UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LABRIE ASPHALT & CONSTRUCTION CO.,	:	
Plaintiff,	:	CIVIL ACTION NO.
v.	:	3:98-cv-855 (JCH)
	:	
QUALITY SAND & GRAVEL, INC., and HOLLY J. BLINKOFF,	:	
Defendants/Counterclaim Plaintiffs.	:	MARCH 19, 2001

MEMORANDUM OF OPINION

I. INTRODUCTION

This lawsuit involves a contract dispute between Labrie Asphalt & Construction, Inc. (hereinafter "Labrie") and Quality Sand & Gravel, Inc. (hereinafter "Quality") and Holly J. Blinkoff. Labrie alleges that it entered into a contract on December 13, 1995, with Quality, purportedly a sole proprietorship of Blinkoff. Pursuant to that contract, Labrie crushed stone materials at the quarry between January 1996 and April 1996, but ceased performance on April 13, 1996, allegedly because of non-payment, because Quality and Blinkoff were not providing documentation to Labrie required under the contract, and because the quarry was too full of material for Labrie safely to operate its machinery to crush any more stone.

Labrie brings claims against both Quality and Blinkoff for quantum meruit, unjust enrichment, fraud, intentional misrepresentation, negligent misrepresentation, statutory theft, and for unfair trade practices under CUTPA. Labrie also asserts a claim of breach of contract against Quality and a claim under the doctrine of piercing the corporate veil against Blinkoff. Labrie seeks damages, attorneys 'fees and costs, prejudgment interest, and punitive damages. Quality and Blinkoff raise special defenses of set-off under Conn. Gen. Stat. § 52-139 and estoppel. Quality and Blinkoff also raise a counterclaim for breach of contract against Labrie and seek money damages.

II. FINDINGS OF FACT

At all relevant times, Labrie was a corporation incorporated under the laws of the State of Massachusetts, which is Labrie's principal place of business. At all relevant times, which is also its principal place of business. Quality is a corporation incorporated in Connecticut, which is also its principal place of business. Blinkoff is a citizen of the State of Connecticut. The amount alleged in controversy between Labrie and Quality and Blinkoff exceeds $75,000.

Following negotiations, on December 13, 1995, Quality and Labrie entered into a written contract ("Contract"), signed by Robert A. Labrie, Labrie Asphalt & Construction, Inc., and Holly Blinkoff, Quality Sand & Gravel, Inc., in which Labrie agreed to perform rock crushing at a rock quarry located at 3217 Winsted Road in Torrington, Connecticut ("quarry"). At all relevant times, Holly Blinkoff owned this quarry.

The Contract, in its unnumbered introductory paragraph, indicates that Quality owned the quarry. Specifically, the Contract states: "Work involved is the crushing of material by Labrie at the Q.S. & G. property at 3217 Winsted Road, in Torrington, CT." Ex. 1 at 1. Quality also agreed to keep the quarry free and clear of liens. Id. at 2. However, at all times material hereto, Quality did not own the quarry. Only subsequent to entering into the Contract, Quality leased the quarry from Blinkoff, by a lease dated December 31, 1996.

Paragraph 1(a) of the Contract provides that Labrie will provide the following equipment, with qualified personnel, as part of the crushing costs: 1) One (1) jaw crusher with belt scale . . .." Id. Paragraph 3 of the Contract reads:

> The equipment will be used by Labrie to crush the following approximate quantities:

a) Stone, 3/4 inch – 10,000 cubic yards
b) Gravel, 5 inch minus – 25,000 cubic yards
c) Gravel, processed (1-1/2 inch minus) – 25,000 cubic yards
d) Stone, 1-1/2 inch – Undetermined
e) Gravel, 3 inch minus – Undetermined

Id. Paragraph 4 of the Contract provides: "The rates to be charged by Labrie for crushing each type of material are as follows, based on material weights. The weights will be determined by a belt scale mounted on the jaw crusher." Id.

Paragraph 6 of the Contract provides:

Both parties agree to the following payment terms and conditions:

> a) Q.S. & G. will maintain necessary property and liability insurance, and Labrie will maintain liability insurance on the crushers and equipment.
>
> b) Labrie will bear all up front costs associated with the crushing operation, and keep a running total of monies owed by Q.S. & G. for the crushing of each material type;
>
> c) Q.S. & G. agrees to keep the property and materials free of liens or other encumbrances that would affect the sale of the materials or payment to Labrie;
>
> d) Labrie will be paid for each cubic yard of material as it is sold [and paid to QS & G and paid to Qual. Sand] by Q.S. & G. at the rates provides in paragraph 4 above. (The formula used for converting from tons to cubic yards, etc., are provided later in this document.) Q.S. & G. to provide sales records and payment to Labrie on a monthly basis, on the 10th of each month for the proceeding month.
>
> e) Q.S. & G. further agrees to compensate Labrie as follows: Q.S. & G. will pay Labrie 50% of all profits on all

> materials crushed by Labrie. The profit will be determined by subtracting Q.S. & G. costs from the selling price of the finished product. The costs include the insitu material costs ($1.00 per cubic yard of finished product), drilling and blasting costs ($4.75 per cubic yard of finished product), and Labrie's crushing cost per cubic yard of finished product. Based on the formulas that follow, the additional compensation due Labrie is as follows. This payment is also due on the 10th of each month for the proceeding month [(material pd for and sold for)]. [Labrie will provide necess. ins on employees (workm. c).]
> . . .
> f) If all of the material crushed by Labrie is not sold within 24 months of the crushing date, all outstanding monies owed to Labrie for the crushing will be due and payable in full by Q.S. & G. Q.S. & G. will be responsible for all collection and legal fees if so incurred by Labrie.

Id. at 2 (bracketed material handwritten and initialed by "HJB" in margins).

Paragraph 5(d) of the Contract provides:

> Q.S. & G. will be responsible for the following:
> . . .
> d) Provide blasted stone that is of a reasonable size to pass through the Labrie jaw crusher. (Oversize materials will be put aside and hammered by Labrie. The volume of oversized materials is to be kept to a minimum.)

Ex. 1 at 2.

Prior to commencement of Labrie's crushing activities at the quarry, Blinkoff represented to Peter Barrett, operations manager at Labrie, that some oversized

material was on site at the quarry. One large pile was "driven over" and appeared to Barrett in December 1995 prior to beginning the job to be broken up on top of the pile and to have been "hammered" throughout. Barrett asked Blinkoff "if the center was hammered, [and] she said the guy [who had hammered the pile] did a very good job, he was there for a long time" and "she thought it was all hammered."

In January 1996, Labrie began crushing operations at the quarry pursuant to the Contract. Once Labrie began crushing the material on the top of the large pile Barrett had observed, Labrie learned that, contrary to Blinkoff's representation, the pile contained large amounts of oversized material within it, which material was not hammered prior to Labrie's arrival at the quarry. Labrie was required to use a hydraulic hammer that was attached to a track excavator in order to break the oversized stone to reduce it to a size that would fit through the jaw crusher.

Labrie continued work at the quarry on 35 days, up until April 3, 1996. During this period, each day, James McDonald, Labrie's crushing foreman on the project, or Barrett in his absence, recorded on a log the number of tons of materials crushed that day by Labrie. These figures were determined by belt scales which weighed the tonnage of three-inch-minus and other stone material crushed each

day.[1] McDonald kept this log on a sheet of paper in the trailer rented by Blinkoff and kept on site at the quarry. Blinkoff had this log in her possession on a few occasions while Labrie was still on site at the quarry, at which times McDonald was required to ask her for the log at the end of those days to record the amount of material Labrie has crushed that day. Blinkoff never objected to the entries on the crushing log nor to the method by which the log was kept daily by Labrie's employees. In early 1996, after Labrie had begun work crushing on site at the quarry, Vet's Explosives, Inc. conducted approximately six blasts to generate rock for Labrie to crush.

Blinkoff received $297 in February 1996 in payment from the sale of materials crushed by Labrie. See Ex. 14. However, neither Blinkoff nor Quality paid out to Labrie any share of the profits from these sales or any compensation for crushing the quantity sold. See Ex. 1 at 2 ¶¶ 6(d)-(e).

On March 23, 1996, shortly before Labrie vacated the quarry, a licensed land surveyor hired by Quality, Ronald E. McCarthy, conducted a survey of the

[1] In Paragraph 4 of the Contract, as noted above, the parties agreed that the weights to determine the amount of material which Labrie is to be paid for crushing "will be determined by a belt scale mounted on the jaw crushers." Ex. 1 at 1 ¶ 4.

stockpiles generated by Labrie. The survey revealed that Labrie's stockpiles contained approximately 15,565 cubic yards of material: 3,910 cubic yards of three-inch minus, 6,602 cubic yards of 1-1/2-inch stone,[2] 2,049 cubic yards of 3/4-inch stone, and 3,004 cubic yards of 3/8-inch processed gravel. Ex. 697 at 1.

The court credits the general accuracy of the survey but finds that the 15,565 cubic yards underrepresents the amount of stone crushed by Labrie between January and March 23, 1996, in several ways. First, prior to the survey, Labrie laid down approximately 3,500 cubic yards of crushed material, mostly three-inch-minus, in the quarry to level off roadways so that customers could get into the quarry and also in a low area in the quarry to fill it in and level it off to allow Labrie to continue to be able to crush and stockpile stone because the yard was getting full. McCarthy acknowledged that he did not account for this material in his survey. Second, Labrie crushed approximately 1,019 cubic yards of material that was sold from the quarry before the survey was undertaken.[3] Ex. 63. Accounting for these omissions, the

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[2] The court finds that the reference to "1-1/4"" on the survey in fact refers to the 1-1/2-inch uniformly referred to throughout the Contract.

[3] Additionally, several of the piles of crushed materials in the quarry were also compacted, i.e., driven over by 30-ton loaders with drivers to compact the stone, by Labrie. By McCarthy's own admission, the survey did not take account of the additional

survey as adjusted indicates that Labrie crushed 7,410 cubic yards of three-inch-minus, 6,602 cubic yards of 1-1/2-inch, 2,049 cubic yards of 3/4-inch, and 3,004 cubic yards of 3/8-inch processed gravel, plus the approximately 1,019 cubic yards of material sold before the survey, for a total of approximately 20,084 cubic yards of stone material at the quarry between January and March 23, 1996.

The crushing log maintained contemporaneously on the project by Labrie indicates that Labrie crushed 9,342 tons of three-inch-minus and 20,338 tons of stone material between January 30, 1996, and March 21, 1996. Ex. 3 at 1-2. The crushing log, however, does not break down the stone into the specific quantities of 1-1/2-inch stone, 3/4-inch stone, and 3/8-inch processed gravel, as the survey does. Mr. Labrie testified that McDonald and Barrett estimated that 50% of the stone other than the three-inch minus was 1-1/2-inch stone, 25% was 3/4-inch stone, and 25% was 3/8-inch processed gravel. See, e.g., Ex. 10. The survey's breakdown indicates that the 1-1/2-inch stone represented 56.6% of the stone other than the three-inch minus, with 3/4-inch stone accounting for 17.6% and 3/8-inch processed gravel accounting for 25.8%. The survey, however, did not account for the 1,019

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saleable quantity of stone material the piles contained by virtue of this compaction.

cubic yards of material crushed by Labrie but sold before March 23.[4] Moreover, the estimate by Labrie's employees covered the material crushed both before and after the survey, which the percentage breakdown of the survey naturally does not. Because Labrie's estimated percentage breakdown differs by less than 10% from the survey's, and because the percentage breakdown adopted by the court will cover material crushed and recorded on the crushing log before and after the survey, the court accepts the estimate of 50%, 25%, and 25% of McDonald and Barrett, whose testimony the court found credible.

According to the log, and using this breakdown of stone product, before the survey, Labrie crushed 9,342 tons of three-inch minus, 10,169 tons of 1-1/2-inch stone, 5,084.5 tons of 3/4-inch stone, and 5,084.5 tons of 3/8-inch processed gravel. These tonnage amounts can be converted according to the factors found in Paragraph 4 of Blinkoff's draft contract: 1.1-tons-to-1-cubic-yard for 1-1/2-inch,

[4] The 3,500 cubic yards of material laid down in the quarry was mostly three-inch-minus. As such, while the survey did not account for this material, this omission does not affect the estimation of the breakdown between the other three types of stone material crushed.

1.3-tons-to-1-cubic-yard for processed (3/8-inch) gravel, 1.1-tons-to-1-cubic-yard for 3/4-inch, and 1.4-tons-to-1-cubic-yard for three-inch-minus. Ex. 2 at 1 ¶ 4.[5]

The court finds that the parties agreed to these factors in Blinkoff's draft contract. Applying these conversion factors, the court finds that, according to the log before the survey, Labrie crushed 6,673 cubic yards of three-inch minus, 9,244.5 cubic yards of 1-1/2-inch stone, 4,622.25 cubic yards of 3/4-inch stone, and 3,911 cubic yards of 3/8-inch processed gravel, for a total of approximately 24,450.75 cubic yards of stone material crushed at the quarry between January and March 23, 1996.

The court finds that the log is accurate, despite Blinkoff's protestations, and finds that Labrie crushed the amount of material indicated on the log between January 1996 and March 23, 1996. The court credits the testimony of McDonald

[5] Labrie's damage analysis adopts these factors, except for the 1.3-tons-to-1-cubic-yard rate for 3/8-inch processed gravel, which Labrie claims is somehow more "favorable to Labrie" than the 1.24-tons-to-1-cubic-yard rate that Labrie suggests. Ex. 17 at 1; compare Ex. 10 at 1 with Ex. 2 at 1 ¶ 4. Labrie benefits from a finding that it crushed more cubic yards than less, however, and a higher tons-to-yards factor results in less cubic yardage that Labrie will be found to have crushed. Because Labrie otherwise adopts the factors from Blinkoff's draft contract, and because the court finds that the parties agreed to these conversion factors, the court also adopts the 1.3-tons-to-1-cubic-yard rate found in that same document.

and Barrett as to how the log was kept and finds that the log is an accurate, reliable, and complete record of the amount of material Labrie crushed.[6]

The log also indicates that Labrie crushed 2,661.5 tons of three-inch minus and 4,861.5 tons of 1-1/2-inch stone, 3/4-inch stone and 3/8-inch processed gravel after the survey, in the period after the survey, between March 25, 1996, and April 3, 1996. Id. at 2. According to the log, using the aforementioned breakdown of stone product, after the survey, Labrie crushed 2,661.5 tons of three-inch minus, 2,430.75 tons of 1-1/2-inch stone, 1,215 tons of 3/4-inch stone, and 1,215 tons of 3/8-inch processed gravel. Applying the conversion factors, the court finds that, according to the log after the survey, Labrie crushed 1,901 cubic yards of three-inch minus, 2,210 cubic yards of 1-1/2-inch stone, 1,104.5 cubic yards of 3/4-inch stone, and 934.5 cubic yards of 3/8-inch processed gravel. The court therefore finds that,

[6] Blinkoff asks the court to find that the survey repudiates the accuracy of the crushing log. The survey, however, once adjusted for the amounts omitted from McCarthy's calculations, buttresses and substantiates the accuracy of the log. Although the survey as adjusted yields a comparison of 20,084 cubic yards to the 24,461.75 cubic yards reflected in the log, the adjusted total of 20,084 cubic yards does not account for compaction, which McCarthy admits he did not consider. In light of this omission, and because the court finds the crushing log to be credible and reliably maintained, the court finds that the survey does not refute the totals on the log and, within a reasonable margin of error, actually tends to substantiate the crushing totals reflected on Labrie's log.

in the aggregate, Labrie crushed 8,574 cubic yards of three-inch minus, 11,454.5 cubic yards of 1-1/2-inch stone, 5,726.75 cubic yards of 3/4-inch stone, and 4,845.5 cubic yards of 3/8-inch processed gravel, for a total of approximately 30,600.75 cubic yards of stone material crushed by Labrie at the quarry between January and April 1996.

On April 3, 1996, Labrie terminated its performance under the Contract for several reasons: there was no more material available to crush because the yard was too full for Labrie's trucks and equipment to safely maneuver; Quality and Blinkoff were not paying Labrie for the material it crushed; and Quality and Blinkoff were not providing Labrie with the sales documentation called for in the Contract. After leaving the quarry, Labrie returned to its own asphalt plant in East Hampton, Massachusetts.

By September 1996, Blinkoff had sold from the quarry the stone material that was crushed by Labrie. She did not provide Labrie with any documentation of the sale of the material until she sent Mr. Labrie a letter on March 14, 1997, with various sales tickets and invoices attached.[7] See Ex. 7.

[7] The court credits Mr. Labrie's testimony at trial that even this documentation provided to Labrie as late as March 1997 was not a complete record of all of the sales of

Between May 1996 and January 1997, Labrie received payments totaling $44,000 from Blinkoff in the form of several checks in payment for some of the material crushed. These checks were issued under the name "B & B Group," except for a check in October 1996 issued under the name "Holly Blinkoff." See Ex. 525; Ex. 658.

At all times relevant to this action, Quality did not have a separate corporate checking account. Blinkoff testified that the bank would not permit her to open a corporate account.

Quality filed a 1996 Amended U.S. Corporation Income Tax Return, which states that, "[p]rior to 1996, the business was operated as a sole proprietorship. Effective 1/1/96, the business was operated by the corporation." Ex. 14 at 2. This return was not filed until some time after the beginning of 1997, after the Contract was signed between Labrie and Quality in December 1995 and after the instant disputes over performance of the Contract and payment thereunder had arisen between the parties.

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the material that Labrie crushed in 1996.

Blinkoff later sold the rock quarry located at 3217 Winsted Road in Torrington, Connecticut. At the time of the sale, neither Blinkoff nor Quality had contracted with another company to crush the stone material remaining at the quarry after Labrie left the site.

III. CONCLUSIONS OF LAW

A. Jurisdiction

The court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1).

B. Plaintiffs 'Claims

The court concludes that Blinkoff operated Quality, at all times relevant to this contract action, as a sole proprietorship. "[T]he sole proprietor retains personal liability for all preconversion debts and obligations incurred by the sole proprietorship." C&J Builders & Remodelers, LLC v. Geisenheimer, 249 Conn. 415, 422 (1999).

Courts in Connecticut will pierce the corporate veil under either the instrumentality rule or the identity rule. Connecticut courts have stated the identity rule as:

> "If plaintiff can show that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise."

Angelo Tomasso, Inc. v. Armor Const. & Paving, Inc., 187 Conn. 544, 554 (1982) (quoting Zaist v. Olson, 154 Conn. 563, 576 (1967)). "The identity rule primarily applies to prevent injustice in the situation where two corporate entities are, in reality, controlled as one enterprise because of the existence of common owners, officers, directors or shareholders and because of the lack of observance of corporate formalities between the two entities." Id. at 559. "There must be such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal." Id. at 556 (internal quotation marks omitted) (quoting Zaist, 154 Conn. at 574). "It is clear that the key factor in any decision to disregard the separate corporate entity is the element of control or influence exercised by the individual sought to be held liable over corporate affairs." Id. at 556-57.

Here, the court concludes that Quality had ceased to operate as an entity separate from Blinkoff. The court notes that Quality's debts to Labrie were paid

through a bank account under the name B & B Group, which Blinkoff testified was the trade name for her personal business. Indeed, Quality had no separate corporate checking account through which to pay Labrie. Moreover, Quality's own 1996 Amended U.S. Corporation Income Tax Return, filed no earlier than 1997 to correct Quality's original 1996 return, states that Quality was operating as a sole proprietorship of Blinkoff, and therefore not respecting the corporate form, in 1995, at the time Quality entered into the Contract with Labrie. Moreover, the quarry at issue in the Contract was owned by Blinkoff, not Quality, and Blinkoff did not lease the quarry out to Quality until December 31, 1996, many months after Labrie's operations at the quarry had ceased.

All of the evidence presented at trial demonstrates that Blinkoff exerted total control or influence over the corporate affairs of Quality. Labrie has proven by a preponderance of the evidence that such a unity of interest and ownership between Quality and Blinkoff that the independence of Quality as a corporation had in effect ceased or never begun.[8]

[8] Following this conclusion, the court will hereinafter refer to the defendants simply as "Blinkoff."

With regard to Count 1, Labrie's claim of breach of contract against Blinkoff, the court turns to the basic principles of contract interpretation under Connecticut law:

> The intention of the parties to a contract governs the determination of the parties' rights and obligations under the contract. Analysis of the contract focuses on the intention of the parties as derived from the language employed. Where the intention of the parties is clearly and unambiguously set forth, effect must be given to that intent. Contract language is unambiguous when it has a "definite and precise meaning . . . concerning which there is no reasonable basis for a difference of opinion." The rules of construction are applied only if the language of the contract is ambiguous, uncertain or susceptible of more than one construction.

Levine v. Advest, Inc., 244 Conn. 732, 745-46 (1998) (citations omitted).

Generally, breach of contract "require[s] proof that the defendants received a benefit." Morgan Bldgs. & Spas, Inc. v. Dean's Stoves & Spas, Inc., 58 Conn. App. 560, 561 n.2 (2000). "It follows from an uncured material failure of performance that the other party to the contract is discharged from any further duty to render performances yet to be exchanged." Bernstein v. Nemeyer, 213 Conn. 665, 672-73 (1990) (citations and footnote omitted). As to damages,

> "[t]he general rule in breach of contract cases is that the award of damages is designed to place the injured party, so far as can be done by money, in

> the same position as that which he would have been in had the contract been performed. It has traditionally been held that a party may recover general contract damages for any loss that may fairly and reasonably be considered [as] arising naturally, i.e., according to the usual course of things, from such breach of contract itself. This court has consistently applied the general damage formula of Hadley v. Baxendale [9 Ex. 341, 354, 156 Eng. Rep. 145 (1854)] to the recovery of lost profits for breach of contract, and it is our rule that [u]nless they are too speculative and remote, prospective profits are allowable as an element of damage whenever their loss arises directly from and as a natural consequence of the breach."

Torosyan v. Boehringer Ingelheim Pharms., Inc., 234 Conn. 1, 32 (1995) (citation omitted).

Paragraph 6(d) of the Contract provides that Labrie was to be paid by the cubic yard of material at the time that the material was sold to customers and Blinkoff was paid for the sale of the materials. See Ex. 1 at 2 ¶ 6(d). The Contract provides for Labrie to be paid based on the amount and type of stone materials crushed at a quarry operated by Blinkoff. Id. The cost per cubic yard of material was provided by applying the conversion fact found in Paragraph 4 of Blinkoff's draft contract [Ex. 2] to the price per ton in Paragraph 4 of the Contract, by type of stone. These figures are $3.50 per cubic yard of three-inch-minus, $3.85 per cubic

yard of 3/4-inch stone, $3.85 per cubic yard of 1-1/2-inch stone, and $4.55 per cubic yard of 3/8-inch processed gravel. Ex. 2 at 1 ¶ 4.

The language of Paragraph 4 calls for Labrie to be paid for each type of stone material crushed "based on material weights," which "will be determined by a belt scale mounted on the jaw crushers." Ex. 1 at 1 ¶ 4. Labrie in fact weighed the material in tonnage on a belt scale, which tonnage was then be converted to cubic yardage to determine the amount owed to Labrie by Blinkoff for material crushed. This payment was to be made on a monthly basis, on the 10th of each month for material sold and paid for in the prior month. See id. at 2 ¶ 6(d). Paragraph 6(d) also calls for Blinkoff to provide sales records to Labrie on the 10th of each month. See id.

Under Paragraph 6(e) of the Contract, Labrie is also to receive half of the profits from the sale of materials crushed over and above the payments for crushing per cubic yard, minus Blinkoff's costs in selling the product. See id. at 2 ¶ 6(e). These payments, too, are "also due on the 10th of each month for the proceeding month" for materials sold and paid for, i.e., Blinkoff only owed Labrie half the

profits for sales, minus costs, when the sale was complete and Blinkoff was paid for the material. Id.

The court concludes that Blinkoff breached the Contract by failing to pay Labrie either for the amount of material crushed pursuant to Paragraph 6(d) or for half the profits of material sold and paid for, pursuant to Paragraph 6(e). Blinkoff admitted that she did not pay Labrie any portion of the $297 she collected for the sale of crushed material in February 1996. Labrie's payment on this material was due on March 10. Blinkoff made no payment to Labrie until May 1996. Furthermore, Blinkoff did not provide to Labrie any records of these or subsequent sales until March 1997, a year after the first records were due to Labrie under Paragraph 6(d).

The court is not persuaded by Blinkoff's efforts to focus attention on the fact that Labrie billed Blinkoff in tonnage and not cubic yardage. The conversion factors were readily available to convert the tonnage to yardage. Furthermore, the court rejects Blinkoff's claim that she would not enter into a contract that called for measuring the weight of the crushed material on a belt scale; her testimony to that effect, in light of the plain language of the Contract into which she entered with

Labrie, is not credible. The parties did enter into a contract and, by its unambiguous terms, the parties agreed to weight crushed materials on a belt scale and to convert the quantities to cubic yards using the agreed-upon conversion factors.

Turning to the amount owed to Labrie under the Contract, the court acknowledges that Blinkoff may have envisioned that her payments to Labrie would be based on the amount of material sold and not upon the total weights determined by the belt scale. But even if the court concluded that Blinkoff's version is correct, the court cannot credit Blinkoff's records of the sales of the materials crushed in order to determine Labrie's damages for Blinkoff's breach of contract. The records are not reliable or complete. Some of the material crushed was paid for by cash, which was sporadically recorded by Blinkoff. The records contain ambiguous and often illegible notes, and Blinkoff did not offer testimony to decipher these notes at trial. In short, Blinkoff's records are, at critical points, incomprehensible and, on the whole, the court concludes that the records do not provide a reliable basis upon which to determine the amount of material crushed by Labrie and sold by Blinkoff.

In the absence of reliable sales records, the court must look to an alternative form of payment expressly contemplated in the Contract. Paragraph 6(f) provides that Labrie will be paid in full for the amounts crushed if all the material is not sold by Blinkoff within 24 months. Paragraph 4 provides that the weights of material crushed by Labrie, which weights will be used to derive the amount of material which Labrie is to be paid for crushing, "will be determined by a belt scale mounted on the jaw crushers." Ex. 1 at 1 ¶ 4. The Contract thus provides that, where the parties cannot base payment on the amount sold, the amount of material for which Labrie will be paid in full for crushing will be determined by a belt scale.[9] These weights can then be converted to cubic yardage, according to which Labrie will be paid at the rates listed on Blinkoff's draft contract. The court notes that, although, under the Contract the parties agreed to the use of a belt scale, they nowhere provided for the employment of a survey to determine amounts crushed for payment.

[9] The court acknowledges Blinkoff's evidence, via the testimony of a representative of the Connecticut Department of Consumer Protection, that Labrie's use of an uncertified belt scale for use in retail sales is improper in Connecticut. The parties, however, explicitly agreed to the use of a belt scale in the Contract. Ex. 1 at ¶ 4. This agreement is enforceable when entered into, after arms-length negotiations between, and complete review of the draft contract by, two experienced businesspeople.

Mr. Labrie agreed at trial that the Contract called for Labrie to crush 60,000 cubic yards of material in the quarry. However, before Labrie could complete that amount of crushing, Blinkoff breached the Contract by failing to pay and provide sales documentation. Perhaps more important is the fact that Labrie was further unable to continue operations until the yard became less full such that Labrie could safely operate its equipment. Labrie could have come back to work at the quarry, at least by September 1996, because Blinkoff had by that time sold the crushed material in the quarry. By this point, however, Blinkoff had materially breached by failing to pay Labrie any share of the profits for the stone material sold and had failed to provide any sales documentation to Labrie. Blinkoff did not, in fact, provide any documentation to Labrie until the transmittal of receipts with a letter dated March 14, 1997. As such, the court concludes that Blinkoff's uncured material failure of performance discharged Labrie from any further duty to render performances yet to be exchanged, i.e., completion of the crushing of approximately 30,000 more cubic yards of stone material on the site.[10]

[10] Blinkoff never crushed this material; she has since sold the quarry.

Labrie claims as an element of damages the cost of the rental of the hammer. The court concludes that Labrie failed to establish by a preponderance of the evidence that this cost constitutes damages flowing from Blinkoff's breach of any specific portion of the Contract. The presence in the Contract of language providing that "[t]he volume of oversized materials is to be kept to a minimum" and the presence of a large pile of oversize at the quarry does not sufficiently establish that Blinkoff breached the contractual provisions regarding oversized material. See Ex. 1 at 2 ¶ 5. The court notes that Labrie did agree that "[o]versize materials will be put aside and hammered by Labrie." Id.

The court further concludes that the plain language of the Contract provides for Blinkoff to pay Labrie's attorneys fees for a successful breach of contract action by Labrie. Paragraph 6(f) provides that "Q.S. & G. will be responsible for all collection and legal fees if so incurred by Labrie." Ex. 1 at 2 ¶ 6(f).

Turning to the issue of damages, the court has found that Labrie crushed 8,574 cubic yards of three-inch minus at a rate of $3.50/yard, 11,454.5 cubic yards of 1-1/2-inch stone at a rate of $3.85/yard, 5,726.75 cubic yards of 3/4-inch stone at a rate of $3.85/yard, and 4,845.5 cubic yards of 3/8-inch processed gravel at a rate

of $4.55/yard. Under Paragraph 6(d) of the Contract, therefore, Labrie was owed a total of $118,204.[11] Labrie, however, received payments, without any sales documentation, between May 1996 and January 1997 of $44,000 from Blinkoff. Accounting for these payments, Labrie's damages under Paragraph 6(d) of the Contract amount to $74,204.

Blinkoff also breached the Contract by failing to pay Labrie one-half of the profits for the sale of the crushed material, minus Blinkoff's costs, pursuant to Paragraph 6(e) of the Contract. The court accepts the calculations of Labrie in its "Summary of Damages" [Ex. 17] as to the amount of profit per type of material, minus costs, except for the figure relating to the 3/8-inch processed gravel. Labrie used a figure of $4.34/yard to determine its claim for the amount owed to Labrie for crushing this type of material, instead of the $4.55/yard used by the court and found

[11] As noted above, the Contract called, in the first instance, for Labrie to be paid for the amount it crushed once the material was sold and paid for. However, the court has rejected Blinkoff's sales records as too unreliable to form the basis for Labrie's payment. As such, because all the material that Labrie crushed was sold, the court finds that Labrie is entitled to payment for all of the material it crushed based on the rates set out in Blinkoff's draft contract. The amounts that Labrie crushed must be determined by converting the figures in the crushing log to cubic yardage using the conversion factors that the parties agreed upon, as Paragraph 6(f) of the Contract contemplates in the event all of the material crushed is not sold within 24 months. In other words, even though all the crushed material was removed from the quarry, the court finds that Blinkoff's records of quantities of material sold, by type, do not record the sale of all material that Labrie crushed.

on Blinkoff's draft contract. See Ex. 17; see also Ex. 635 (price list). Accordingly, the court finds that Blinkoff received $.75 profit per cubic yard of three-inch-minus sold, $5.15 profit per cubic yard of 1-1/2-inch stone sold, $9.70 profit per cubic yard of 3/4-inch stone sold, and $2.50 profit per cubic yard of 3/8-inch processed gravel sold. Labrie is entitled under Paragraph 6(e) to half of the profits from each type of material sold. Therefore, Labrie's damages for Blinkoff's breach of Paragraph 6(e) of the Contract are $1,902.75 for the three-inch-minus sold (excluding the 3,500 cubic yards of three-inch-minus laid down in the yard and not sold),[12] $29,495.25 for the 1-1/2-inch sold, $27,774.75 for 3/4-inch sold, and $3,240.50 for the 3/8-inch processed gravel sold,[13] for a total of $62,413.25.

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[12] The court does not award Labrie its "profit" damages on the material laid down in the quarry because that material was not sold, and thus there was no "profit" for which compensation is owing to Labrie under Paragraphs 6(e) or 6(f) of the Contract. Further, Labrie did not object to the use of this material at the time.

[13] Labrie concedes that a portion of the processed gravel sold by Blinkoff was sold as "screenings" at a rate of $10.00 per cubic yard, rather than the rate of $12.80 per yard at which Blinkoff sold the material as processed gravel. See Ex. 17. Using its 1.24-tons-per-cubic-yard conversion factor and its $2.71/yard profit margin for 3/8-inch processed gravel sold, Labrie concedes that the profits it is owed for sales of processed gravel should thus be reduced by $3,200. Id. The court will not use that number, however, because the number had to have been derived using the conversion and profit factors which the court has rejected.

The profits due for the 3/8-inch processed gravel before applying a discount would be $6056.75, or half of the product of 4,845.5 cubic yards at $2.50/yard. The court

Conn. Gen. Stat. § 37-3a provides for a rate of prejudgment interest on damages of 10% per year.[14] The Connecticut Supreme Court has "construed § 37-3a as permitting a trial court, in the exercise of its equitable discretion, to award prejudgment interest." State v. Lex Assocs., 248 Conn. 612, 628 (1999).

"[A] necessary predicate for such an award is, however, a determination that the party against whom interest is to be awarded 'has wrongfully detained money due the other party . . ..'" Id. (quoting Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc., 239 Conn. 708, 735 (1997)). "Interest on such damages ordinarily begins to run from the time it is due and payable to the plaintiff . . .. The determination of whether or not interest is to be recognized as a proper element of damage, is one to be made in view of the demands of justice rather than through the

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calculated that Labrie determined that Blinkoff sold 46.5% of the 3/8-inch stone crushed as screenings, or the $3,200 reduction, divided by Labrie's undiscounted profit figure of $6,884.05, multiplied by 100%. Adjusting for the court's use of a conversion factor of 1.3 and profit margin of $2.50/yard, the court calculated the profits due to Labrie for sale of 2,253 cubic yards of the 3/8-inch stone, or 46.5% of 4,845.5 cubic yards. The court therefore discounts the profits due to Labrie for the 3/8-inch processed gravel by $2,816.25, or half of $5,632.50 (the product of 2,254 cubic yards at $2.50/yard).

[14] Labrie claimed, in the alternative, an 18% per annum rate of interest, derived from Labrie's own credit application. See Ex. 504. Blinkoff, however, refused to sign this application, citing her disagreement with the payment terms, including the rate of interest. See id. The court therefore can find no basis for applying this 18% rate of interest.

application of an arbitrary rule.'" Blakeslee, 239 Conn. at 734-35 (quoting West Haven Sound Dev. Corp. v. West Haven, 207 Conn. 308, 321 (1988)).

The court concludes that pre-judgment interest should be awarded on the profit portions and payment for crushing due to Labrie, running from October 10, 1996, the time for payment by Blinkoff based upon the sale of most if not all of the material that Labrie crushed. At a rate of 10% per year, the interest on the total damages of $136,617.75 calculated from October 10, 1996, to March 19, 2001, amounts to $60,658.25.

As to Counts 2 and 4 for quantum meruit against Quality and Blinkoff, respectively, the court finds for the defendants on these claims. As discussed above, an express contract exists between the parties in this case. "'An implied contract can only exist where there is no express one.'" Biller Assocs. v. Peterken, 52 Conn. App. 18, 30 (1999) (quoting Rosick v. Equip. Maint. & Serv., Inc., 33 Conn. App. 25, 37 (1993)).

Likewise, the court finds for the defendants on Counts 3 and 5 for unjust enrichment against Quality and Blinkoff, respectively. "'[L]ack of a remedy under the contract is a precondition for recovery based upon unjust enrichment.'" Hartford

Whalers Hockey Club v. Uniroyal Goodrich Tire Co., 231 Conn. 276, 284 (1994) (citation omitted).

Because the court concludes that Quality was not a separate corporate entity from Blinkoff, the court must find for the defendants on Counts 6 and 7, fraudulent misrepresentation against Quality and Blinkoff, respectively, and Counts 8 and 9, negligent misrepresentation against Quality and Blinkoff, respectively. Each claim requires the plaintiff to prove that a false representation of fact was made by the defendants. Weisman v. Kaspar, 233 Conn. 531, 539 (1995) (fraudulent misrepresentation); Williams Ford, Inc. v. Hartford Courant Co., 232 Conn. 559, 575-76 (1995) (negligent misrepresentation). Since Blinkoff owned the quarry, there was an identity of interest between Quality and Blinkoff, and Quality has no separate existence from Blinkoff, it is not false for the defendants to represent in the Contract that the quarry is Quality's "property."

As to Counts 12 and 13, against Quality and Blinkoff, respectively, the court notes that CUTPA provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a). The Connecticut Supreme Court has

observed that the Connecticut "General Assembly, in adopting the sweeping language of § 5(a)(1) of the [Federal Trade Commission Act ("FTCA")], deliberately chose not to define the scope of unfair or deceptive acts proscribed by CUTPA so that courts might develop a body of law responsive to the marketplace practices that actually generate such complaints. "' Associated Inv. Co. Ltd. P'ship v. Williams Assocs. IV, 230 Conn. 148, 157 (1994) (citation omitted). Accordingly, the Connecticut Supreme Court has held that "there is 'no . . . unfair method of competition, or unfair [or] deceptive act or practice that cannot be reached [under CUTPA], "' such that there is a "unique breadth and flexibility of the cause of action created by CUTPA." Id. at 158, 159 (citation omitted).

In his closing remarks, Labrie's attorney indicated that Labrie claims Blinkoff acted deceptively in making misrepresentations regarding the formation of the Contract and in that the sales records were not contemporaneously provided to Labrie as required in the Contract, such the information was intentionally withheld from Mr. Labrie to prevent his exercise of his legal rights. As to the first deceptive CUTPA theory of recovery, given the court's conclusion that there is an identity of interest between Quality and Blinkoff, the court has determined above that Quality

and Blinkoff did not make a deceptive statement by representing in the Contract that Quality owned the quarry. As to the second, withholding information due under a contract may be a breach of contract, but it is not necessarily deceptive. A breach of contract standing alone does not constitute a violation of CUTPA. See Boulevard Assocs. v. Sovereign Hotels, Inc., 72 F.3d 1029, 1038-39 (2d Cir. 1995). Accordingly, the court concludes that Labrie has failed to establish a violation of CUTPA's prohibition on deceptive acts or practices by Blinkoff.

Moreover, Labrie has failed to establish by a preponderance of the evidence proof of a violation of CUTPA's prohibition on unfair acts and practices. Labrie's attorney represented that Labrie claims that Blinkoff engaged in a pattern of entering into contracts and not honoring them and has thereby violated CUTPA. The court cannot agree, based on the evidence presented at trial, that Blinkoff's actions rise to the level of an unfair act or practice under CUTPA. See Hartford Elec. Supply Co. v. Allen-Bradley Co., Inc., 250 Conn. 334, 367-68 (1999) (setting forth elements and "cigarette rule" test). Labrie has established only that Blinkoff breached the Contract with Labrie and may have breached other contracts with other companies. Labrie has failed to carry its burden of proving that Blinkoff

violated public policy by deliberately engaging in a pattern of entering contracts with no intention of honoring their obligations thereunder, rather than simply pursuing genuine disputes regarding several contracts. Moreover, Labrie has failed to put forward sufficient evidence for this court to conclude that Blinkoff's conduct, while constituting a breach of conduct, amounted to immoral, unethical, oppressive, or unscrupulous behavior. Furthermore, Labrie failed to carry its burden of proof of demonstrating substantial injury which Labrie could not reasonably have avoided. See id. at 368.

Accordingly, the court finds for the plaintiffs on Claims 12 and 13. Because Labrie failed to establish its CUTPA claims, and absent any evidence of malicious, willful or reckless tortious conduct by Blinkoff, the court also rejects Labrie's request for punitive damages in Counts 14 and 15, against Quality and Blinkoff, respectively. See Conn. Gen. Stat. § 42-110g(a) (CUTPA punitive damages); City of Hartford v. Int'l Ass'n of Firefighters, Local 760, 49 Conn. App. 805, 817 (1998) ("Punitive damage awards are not ordinarily available in a contract action unless tortious conduct that is malicious, willful or reckless is alleged.").

Finally, Labrie has alleged statutory theft in violation of Conn. Gen. Stat. § 52-564 in Counts 10 and 11 by Quality and Blinkoff, respectively. "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages." Conn. Gen. Stat. § 52-564. The Connecticut Supreme Court has recently held that "[s]tatutory theft under [General Statutes] § 52-564 is synonymous with larceny [as provided in] General Statutes § 53a- 119. . . . Pursuant to § 53a-119, [a] person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or [withholds] such property from [the] owner. '" Hi-Ho Tower v. Com-Tronics, Inc., 255 Conn. 20, 44 (2000) (quoting Suarez-Negrete v. Trotta, 47 Conn. App. 517, 520-21 (1998)). "[S]tatutory theft requires that a defendant 'wrongfully 'take, obtain or hold the property of another." Id. at 47 (quoting Suarez-Negrete, 47 Conn. App. at 520-21).

Labrie seeks to hold Blinkoff liable for statutory theft under section 52-564 for a failure to pay in the commercial context. The court concludes that Labrie has failed to put forth clear and convincing evidence of the necessary wrongfulness and intent on the part of Blinkoff in her failure to pay Labrie any amounts due for

Labrie's crushing services. See Second Injury Fund v. Lupachino, 45 Conn. App. 324, 347 (1997) (clear and convincing evidence required for treble damages under section 52-564). As such, the court finds for the defendants on Counts 10 and 11.

C. Blinkoff's Counterclaims and Special Defenses

Turning to Blinkoff's counterclaim of breach of contract against Labrie, the court notes that it is well-settled in Connecticut that "'[a] party cannot recover on a contract unless he has fully performed his obligations under it, has tendered performance, or has some legal excuse for not performing.'" Ravitch v. Stollman Poultry Farms, Inc., 165 Conn. 135, 149 (1973). The court concludes that Labrie did not breach the Contract by leaving the quarry because Labrie was unable to continue crushing. The yard became too full for Labrie to safely operate its machinery, such that, even if it was a breach to leave the quarry, the breach was excused. "Certainly a defendant who has wrongfully prevented the other party from completing performance cannot set up the nonperformance of the other as a defense."[15] Burns v. Gould, 172 Conn. 210, 221 (1977).

[15] It was clearly Blinkoff's obligation to effect the sale of the crushed material.

As noted above, Labrie could have come back to work at the quarry, by September 1996, because Blinkoff had sold the material that Labrie had crushed. By this point, however, Blinkoff had materially breached by failing to pay Labrie any share of the profits for the stone material sold and had failed to provide any sales documentation to Labrie. Blinkoff did not, in fact, provide any documentation to Labrie until the transmittal of receipts with a letter dated March 14, 1997.

Furthermore, Labrie alleges that Blinkoff breached her duty to mitigate any damages from Labrie's alleged breach of the Contract. The party against whom breach of contract is alleged has the burden of proof on the issue of mitigation of damages. Preston v. Keith, 217 Conn. 12, 21-22 (1991). "To claim successfully that the [defendants] failed to mitigate damages, [Labrie] 'must show that the injured party failed to take reasonable action to lessen the damages; that the damages were in fact enhanced by such failure; and that the damages which could have been avoided can be measured with reasonable certainty.'" Id. at 22 (quoting M. Minzer, Damages in Tort Actions § 16.10, p. 16-18 (1989)).

"The concept of mitigation of damages presupposes that an injured party has one or more courses of conduct available at or after the time a breach occurs and an

obligation therefore exists to pursue that course that results in the least damages to the offending party." Rametta v. Stella, 214 Conn. 484, 492 (1990). "The injured party is not precluded from recovery . . . to the extent that he has made reasonable but unsuccessful efforts to avoid loss.'" West Haven Sound Dev. Corp. v. City of West Haven, 201 Conn. 305, 332 (1986) (quoting 3 Restatement (Second), Contracts § 350(2)).

Here, Labrie proved by a preponderance of the evidence that Blinkoff failed to take any action to mitigate. She did not, for example, hire another company to crush the remaining stone in her quarry, the lost profits for which Blinkoff now claims as damages flowing from Labrie's failure to crush 60,000 cubic yards of material under the Contract. The court concludes that hiring another crushing company was a reasonable course of action available to Blinkoff, which course she failed to avail herself.

More fundamentally, however, Blinkoff has failed in a crucial element of her proof of their counterclaim. Blinkoff failed to establish with reasonable certainty the amount of damages she alleges resulted from Labrie's nonperformance of the Contract to crush 60,000 cubic yards of stone material. See Burr v. Lichtenheim,

190 Conn. 351, 360 (1983). Moreover, Blinkoff later sold the quarry, which still contained this uncrushed stone material. Blinkoff offered no proof of her damages, e.g., that the sale price did not reflect the presence of the value of the uncrushed material.

For the reasons stated above, the court rejects Blinkoff's claimed special defense of a set-off under Conn. Gen. Stat. § 52-139. Because the court concludes that Labrie did not inexcusably breach the Contract with Blinkoff, Blinkoff has no entitlement to any damages from Labrie which may be used to set off the damages owed to Labrie from Blinkoff. See generally Hope's Architectural Prods., Inc. v. Fox Steel Co., 44 Conn. App. 759, 761-62 (1997).

Blinkoff raises a second special defense of estoppel. Blinkoff alleges that Labrie knowingly induced Blinkoff to believe that Labrie was to receive payment based solely on the cubic yardage of material crushed and induced Blinkoff to act in reliance on that belief. Blinkoff alleges that she did not receive notice that Labrie was billing by the ton until it began to receive invoices from Labrie after completion of the survey and that Blinkoff continued performance under the Contract far longer than it otherwise would have if it had been made aware that Labrie intended to

charge for its services by the ton. Blinkoff thus asserts that, in reliance upon Labrie's representations, Blinkoff incurred damages in excess of those it would have suffered if it had been informed earlier of Labrie's intentions and that, consequently, Labrie is estopped from asserting that Blinkoff was to pay for services rendered to Labrie by a per ton measurement.

"[A]ny claim of estoppel is predicated on proof of two essential elements: the party against whom estoppel is claimed must do or say something calculated or intended to induce another party to believe that certain facts exist and to act on that belief; and the other party must change its position in reliance on those facts, thereby incurring some injury. It is fundamental that a person who claims an estoppel must show that he has exercised due diligence to know the truth, and that he not only did not know the true state of things but also lacked any reasonably available means of acquiring knowledge. . . ." In re Michaela Lee R., 253 Conn. 570, 604 (2000) (quoting Kimberly-Clark Corp. v. Dubno, 204 Conn. 137, 148 (1987)).

The court concludes that Blinkoff has failed to meet her burden of proof on this issue. The court rejects Blinkoff's testimony that, had she known Labrie would

bill by the ton and not by cubic yards, she would not have entered into the Contract with Labrie. Blinkoff herself provided conversion factors to allow the conversion of tonnage to cubic yardage. See Ex. 2 at 1 ¶ 4. The court concludes that, at the very least, Blinkoff failed to present any credible evidence of injury suffered by the defendants as a result of any reliance on Blinkoff's alleged understanding that Labrie would bill her under the Contract in cubic yardage. As such, Labrie is not estopped from recovering for Blinkoff's breach of the Contract.

IV. CONCLUSION

For the foregoing reasons, judgment is entered for the plaintiff, and the court awards the plaintiff damages in the amount of $197,276, which includes prejudgment interest pursuant to Conn. Gen. Stat. § 37-3a. The court also concludes that the plaintiff is entitled to recovery of its attorneys 'fees under Paragraph 6(f) of the Contract.

The plaintiff is directed to provide the defendants with billing records and a fee claim amount by **March 29, 2001**. The plaintiff is ordered to file an application for its attorneys 'fees which addresses both the number of hours, the hourly rates claimed and the level of experience of each timekeeper, and also which indicates if

the defendants object, by **April 12, 2001**. If the defendants object, they are ordered to file a brief in opposition within **fourteen (14) days** of the filing of this application. The plaintiff may file a reply brief within **seven (7) days** of the filing of the defendants 'opposition.

The clerk is directed to enter judgment and close the case.

SO ORDERED.

Dated at Bridgeport, Connecticut, this 19th day of March, 2001.

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Janet C. Hall
United States District Judge