meeting with Haxton at Tavern on Main on September 4, 2014. Gushue recalled that, during the meeting, Haxton said he would come up with $500,000 for the project but that Hobson had to come up with $200,000. Haxton asked Gushue if he could work with that budget (i.e., $700,000) and Gushue indicated that he thought he could.
- Gushue described his anticipated role in the project to Haxton as “coordinator”. He stated that he did not explain what portion of the work he would be doing himself and what work he would be sub-contracting. Gushue initially testified that he mentioned to Haxton that he would be charging a rate of $100 per hour; however, at his Questioning for Discovery in 2017, when asked if he had indicated the terms of his compensation during this meeting, his response at that time was “no”. In cross-examination, Gushue conceded that he had not advised Haxton what his rate would be.
- With the assistance of Hobson, Gushue prepared a document for trial detailing his fees and out of pocket expenses (“Exhibit 1, Tab 9”). At the end of Exhibit 1, Tab 9, Gushue added some explanatory comments, one of which was “The original agreement with the owner of Ristorante Cosa Nostra, Mark Hobson, was $100 per hour for my services and my invoices do not reflect this rate”.

- Gushue did not advise Haxton that he would be marking up his out-of-pocket expenses by 10%, but he testified that this was just standard business practice. Gushue also confirmed that he never provided Haxton with a final price, indicating that this is "not possible in the renovation world".
- Gushue maintained that Haxton specifically assured him during this meeting that the labour and trades used on the project would be paid. Haxton also mentioned that the space would be available November 1. The meeting ended with a handshake and Haxton saying to Hobson "protect my $500,000" and "don't butcher my building".
- Another of the comments included by Gushue in Exhibit 1 Tab 9, was that "1361556 Alberta Ltd. proceeded in this project in good faith **from the personal guarantee from Keith Haxton** from a result of a meeting with Keith, Mark and I (Tim Gushue, owner of 1351556 Alberta Ltd.) in October 2014, in Tavern on Main" (emphasis added). In cross-examination, Gushue conceded that he never received a written personal guarantee from Haxton.
- Gushue understood that the money from Haxton was going to be paid to Cosa Nostra and that there would be no money coming from Haxton until documents were firmed up between Haxton and Hobson. This never changed, as far as he was aware.
- In addition to the meeting at Tavern on Main, Gushue recalled several other meetings with Haxton. In mid-November 2014, he was present when Hobson told Haxton about some potential investors he had lined up, one of whom Haxton would not agree to.
- On November 18, 2014, Hobson told him that Haxton had asked him to get an extra key made for the restaurant site. So Gushue ensured that an extra key was made for Haxton.
- Also in November 2014, Haxton told him and Hobson to stop doing any work at the site until the paperwork was signed by Hobson.
- In December 2014, he approached Haxton to ask if he could get into the space of the tenant below the restaurant, Grand & Toy, over the Christmas break to start some plumbing work. Haxton told him not until Hobson had lined up his investors and had signed documents with him.
- Gushue confirmed that there were never any meetings between himself and Haxton where it was discussed that Haxton would be directing the work that 1361556 did. All directions came from Hobson.
- Gushue sent all of the invoices from 1361556 to Cosa Nostra. He did not direct or copy his invoices to Haxton or Haxton Holdings. 1361556 issued three invoices, with the final one in October 2015.
- In July 2015, Haxton phoned him three times to see when he was coming back to finish incomplete work. When he asked Haxton about getting paid, Haxton told him to see Hobson about his account.

- Gushue's final invoice issued in October 2015 was for $153,000 It included all work performed by 1361556 and any sub-contractors from mid-March 2015 on, and all materials and disbursements incurred. Gushue testified that the more detailed explanation of his fees and expenses in support of this invoice were set out in Exhibit 1, Tab 9. Exhibit 1, Tab 9, included an $8,000 expense that Gushue explained related to the claim against Hobson with respect to a rental house and had nothing to do with the claim by 1361556 against Haxton and Haxton Holdings.

[111] Haxton testified that:

- He received a call from Hobson in September 2014, asking to set up a meeting with the guy Hobson was going to have build the restaurant for him. He recalled thinking the meeting was a bit premature. At his Questioning for Discovery in 2017, he recalled that the meeting lasted about 15 minutes; at trial, he indicated it was a ½ hour. He met Gushue for the first time at Tavern on Main. Hobson introduced Gushue as his general contractor. At his Questioning for Discovery in 2017, he could not recall what was discussed at the meeting; at trial, he testified that Hobson had lots of ideas and was quite enthusiastic about the project and that Gushue was quite vain and talked about himself a lot.
- Haxton was aware before this meeting that Hobson had no money and he told Hobson that they could not go any further until Hobson had lined up some investors. Haxton told Hobson that if he got some money on his own, Haxton would put some money in. However, Haxton did not make any financial commitment to Gushue.
- Haxton testified that he did not indicate to Hobson or Gushue the specific amount he was prepared to put up as financing for the restaurant during their meeting as he can remember when he makes commitments for money. He claimed he did not tell Hobson to "protect my $500,000".
- Haxton indicated that the September 2014 meeting was the only sit down meeting he ever had with Gushue. Haxton initially testified that he did not see Gushue between September 2014 and March 2015. When Haxton was asked whether he had ever requested or been provided with a key to the restaurant space, Haxton initially stated that this had "never happened". Haxton later clarified that Gushue had never handed him the key, but one was dropped off at his bar. At his Questioning for Discovery in 2017, Haxton's evidence was that he could not remember.

[112] Hobson testified at trial and provided additional relevant evidence. His account regarding the meeting at Tavern on Main was similar to Gushue's in many respects:

- Hobson knew it was important to Gushue to have confirmation that the money was in place before going any further with the project. He recalled that Haxton told Gushue he was "in it for $500,000" and that the labour and trades were the most important things to be paid.
- Hobson stated that this meeting was the first time that Haxton had mentioned that Hobson had to have some "skin in the game" himself, but the amount was not

specified. Hobson had worked all summer to get pricing from various companies, and so, by the September meeting, he thought that $700,000 would be enough for a "turn key operation".

- Hobson recalled that Gushue raised the issue of him having to pay to hire an engineer to ensure the floor would support the restaurant and Haxton told Gushue not to worry about it and that he would be paid.
- Hobson testified that, at the end of the meeting, Haxton told Gushue that he wanted his building protected.

[113] As well, Hobson recalled that he approached Haxton later to ask for a key so that he could get in and see the space. Haxton indicated he also wanted a key for the restaurant space and so Hobson asked Gushue to get an extra key cut. Hobson did not mention to Haxton that he was going to go in and start demolition.

[114] Hobson confirmed that Haxton told him and Gushue in November 2014 to stop work. He believed that he must have mentioned the names of the investors he had found to Haxton sometime in November, after they ceased work. Hobson testified that Haxton let them back in to start work again in January 2015, even though no paperwork had yet been signed. When asked why the paperwork was not signed until March 2015, although Hobson had consulted a lawyer as early as the summer of 2014, Hobson's only response was "ask Haxton".

[115] When the paperwork was finally signed, Hobson did not advise Gushue that the loan was only for $400,000 not $500,000 His reasoning for this was because Haxton had also agreed he would provide a further $100,000 when the work was complete. Hobson believed paperwork was prepared prior to the loan documents being executed which confirmed this, however, these documents were not produced during the trial.

[116] I have concerns about the reliability and/or credibility of each of these three witnesses, but to varying degrees. What immediately became apparent was the differing levels of sophistication and business experience between these three individuals. In my view, Hobson and Gushue were clearly at a disadvantage in any dealings directly with Haxton. They simply did not have anywhere near the same level of business knowledge and acumen as Haxton, who had a Bachelor of Commerce degree and many years experience as a landlord. However, Gushue testified that he was aware that Haxton had a less than stellar reputation in the Fort McMurray business community when he became involved in the project. Meanwhile, Hobson testified that he had consulted with a lawyer as early as the summer of 2014. So, both Hobson and Gushue entered into these discussions with Haxton "with their eyes open".

[117] Haxton's testimony came across as well scripted. However, there were a number of occasions when his evidence at trial contradicted what he had said at his Questioning for Discovery in 2017. Of particular concern was Haxton's evidence in 2017 that he could not recall what was discussed at the meeting at Tavern on Main in September 2014. Yet, at trial, Haxton testified to some very specific aspects of the conversation at that meeting. I do not accept that Haxton's memory of events has improved in the five years since his discovery.

[118] In my view, Hobson's testimony must be viewed with some caution as well. Hobson presented as a very excitable and passionate witness. It was apparent that he had worked very closely with Gushue throughout the project. They put in long days and long hours together, and Hobson clearly felt terrible that Gushue, in particular, had not been paid. Hobson left Fort

McMurray shortly after transferring ownership of the restaurant to Haxton, and suffered a heart attack a few months later. I accept that the failure of the project was extremely hard on him.

[119] Hobson and Cosa Nostra admitted liability to both Plaintiffs early on in these proceedings. Gushue testified at trial that he had decided to abandon his claim against Hobson personally in about 2016. Therefore, the only reason Hobson travelled to Edmonton to testify at this trial was to assist 1361556 and Designs by Marlynn in pursuing their claims against Haxton and Haxton Holdings.

[120] Hobson clearly had a narrative that he wanted to get across to the Court and he had to be cautioned several times during his cross-examination to restrict his answer to the question that was being asked of him. As well, Hobson's evidence was, at times, contradictory and illogical. For example, he initially testified that Haxton indicated, during their meeting at the Tavern on Main, that he would provide financing of $500,000. Hobson was asked during cross-examination why he had not told Gushue, in March 2015, that the loan agreement he ultimately signed with Haxton Holdings was only for $400,000. Hobson explained that he did not tell Gushue because Haxton had also agreed to provide a further $100,000 when the project was finished. When asked to confirm when Haxton agreed to this, Hobson indicated it was during their initial meeting. However, neither Haxton nor Gushue made any mention about Haxton agreeing to pay the final $100,000 after the project was finished when they testified about the meeting on Tavern at Main.

[121] Hobson's feelings of having been betrayed and duped by Haxton were apparent despite the passage of almost eight years. The strength of his emotions and his clear sympathy for the positions of 1361556 and Designs by Marlynn impact the weight I am prepared to give to at least portions of his testimony.

[122] Gushue was, for the most part, a credible witness. He seemed to have the best recollection of significant dates and the overall timeline of events. He appeared to answer the questions asked of him directly and to the best of his ability. There was an inconsistency between the evidence he gave at his Questioning for Discovery and at trial about whether or not he had told Haxton the rate he was going to charge for his services, but ultimately, Gushue acknowledged he had not done so.

[123] The concerns I have with Gushue's evidence relate more to his questionable record-keeping and invoicing practices, and the reliability of the information and amounts in his invoices and related summaries. The fact that bookkeeping and accounting was not one of Gushue's strengths was supported by his decision to enlist the help of Hobson, a chef, to help him prepare a more detailed outline for trial of the expenses that he alleges make up his claim for $153,000 and for which Cosa Nostra received a final invoice in October 2015. There were no time records produced to support the hours billed or the dates of claimed travel, and no documentation produced to substantiate the amounts claimed to have been paid to casual labourers.

[124] For 1361556 to be successful in its claim against Haxton and/or Haxton Holdings for breach of contract, it must prove, on a balance of probabilities, that an oral contract was entered into during the first meeting at Tavern on Main. Given the limited dealings between Gushue and Haxton, that is the only occasion when this alleged agreement could have been reached. I find that it is unable to meet its burden for several reasons.

[125] As outlined previously, there are a number of essential elements to any contract. I agree with the position of Haxton and Haxton Holdings that all of the elements are missing in this case. There is no evidence that Haxton made any offer to engage the services of 1361556 or that 1361556 made any offer to Haxton to provide its services. Instead, I accept that Gushue was introduced to Haxton by Hobson simply as the guy Hobson was hiring to build the restaurant. I accept Gushue's evidence that at all times he believed he worked for Cosa Nostra and Hobson, not Haxton or Haxton Holdings.

[126] As well, I accept that Gushue never told Haxton, at any time during the meeting, exactly what services he would be providing for the project, or what his charges for the project would be – his fees and/or the 10% mark up rate on his expenses. There was no certainty regarding the terms of any contract by the end of the meeting.

[127] Finally, I accept Gushue's evidence that he understood that Haxton was not going to get involved in the project at all unless Hobson could invest some money of his own and until all of the paperwork was signed by Hobson. Hobson had no investors lined up when they met at Tavern on Main, and certainly no paperwork was signed on that date.

[128] In my view, the relationship between 1361556 and Cosa Nostra was similar to the relationship between Designs by Marlynn and Cosa Nostra. Hobson was the one who brought Gushue into the project. Hobson was the only one who knew the scope of work 1361556 was being hired to complete and the fees that Gushue was going to charge. 1361556 only invoiced Cosa Nostra and expected payment to be made by Cosa Nostra. I have no difficulty concluding, as I did with Designs by Marlynn, that Cosa Nostra entered into an oral contract with 1361556.

[129] However, just as I found in the Designs Claim, 1361556 has failed to demonstrate that there were any contractual relations between it and Haxton or Haxton Holdings on which it can base a claim for breach of contract. I conclude that 1361556's claim for breach of contract against these Defendants must fail.

B. Negligent Misrepresentation

[130] 1361556 further alleges that, at the time the oral contract was entered into, the Defendants, Haxton and Haxton Holdings, made a number of negligent misrepresentations to 1361556 that it relied on to its detriment. As a result of these misrepresentations, 1361556 seeks damages against the Defendants in the amount of $153,000. The alleged misrepresentations include that Haxton and Haxton Holdings:

(a) would finance the project up to at least $500,000;

(b) would ensure that 1361556 was paid for its services; and

(c) would arrange for all invoices to be paid within a reasonable amount of time from issuance.

[131] Haxton and Haxton Holdings submit that the Statement of Claim does not plead all of the necessary elements of this cause of action.

[132] Rule 13.6(3) of the *Alberta Rules of Court*, Alta Reg 124/2010 states:

> A pleading must ... include a statement of any matter on which a party intends to rely that may take another party by surprise, including, without limitation, any of the following matters:

...

(g) misrepresentation

[133] Rule 13.7 of the *Alberta Rules of Court* further states that a "pleading must give particulars of any of the following matters that are included in the pleading... (c) misrepresentation.". In ***WIC Premium Television Ltd v General Instrument Corp***, 1999 ABQB 804 (***WIC Premium***), Clarke J stated that for a claim of misrepresentation, the following elements must be set out in the pleadings:

(1) the alleged misrepresentation,

(2) when, where, how, by whom, and to whom it was made,

(3) its falsity,

(4) the inducement,

(5) the intention that the plaintiff should rely on it,

(6) the alteration by the plaintiff of his or her position relying on the misrepresentation,

(7) the resulting loss or damage to the plaintiff.

[134] However, as noted by Loparco J in ***Love v Parmar***, 2023 ABKB 30 at para 48, the ***WIC Premium*** case was decided under the old *Rule* 115, which required specific particulars for misrepresentation claims. Loparco J followed the more "realistic and pragmatic" approach adopted in ***Wesley v Alberta***, 2009 ABQB 418 at para 23, where the Court states "while recognizing the need for defendants to understand the case against them at the pleadings stage, the Court must also recognize that not every claim is capable of being pleaded with the same degree of particularity, and that subsequent stages in the litigation process may also function to clarify and narrow the issues". I agree with this more practical approach.

[135] I am satisfied that the Statement of Claim filed by 1361556 contained sufficient particulars for the Defendants to understand that 1361556 was advancing a claim based on negligent misrepresentation and the basis for that claim. The Statement of Claim details the alleged representations, who made them, and the date they were made (paras 7, 10), that 1361556 reasonably relied on those representations (para 11, 17), that the representations were inaccurate (para 16) and that 1361556 suffered losses as a result (para 17).

[136] Even if I am wrong and the initial pleadings were somehow deficient, by the time Haxton and Haxton Holdings filed their Statement of Defence on February 22, 2016, they clearly understood the specifics of this cause of action. Paragraphs 11 – 18 of the Statement of Defence outline their position with respect to each of the necessary elements of a misrepresentation claim. If the purpose of requiring pleadings that allege misrepresentation to be specific is to avoid prejudice or surprise to the Defendants, then this purpose was clearly met.

[137] Haxton and Haxton Holdings further submit that 1361556 is unable to prove this claim because it has not established, on a balance of probabilities, that the alleged representations were made by Haxton to 1361556 at the first meeting at Tavern on Main in September 2014, and even if they were, no reasonable person would have relied upon them. The Defendants suggest that the allegation of negligent misrepresentation was only made because 1361556 cannot prove that Haxton and Haxton Holdings provided 1361556 with a guarantee.

[138] Negligent misrepresentation is one of the limited circumstances where courts have permitted recovery for pure economic loss between private parties: ***1688782 Ontario Inc v Maple Leaf Foods Inc***, 2020 SCC 35 at para 21 (***Maple Leaf***). The elements of negligent misrepresentation are that: there is a duty of care between the parties based on a "special relationship"; the representation in question must be untrue, inaccurate, or misleading; the representor must have acted negligently in making said misrepresentation; the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and the reliance must have been detrimental and resulted in damages: ***Queen v Cognos Inc***, [1993] 1 SCR 87.

[139] Our Court of Appeal has recently confirmed that the "essential elements of a negligent misrepresentation claim listed in ***Cognos*** remain the same…": ***Giustini v Workman***, 2021 ABCA 65 at para 36.

[140] To determine whether a duty of care exists, the proximity of the relationship between the parties must be examined. What is required is that the "relationship between a plaintiff and a defendant bear the requisite closeness and directness, such that it falls within a previously established category of proximity or is analogous to one...": ***Maple Leaf***, at para 23. This "special relationship" may exist when the following two criteria are met: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable: ***Hercules Management Ltd v Ernst & Young***, [1997] 2 SCR 165 at para 24 (***Hercules***).

[141] A proximate relationship is formed when the defendant undertakes responsibility which invites reasonable and detrimental reliance by the plaintiff upon the defendant for that purpose:

> In other words, it is *the intended effect* of the defendant's undertaking upon the plaintiff's autonomy that brings the defendant into a relationship of proximity, and therefore of duty, with the plaintiff. Where that effect works to the plaintiff's detriment, it is a wrong to the plaintiff. Having deliberately solicited the plaintiff's reliance as a reasonable response, the defendant cannot in justice disclaim responsibility for any economic loss that the plaintiff can show was caused by such reliance: ***Maple Leaf*** at para 34.

[142] There are some recognized general *indicia* of "reasonable reliance", which are not determinative, but do help to distinguish situations where reliance is reasonable from those where it is not. These *indicia* include: the defendant having a direct or indirect financial interest in the transaction in respect of which the representation was made; whether the defendant was a professional or someone who possessed special skill, judgment, or knowledge; whether the advice was provided in the course of the defendant's business; whether the information or advice was given deliberately and not on a social occasion; and whether the information was given in response to a specific request or enquiry: ***Hercules*** at para 43.

[143] Gushue testified that during his first meeting with Haxton at Tavern on Main, Haxton represented that he would provide $500,000 for the project, if Hobson came up with $200,000. Gushue had requested the meeting with Haxton as he wanted to meet whoever was financing the project before going any further. Gushue was asked by Haxton if he could work with a budget of $700,000, and Gushue responded that he thought he could. He never provided Haxton with a budget. During the meeting, Haxton assured him that there would be no problem with labour and the trades being paid. At the end of the meeting, Haxton said "protect my $500,000" and "don't butcher my building".

[144] Hobson's testimony was very similar to Gushue's regarding what transpired during the meeting at Tavern on Main. He stated that Haxton told Gushue he was prepared to invest $500,000 and that Haxton indicated that the labour and trades were the most important things to be paid, and in a reasonable amount of time.

[145] Haxton testified that he did not indicate to Hobson or Gushue the specific amount he was prepared to put up as financing for the restaurant, during their meeting, as he can remember when he makes commitments for money. He also claimed he did not tell Hobson to "protect my $500,000".

[146] As I have noted previously, Haxton's evidence about what transpired at this meeting is unreliable. He could not recall any details at his Questioning for Discovery in 2017 and yet, at trial, he was quite adamant that he did not mention a specific amount that he was prepared to invest, and that he did not represent that he would ensure that labour and trades were paid. I accept Gushue and Hobson's testimony that Haxton did state that he would be prepared to invest $500,000 in the project. It makes sense that this specific figure was mentioned by Haxton as all three testified to the fact that they discussed the total budget for the project being around $700,000 and Hobson was told by Haxton he had to come up with $200,000.

[147] I also accept that Haxton indicated it was important that the trades and labour on the project be paid. However, what I do not accept is Gushue's evidence that Haxton specifically assured him that the labour and trades on the project would be paid by him. In my view, it would not make sense for Haxton to have made that commitment during the meeting. All three people at that meeting clearly understood that Haxton was just going to be an investor and that Hobson would be the one in charge of the project. As Haxton told Hobson he would have to come up with some money as well, it was also apparent that Haxton was not going to be the only investor and therefore, not the only source of the funding to pay for the labour and trades. Gushue also confirmed in his testimony that he understood that any money coming from Haxton was going to be paid to Cosa Nostra. Therefore, Haxton would not be in a position to ensure that the labour and trades were paid as he would have no control over how the funds were spent by Hobson. I cannot accept, given Haxton's previous business experience and his anticipated role in this project, that he would have represented to Gushue that the labour and trades would be paid by him.

[148] Even though I have found that Haxton told Gushue and Hobson he was prepared to invest $500,000 into Ristorante Cosa Nostra during their meeting at Tavern on Main, I am not satisfied that the elements for a claim for negligent misrepresentation are made out. More specifically, I do not accept that a "special relationship" and therefore, a duty of care existed between Haxton and Gushue.

[149] As noted previously, in order to establish that Haxton and/or Haxton Holdings owed a duty of care to 1361556, 1361556 must show: (1) that Haxton ought to have reasonably foreseen reliance by 1361556 on its representation that it would invest $500,000; and (2) that reliance by 1361556 on this representation was reasonable in the circumstances.

[150] With respect to the first requirement, I do not accept that Haxton ought to have foreseen that Gushue would rely on Haxton's statement that he was prepared to invest $500,000. The meeting at Tavern on Main was the first time that Haxton had ever met Gushue. It was a brief meeting, at most about a ½ hour. I accept Gushue and Hobson's evidence that Hobson came to the meeting with preliminary drawings for the restaurant and having costed out some items like

dishes and kitchen equipment. Gushue was introduced to Haxton as Hobson's general contractor. Gushue did not provide Haxton with details of his services or fees and no budget was prepared for the meeting. All parties were aware at the time of that meeting that the space might not even support the weight of a restaurant and that an engineering report would have to first be obtained. As well, I accept that Haxton made it clear that any investment by him was dependent on Hobson arranging additional financing, and signing legal documents for the lease and the loan being finalized. There were too many uncertain and undetermined factors at this point to make it reasonably foreseeable that 1361556 would rely on Haxton's representation with respect to the amount of money he was prepared to invest.

[151] With respect to the second requirement, I accept that Haxton had a financial interest in the transaction as it was Haxton's expectation that if he loaned money to Hobson, he would be paid interest on those funds. Haxton would also be paid rent for the space occupied by the restaurant in his building. I also agree with the submission of 1361556 that Haxton's representation was provided in the course of Haxton's business.

[152] Nonetheless, in my view, any reliance by 1361556 on Haxton's representation that he was going to invest $500,000 was not reasonable in the circumstances for the following reasons:

- This was a brief meeting held in a social setting (i.e., a pub) that was set up at Gushue's request. Gushue wanted to meet Haxton;
- While I accept that Haxton was an educated and experienced businessman and landlord, there was no evidence to suggest that Haxton had any special knowledge about constructing a fine dining Italian restaurant. Rather, it was Haxton who asked for Gushue's opinion as to whether a budget of $700,000 to build the restaurant was workable. This suggests that Gushue was not relying on any special knowledge or skill that Haxton possessed in relation to this project;
- Although Haxton and Gushue had not met before, Gushue testified that Fort McMurray was a small community and he had heard through other sources that Haxton had "screwed people over". Gushue was of the view that Haxton's reputation in the business community was less than stellar;
- At the time this representation was made by Haxton, it was not clear whether the project would ever get off the ground at all. An engineering report was required to see if the space could accommodate a restaurant, a building permit had not been approved, Hobson still had to find other investors whom Haxton approved of, they had not made a final decision on a designer, and none of the documentation for the lease or the loan between Cosa Nostra and Haxton Holdings had been prepared.

[153] In summary, I would characterize the meeting at Tavern on Main as being more in the nature of an initial "meet and greet", rather than a formal business meeting. The parties got together briefly so that Gushue could be introduced to Haxton. The project could only be discussed in very general terms at this stage, and it was made clear by Haxton that nothing was firm until legal documents were signed. While I find that Haxton did state during the meeting that he was prepared to provide $500,000 in financing, after looking at all of the circumstances surrounding that meeting, I do not find that Haxton reasonably expected Gushue would rely on that representation or that it was reasonable for Gushue to do so.

[154] I therefore conclude that 1361556's claim against Haxton and Haxton Holdings for negligent misrepresentation cannot succeed.

C. Unjust Enrichment and *Quantum Meruit*

[155] 1361556 also advances a claim against two of the Defendants, Cosa Nostra and Haxton Holdings, alleging that they have been unjustly enriched by the services it supplied. In its Statement of Claim, 1361556 claims both that it is entitled to payment of $153,000 on a *quantum meruit* basis and also, that the Defendants hold this sum pursuant to a constructive trust in its favour.

[156] Haxton Holdings submits that the Statement of Claim did not allege unjust enrichment. In fact, the Statement of Claim does allege unjust enrichment in para 29, although, as this cause of action was awkwardly included in the section of the pleading dealing with its builders' lien claim, it was easily overlooked. In defence of this claim, Haxton Holdings argues that:

(a) 1361556 has failed to prove that Haxton Holdings was directly enriched by the actions of 1361556, and instead, Haxton Holdings submits that it suffered damages;

(b) even if there was a benefit to Haxton Holdings, it was indirect, resulting from its lease with Cosa Nostra and therefore, there is no nexus between the enrichment of Haxton Holdings and the deprivation of 1361556; and

(c) there are several juristic reasons for any enrichment Haxton Holdings did receive, which include that it was a secured creditor, that 1361556 had failed to provide the specified notice to a landlord required by s 15 of the *Builders' Lien Act*, and the common contractual framework in the construction industry.

[157] The relevant law is outlined in paras 66 - 69 above. The analysis I conducted with respect to the Designs Claim is equally applicable to the 1361556 Claim.

[158] In this case, as with Designs by Marlynn, Haxton Holdings did not receive anything at all directly from 1361556. Everything acquired by Haxton Holdings was the result of the contract it entered into with Cosa Nostra on February 7, 2016, to purchase the assets, inventory, equipment and leasehold improvements of Ristorante Cosa Nostra. Therefore, the first element of enrichment has not been made out.

[159] Likewise, the deprivation suffered by 1361556 was a result of Cosa Nostra not fully paying for the goods and services 1361556 delivered in accordance with the contract that it entered into, specifically, with Cosa Nostra. Haxton Holdings acquired the goods indirectly, through its own dealings with Cosa Nostra, not 1361556. The requirement of a direct nexus between the enrichment and deprivation of the parties is also absent here.

[160] Finally, the sale entered into between Haxton Holdings and Cosa Nostra, after the latter breached the terms of its loan and lease agreements with Haxton Holdings, provided the requisite juristic reason for any enrichment retained by Haxton Holdings. As mentioned above in respect of the Designs Claim, the Bill of Sale is flawed since it improperly omitted the outstanding debt owed to 1361556. 1361556 submitted that the lease rate was extortionate, as is evidenced by the fact that Haxton Holdings subsequently reduced it by over half for the Collins'. Regardless, Cosa Nostra was clearly in default of its rent. 1361556 also argued that Haxton Holdings had crippled Cosa Nostra's viability by unilaterally reducing by $100,000 the promised loan mentioned

during the September 2014 meeting. However, Haxton Holdings had advanced $400,000 to Cosa Nostra, and it was clearly in default of the terms of the loan agreement as well.

[161] 1361556, and to a lesser extent, Designs by Marlynn, impugn the sale between Haxton Holdings and Cosa Nostra, and claim that it was deliberately designed to avoid paying the outstanding debts and frustrate the recently filed liens. In response, Haxton claims that he was seeking to minimize his losses since he had in fact advanced $400,000 for the project and Cosa Nostra was in default in respect of its obligations under both the lease and the loan agreements. The sale was clearly engineered by Haxton. Admittedly, the sale documents were inaccurate insofar as they stated that no debts or charges were outstanding. However, 1361556's complaint about the nature and/or intention of the sale is in effect a claim of fraud. Fraud is a serious allegation which must be explicitly pleaded (Rules 13.6(3)(d) and 13.7 of the *Alberta Rules of Court*) and the proof of which involves a high burden. Even applying Loparco J's "realistic and pragmatic" approach in ***Love v Parmar***, with which I agree, I cannot find that 1361556's Statement of Claim pleaded fraud. Further, 1361556 cannot use complaints about the sales in the context of the cause of action of unjust enrichment as a backdoor to raise allegations of fraud that had not been pleaded.

[162] As I stated above in respect of the Designs Claim, in my view, the overall circumstances generally favour finding the presence of a juristic reason. In any case, the test is cumulative, so that the absence of a juristic reason would be unable to overcome the absence of the first two elements.

[163] I therefore find that 1361556 has failed to prove its claim of unjust enrichment against Haxton Holdings.

D. Builders' Liens

[164] Finally, 1361556 seeks a declaration that it has valid and subsisting liens in the fee simple interest of Haxton Holdings in its commercial building at 10020 Franklin Avenue, where Ristorante Cosa Nostra operated, as well as Cosa Nostra's leasehold interest therein.

[165] The analysis below is directed primarily at the two liens filed against Haxton Holdings' fee simple interest in its commercial building, but the reasoning applies equally to all three liens. I will address a challenge that was specific to the lien filed against Cosa Nostra's leasehold interest in that building at the end of my discussion.

[166] Haxton Holdings raised six concerns regarding the liens. As with the Designs Lien, I find three of the arguments determinative and find the 1361556 Liens to be invalid. The remaining challenges are relatively minor and do not contribute substantively to the elucidation of the issues. Haxton Holdings submits that (1) its title was not lienable, since it was not an "owner" within the meaning of the *Builders' Lien Act*, (2) 1361556's lien was registered beyond the 45-day statutory deadline, and (3) 1361556 did not provide Haxton Holdings with the requisite statutory notice under s 15 of the *Builders' Lien Act*. I agree with these arguments and, for the reasons that follow, I conclude that the 1361556 Liens must fail.

[167] In its written submissions, Haxton Holdings raised a couple of additional technical challenges: (1) insufficiency of evidence to establish that the builders' liens had actually been registered, and (2) non-compliance with s 34(6) of the *Builders' Lien Act* which prescribes the evidence necessary to verify a statement of lien. I will address these technical challenges briefly first.

i. Evidence of Liens

[168] Haxton Holdings challenge to the sufficiency of evidence to establish the 1361556 Liens was raised for the first time after the end of the trial in its written submissions. The analysis I conducted with respect to this challenge of the Designs Lien is equally applicable to this technical challenge to the 1361556 Liens, and thus, my conclusion is identical. This challenge is accordingly dismissed.

ii. Invalidity under s 37(1)

[169] In its written submissions, Haxton Holdings also challenged the 1361556 Liens on the grounds that s 34(6) of the *Builders' Lien Act* had not been complied with.

[170] As with respect to Haxton Holdings related challenge to the sufficiency of the evidence to establish that the liens had been registered, I find that, by accepting the validity of the 1361556 Liens throughout the many years of litigation and several days of trial, Haxton Holdings acquiesced in their validity and is estopped from challenging them now.

[171] Beyond this, s 37 of the *Builders' Lien Act* provides that substantial compliance with the requirements of s 34 is sufficient and that a lien shall not be invalidated by non-compliance unless prejudice results. The question of prejudice in this context has been framed as whether "anyone was misled and did anything to their detriment in consequence": ***Avli BRC Developments Inc v BMP Construction Management Ltd***, 2023 ABCA 147 at para 15. In my view, this curative provision is sufficient to dispose of this technical challenge.

iii. Was Haxton Holdings an "Owner"

[172] In order to file a lien against Haxton Holdings' fee simple interest in its property, it must qualify as an "owner" under the *Builders' Lien Act*.

[173] Section 1(j) of the *Builders' Lien Act* defines "owner" as follows:

> (j) "owner" means a person having an estate or interest in land at whose request, express or implied, and
>
> (i) on whose credit,
>
> (ii) on whose behalf,
>
> (iii) with whose privity and consent, or
>
> (iv) for whose direct benefit,
>
> work is done on or material is furnished for an improvement to the land and includes all persons claiming under the owner whose rights are acquired after the commencement of the work or the furnishing of the material;

[174] The definition has three elements; ***Gypsum Drywall (Northern) Ltd v Coyes***, 1988 ABCA 58 at para 13 (***Gypsum Drywall***). An "owner" has to have an estate or interest in land, they have to request the work or material, and they have to fit within one of the four listed situations – i.e., the work or material has to be done or supplied on their credit, on their behalf, with their consent, or for their direct benefit.

[175] The first element seems relatively straightforward. While Haxton Holdings asserts that there was no evidence to support the claim that it is the owner of the subject property, I find that

Haxton Holdings is the owner of the fee simple interest in its commercial building at 10020 Franklin Avenue.

[176] The next question is whether the work was performed at the request, express or implied, of Haxton Holdings. The concept of a request does not require direct communication between a landlord and a contractor. However, it does require more than mere knowledge or consent; instead, it requires "active participation": ***Gypsum Drywall*** at para 22; West & Hopkins, *Construction Liens 2021-2022* at 187.

[177] In ***Stealth Enterprises Ltd v Hoffman Dorchik***, 2000 ABQB 311, Hawco J found that the owners of the building "knew generally what was planned, what was happening on a fairly regular basis and what would be going on" but concluded that that was insufficient to constitute a request (at para 38). He stated at para 40:

> In this case, there was no active participation by either Mr. Schroeder or Mr. Unger. Mr. Olsen may have directed or given approval to Mr. Menhem to carry out certain work with respect to cleaning apartments so they could be re-rented; however, that work was relatively minimal. Certainly S&U obtained a benefit from the work which was done in that some of the suites had been upgraded and the lobby was expanded and made more visually appealing. Work had been done on the exterior. But none of the renovations were carried out at their request. They could have cared less about condominiumizing this building. They had no say in what was done, they gave no directions with respect to how anything should be done. The only way in which they stood to benefit was should the transaction not proceed, they would receive, without paying for them, certain upgrades. However, they were more interested in selling the building than reaping the so-called benefits.

[178] Attempts to find landlords to be "owners" under the *Builders' Lien Act* have often failed on the grounds that the element of request has been absent. Obviously though, the question of whether there is a "request" in any given case is a question of fact. A landlord who has been significantly involved in the design and/or construction of the leasehold improvements can be found to have made an implied request for the work done.

[179] ***K & Fung Canada Ltd v NV Reykdal & Associates Ltd***, 1998 ABCA 178, leave to appeal dismissed, [1998] SCCA No 349, is a case relatively close on point. It involved a contractor who sought to lien the landlord's interest after a tenant failed to pay for its work. The lease allowed the tenant to make improvements to the premises for the purpose of constructing a restaurant. The landlord reserved the right to approve "the tenant's conceptual drawings and specifications for the finishing of the Premises, storefront design and signage design." There was no evidence that the landlord had actually done so, though it had approved the paint colours for the exterior of the building. The Court of Appeal noted that the landlord had not selected the contractor, had not prepared nor approved construction plans, had not controlled funding for the construction, and had not provided any on-site supervision or inspection. The Court of Appeal concluded that the landlord had not actively participated in the project and upheld the dismissal of the lien. But the Court of Appeal went on to add that, had the landlord exercised the considerable control contemplated in the lease, then such conduct might well have constituted a request.

[180] In ***Synergy Projects (Destiny) Ltd v Destiny Bioscience Global Corp***, 2022 ABQB 384 (***Synergy Projects***), a designer filed a lien against the landlord's fee-simple title after the tenant failed to pay its invoices. The lease required the tenant to submit drawings, plans and specifications for any improvements to the premises, and the landlord reserved the right to approve them. The lease contemplated that the tenant would construct buildings on the leased lands. Lema J found that the owner played a purely passive role since it did not authorize or direct the construction work done by the contractors, nor did it provide any direction or supervision.

[181] In ***Encore Electric*** at paras 18-19, the landlord's "relatively minor" involvement in the tenant's construction of a gym and payment of a leasehold-improvement allowance were held to be insufficient to constitute a request.

[182] In ***Labbe-Leech Interiors Ltd v TRL Real Estate Syndicate (07) Ltd***, 2009 ABQB 653 (***Labbe-Leech Interiors***), a landlord's control over work scheduling and payment of a leasehold-improvement allowance were held to be insufficient to show an implied request for a contractor's services.

[183] In ***Lighting World Ltd v Help-U-Build (Edmonton) Inc***, 1998 ABQB 930, the landlord was aware of the work being done by the tenant, and in fact, lent money to pay the bills associated with it. But, the landlord did not take part in the renovations. Notably, almost immediately after the work was finished, the landlord terminated the lease and re-leased the premises to a related corporation landlord. It was held that there was insufficient active participation by the landlord in the construction of the improvements to constitute an implied request.

[184] In ***Morguard Investments Ltd v Hamilton's Floor Coverings (1982) Ltd*** (1986) 1986 CanLII 1792, 49 AltaLR (2d) 88, 75 AR 306, 24 CLR 291, 1986 CarswellAlta 258 (QB), the landlord leased space to a tenant for use as a dancehall. The tenant was allowed to make renovations. The landlord did not pay for any of the improvements and did not share in the revenues. It was held that there was no implied request by the landlord to the tenant's contractor.

[185] In ***Hillcrest Contractors Ltd v McDonald (No 2)*** (1977), 1977 CanLII 555, 2 AltaLR(2d) 273, 5 AR 554, 1977 CarswellAlta 36 (QB), the lease allowed the tenant to make minor improvements which were to be removed at the end of the lease. Master Hyndman held that there was no implied request by the landlord to the tenant's unpaid contractor.

[186] These authorities can be contrasted with the line of cases involving owners who acted as developers and were found to have made requests: see ***Acera Developments Inc v Sterling Homes Ltd***, 2010 ABCA 198; ***Gypsum Drywall.***

[187] Much time and effort was spent at trial by 1361556 eliciting the following evidence from its witnesses to establish that Haxton took an active role in the Cosa Nostra Ristorante renovation project from the outset:

- Hobson & Haxton discussed the possibility of Hobson operating a restaurant in Haxton's premises as early as mid-2014;
- In July 2014, Haxton supplied Hobson with a letter addressed to the Municipality of Wood Buffalo to support his application for a development permit; the letter identified Hobson as the new tenant for premises, effective October 2014;

- Haxton, Hobson & Gushue met in September 2014 to discuss the proposed project; at this meeting, Haxton allegedly promised to pay the labour and trades, and indicated he did not want any labour problems;
- After the September meeting, Gushue asked Haxton for drawings in order to ensure that the second-floor premises would structurally support the extra weight of a restaurant; when none were supplied, Gushue hired an engineer to prepare a report;
- Haxton visited the site at least monthly as work progressed; he apparently complained to Gushue & Karen Collins about slow progress;
- Haxton coordinated with the tenant in the main floor premises in order to have the necessary mechanical work carried out;
- Haxton refused to allow work in the main floor premises over the Christmas break while the tenant was closed;
- Haxton was allegedly involved in decision-making in respect of some of the work such as access to the space below the second-floor premises;
- Haxton told Hobson how many bank accounts he should have;
- In July 2015, Haxton contacted Gushue on several occasions to ask when the work would be complete;
- From July 2015 onwards, Haxton allegedly micromanaged the staff, directing them to use cheaper tablecloths, directing them about what alcohol to buy, directing the termination of certain staff such as General Manager Brain Quan, in order to reduce costs; and directing the installation of security cameras; and
- From July 2015 onwards, Haxton, along with George Collins, approved expenditures.

[188] In my view, the evidence that I accept falls short of establishing that the work was performed at Haxton's request.

[189] Actions such as supplying a letter of support to the Municipality and coordinating with the main floor tenant to enable work to be performed constitute the type of conduct any commercial landlord would take in order to assist its prospective tenant. Likewise, visiting the construction site at a building one owns seems both understandable and not uncommon.

[190] Explicitly promising to pay for the labour and trades would be a strong indicator that Haxton was indeed acting as an "owner". However, in contrast to Hobson and 1361556's description of the September 2014 meeting, I am satisfied that during the discussions it was agreed financing would come from Hobson, Haxton and other investors, and that Haxton did not make any specific promise to pay those costs. 1361556 did not cite any instance where Haxton directed or supervised Gushue in the construction work, or where Haxton was involved in substantial decisions about what was to be done.

[191] The fact that Haxton did not reply to Gushue's request for structural drawings does not support the proposition for which it is advanced, and the claim that Haxton specifically authorized reimbursement of the cost of the engineer's report is disputed by Haxton.

[192] I agree that Haxton's actions after July 2015, do indicate a more active role. The difficulty with these cited items is that they occurred after the restaurant had opened, by which time the work was substantially completed. A more active role after the opening of the restaurant cannot retroactively alter the nature of Haxton's role in the period when the work was being done. There is nothing to suggest that Haxton *actively* participated in the construction project.

[193] In this case, Haxton was involved in the project from the outset, knew generally what was planned, and monitored what was happening on a fairly regular basis. He was also responsible for financing the majority of the costs of the project. But I find that his role was passive until the work was almost entirely completed - none of the renovations were carried out at his request and he did not direct how anything should be done. In my view, this case is most similar to ***Fung***, ***Lighting World*** and ***Labbe-Leech Interiors***. I find that the work was not performed at the request, express or implied, of Haxton or Haxton Holdings.

[194] Even I am incorrect and there had been a request, the final element of the test is missing as well. There is no evidence that Haxton Holdings agreed to pay for the work, contracted and consented to the work, that it was done on its behalf, or that it obtained a "direct benefit" from the work.

[195] Clearly, Haxton was the primary financial backer of the renovations of the premises into a restaurant. However, Haxton required Hobson to obtain additional funding before the work commenced, implying that he was not accepting sole financial responsibility for the project. 1361556 did not present evidence to show any interaction between itself and Haxton whereby he agreed to pay for its work.

[196] It is true that Haxton Holdings consented to the work, but the definition in s 1(j)(iii) entails that such consent arise out of a contractual relationship, which is not the case here. Something "in the nature of a direct dealing" is required between the lien claimant and the owner to indicate there was privity and consent to the work being done: ***Suss Woodcraft Ltd v Abbey Glen Property Corporation***, 1975 CanLII 252, [1975] 5 WWR 57, [1975] CarswellAlta 48 (SC) (***Suss Woodcraft); Royal Bank of Canada v 1679775 Alberta Ltd***, 2019 ABQB 139 at para 89**.**

[197] The analysis I conducted above reveals that the work was not done on behalf of Haxton.

[198] Finally, it is true that Haxton Holdings indirectly benefitted from the work since it facilitated the sale of Cosa Nostra's leasehold improvements to the Collins'/1944078 and the use of the premises to operate another restaurant, Asti Trattoria Italiana. However, a landlord's reversionary interest does not qualify as a "direct benefit": ***Synergy Projects*** at paras 69-72.

[199] In sum, Haxton Holdings does not meet two of the three elements of "owner" within the meaning of s 1(j) of the *Builders' Lien Act*. The 1361556 Liens are accordingly fatally flawed and invalid.

iv. Time for filing the Liens

[200] Haxton Holdings submits that 1361556 filed its liens outside of the 45-day deadline specified in s 41 of the *Builders' Lien Act*. Haxton Holdings did not dispute that 1361556's contract was not completed and that there were materials that had yet to be furnished. However, Haxton Holdings argues that 1361556 abandoned its contract more than 45 days before the liens were filed on December 8 and 9, 2015.

[201] The Court of Appeal in ***Tervita,*** at paras 11-12, 15-16 set out how the term "abandonment" in s 41 of the *Builders' Lien Act* should be interpreted*:*

> … The term "abandonment" can have a narrow meaning, denoting conduct of the contractor that signifies a subjective intention to cease performing its obligations. This would include the contractor "walking off the job" or "no longer showing up". Abandonment may often be assumed upon the insolvency of the contractor…,
>
> In some cases a contract may be "abandoned" on an objective basis. The statute just requires abandonment, not necessarily abandonment by the lien claimant. Certainly a subjective abandonment by the lien claimant will be sufficient. However, when it becomes clear that the contract has been rendered un-performable by the conduct of either or both parties, by the actions of third parties, or as a result of external factors, the contract is essentially "abandoned". Once it becomes impractical or impossible to perform the contract, no reasonable party would persist in saying they are "ready, willing and able" to continue performing: ***Lake of the Woods Electric (Kenora) Ltd v Kenora Prospectors & Miners Ltd*** (1996), 27 CLR (2d) 184 at para. 49 (OCJ Gen Div). There comes a point in time when it is clear that the contract is at an end. That will also start the 45 days running....
>
> ...
>
> ... The test is when the lien claimant knew or should have known that the other party would not complete the contract... An abandonment can occur without a formal communication from the other parties that the contract is terminated....
>
> The time to file the lien starts running when the lien claimant knew or ought to have known that the other contracting party would not complete (i.e. had "abandoned") the contract....

[202] At his Questioning for Discovery and at trial, Gushue was asked when the last time his company did any work on the project. His response both times was "August 2015". However, the law is clear that the mere cessation of work is not sufficient to constitute abandonment. There must be both a stoppage of work and a co-existing intention not to carry on with the project: ***Equinox Electric Ltd v Progress Construction & Development Ltd***, 2014 ABQB 552 at para 26 quoting Master Funduk in ***Kershaw Financial Corporation v Jehan Holdings Ltd***, [1988] AJ No 627 at para 41.

[203] Gushue testified that he rendered a total of three invoices to Cosa Nostra. His first two invoices dated October 31, 2014 and March 13, 2015 were paid. His last invoice was not sent to Cosa Nostra until October 19, 2015. After the opening of the restaurant, at the end of June 2015, Gushue stated there was still work that needed to be completed. For example, the office did not have a door, the cloak room was not finished, the dishwasher station was not secured, a sink in the bar area was incomplete, the gas meter protection line was not installed, and there was a piece of slate in the front reception area that did not fit well. Gushue took some time off at the beginning of July 2015 and went to his cabin as he had been working seven days a week for six months. He recalled receiving three calls from Haxton that month asking him when he was coming back to complete the work.

[204] Gushue testified that he told Haxton he was waiting on the underground locates before he could install the required gas meter protection. He completed that task during the first week in August. During that period of time he was trying, unsuccessfully, to speak to Hobson, George Collins or Karen Collins about getting paid. He also asked Haxton about payment during one of their telephone calls in July 2015, and Haxton told Gushue to speak to Hobson. Gushue stated that after August, there was no communication between himself and Hobson or either of the Collins.

[205] Gushue was asked why he did not complete any more work after the first week of August 2015. He stated that he was "penniless, literally" and that he needed money before he could do "any more work for anyone in town". He confirmed that he told Hobson after he installed the gas meter protection during the first week of August, that he was not coming back until he was paid.

[206] Gushue attended at the site on one further occasion in November 2015. This was only after he had received a notice that his GST payment for 1361556 was due and his credit cards had been cancelled. He attended to pick up a cheque for $15,000.

[207] I am satisfied that 1361556 abandoned its contract with Cosa Nostra sometime between the first week of August 2015, when it last performed work on site, and the date that it rendered its last account to Cosa Nostra on October 19, 2015.

[208] Both Gushue and Hobson's evidence was that they had worked together very closely throughout the project. Gushue testified that Hobson even helped him to prepare a document that was entered at trial detailing the fees and disbursements included in 1361556's final invoice to Cosa Nostra dated October 19, 2015. I accept Gushue's evidence that by the time he came back at the end of July 2015, to install the gas meter protection, he was having difficulty connecting with Hobson, George or Karen Collins. Because of his close working relationship with Hobson, up to that point, I find that Gushue would also have known by that date that Karen Collins had taken over the day-to-day operations of the restaurant from Hobson, and that Hobson was just working as a cook and no longer making any of the financial decisions for the restaurant.

[209] By August 2015, the restaurant was fully operational and none of the work left to be completed by Gushue was required for it to operate. I accept Gushue's evidence that, after he installed the gas meter protection, he had no intention of completing any further work until he was paid. I am satisfied that Gushue's decision in August 2015, that he would not do any further work, coupled with his financial insolvency by that time, support a finding that Gushue subjectively intended to abandon the contract. However, even if I am wrong about his subjective intention, I also find that Gushue ought to have known after Hobson stopped communicating with him and when Karen Collins assumed the day-to-day management of the restaurant, that Cosa Nostra was not going to complete the contract. Certainly, by the date that 1361556 rendered its last invoice on October 19, 2015 (with Hobson's assistance), it would have been very clear to 1361556 that Cosa Nostra was not going to complete its obligations under the contract whereby it has been rendered un-performable.

[210] 1361556 registered its builders liens on December 8 and 9, 2015. This is more that 45 days after October 19, 2015, which is the last possible date that I have found the contract was abandoned, whether on a subjective or objective basis. Therefore, the liens were filed outside of the time period permitted in s 41 of the *Builders' Lien Act* and must fail.

v. Failure to provide Section 15 Notice

[211] As discussed above in relation to the Designs Lien, failure to provide notice under s 15 of the *Builders' Lien Act* to the landlord can be fatal to a lien. There is no evidence that 1361556 provided the requisite statutory notice to Haxton Holdings.

[212] Counsel for 1361556 refers to ***Suss Woodcraft*** for the proposition that the notice requirement "may perhaps be satisfied by the delivery to the landlord of documents the cumulative effect of which will be to put the landlord on notice that the person giving notice will be doing work and furnishing materials of a certain kind and for a certain amount" (at para 31). Importantly though, McDonald J explained that such notice "must surely refer to work and materials for which a lien might be claimed, and not to work and materials of which only a part will be "in respect of an improvement" (at para 35). Counsel for 1361556 did not cite any cases where McDonald J's conditional comment was actually applied to find that s 15 was satisfied. While Haxton was clearly aware of the proposed project from the outset, 1361556 did not demonstrate that there was sufficient interaction between itself and Haxton for Haxton Holdings to have been effectively put on notice of a possible lien in the event of unpaid invoices. All of the items cited by 1361556 to support their argument show that Haxton was intimately familiar with the work to be done, but not that he had been put on notice that 1361556 would file a lien for outstanding invoices. Indeed, the fact that Haxton required Hobson to obtain additional funding before the work commenced would suggest that he sought to forestall potential claims against his interests.

[213] As also discussed above in relation to the Designs Lien, failure to provide the requisite statutory notice is not fatal if a landlord qualifies as an "owner" and is found to have made an implied request for the work. The analysis I conducted above reveals that Haxton Holdings did not qualify as an "owner" within the meaning of the *Builders' Lien Act*, and therefore the statutory notice was mandatory.

[214] The 1361556 Liens were filed without providing the requisite notice under s 15 of the *Builders' Lien Act* and must fail.

vi. Lien Against Cosa Nostra's Leasehold Interest

[215] Haxton Holdings submits that even if the lien against Cosa Nostra's leasehold interest was otherwise valid, it must fail as there is nothing against which it can continue to attach.

[216] As Haxton Holdings points out, Cosa Nostra's lease was terminated before the expiration of its term, and in any event, the full term of the lease was only until February 29, 2020. I agree that there is no longer any subsisting interest against which 1361556's Liens could continue to attach and is thus invalid.

E. Conclusion – 1361556 Claim

[217] Like Designs by Marlynn, 1361556 clearly suffered losses by reason of unpaid invoices of $153,000. However, as the above analysis shows, its claims to be made whole by Haxton Holdings have not been made out.

[218] 1361556 entered into an oral agreement with Cosa Nostra. However, there is no basis to find that 1361556 entered into any type of agreement with Haxton Holdings.

[219] 1361556's claim for compensation for negligent misrepresentation is dismissed.

[220] 1361556's claim for compensation for unjust enrichment is dismissed.

[221] The 1361556 Liens are fatally flawed since Haxton Holdings was not an owner under the *Builders' Lien Act*, the Liens were filed out of time, and no notice had been provided under s 15 of the *Builders' Lien Act*. In addition, the lien against Cosa Nostra's leasehold interest is invalid since there is no longer an interest against which it can attach.

[222] In sum, all of 1361556's claims are dismissed.

V. Overall Conclusion

[223] While I have tremendous sympathy for the Plaintiffs in both actions, their claims as plead cannot succeed. I am sure that Hobson and the Plaintiffs wish, in retrospect, that they had exercised more caution before becoming involved in this project. Certainly, Gushue should have had reservations once it was confirmed to him that the majority of the financing was coming from Haxton, who was someone he understood to have a reputation in the local business community for questionable ethics.

[224] In summary, I conclude as follows:

(a) Action 1603 02749 – Designs Claim

[225] All of the Plaintiff, Designs by Marlynn's claims, are dismissed. In addition, the Designs Lien is invalid, and I direct that both the Lien and *lis pendens* be struck out.

(b) Action 1603 01497 – 1361556 Claim

[226] All of the Plaintiff, 1361556's claims, are dismissed. In addition, the 1361556 Liens are invalid, and I direct that both the Liens and *lis pendens* be struck out.

[227] If the parties are unable to agree on costs, counsel may send written submissions in letter form, not to exceed three pages, excluding exhibits and authorities, and supported by a draft bill of costs, within 30 days from the date of this decision.

Heard on the 11-14th days of April, 2023.
Written submissions filed on May 6, 8, 10, and 24, and October 12, 2023.

Dated at the City of Edmonton, Alberta this 18th day of October, 2023.

D. J. Kiss
J.C.K.B.A.

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