

SUPERIOR COURT  
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CIVIL DIVISION  
Case No. 327-5-18 Wncv

Rock of Ages Corporation vs. Mr. Wu

Findings of Fact and Conclusions of Law Following Trial

This matter came for hearing before the Court over three days in the spring of 2023. Post-trial briefing was delayed for a considerable period while the parties attempted to resolve their dispute through mediation. Eventually, the parties submitted post-trial briefing, and the Court held oral argument in the spring of 2024. The parties then submitted additional post-argument briefing.

Plaintiff Rock of Ages (ROA) was present throughout the proceedings and was represented by Attorney Steven Dutton. Defendant/Counterclaim Plaintiff Zhong Lin Wu was also present throughout the proceedings and was represented by Attorneys Vincent Wong, Michael Brand, and Michael Tarrant. Having considered the evidence and the arguments of both sides, the Court makes the following determinations.

I. Background and Procedural Setting

This dispute arises out of an alleged contract between ROA and Mr. Wu to build a mausoleum in New York City. Both parties agree the mausoleum was erected, but each side maintains claims against the other following that construction. Specifically, ROA claims that it performed and that Mr. Wu violated

their contract by failing to pay the full amount due under the agreement. Mr. Wu disputes that claim and filed his own counterclaims, asserting: that no contract had been formed; that, if there was a contract, ROA had breached it; that he can void the contract because ROA is not licensed to do business in New York; that ROA's conduct violated Vermont's Consumer Protection Act and New York law; that ROA breached its Warranty; and that Mr. Wu is entitled to equitable relief requiring ROA to dismantle and remove the mausoleum.

## II. Findings of Fact

Mr. Wu is a resident of New York City. His primary language is a dialect of the Chinese language. Mr. Wu has limited proficiency with the English language. Mr. Wu has a family friend, Sonia Hsi, who speaks both English and Mr. Wu's dialect of Chinese. Ms. Hsi frequently assists Mr. Wu with English matters. In this instance, ROA eventually paid Ms. Hsi to provide translation services in connection with this project. (The trial in this matter occurred with the assistance of third-party translators provided by the Vermont Judiciary.)

Mr. Wu is a successful businessman based in New York City. After immigrating from China, he started working in the construction field and became the owner of a company performing renovation work. He is not an engineer but has experience with renovating buildings. He testified that he understands "a little bit" about the designing and construction of mausoleums through that experience.

Sadly, Mr. Wu's wife passed away more than ten years ago, and he has been desiring a good quality mausoleum for her and himself in the future so that they can be interred together. Mr. Wu purchased a plot in All Faiths Cemetery ("All Faiths) in Queens, New York, in December 2015 with the intention of having a mausoleum constructed there for both of them.

In or around the spring of 2016, Mr. Wu located a mausoleum in Long Island (the "Long Island Mausoleum"), which he thought was "strong" and was of "good quality workmanship." He determined that it had been built by ROA. He decided to contact ROA regarding building a mausoleum for him at All Faiths. Ms. Hsi reached out to Rock of Ages by telephone and email and conferred with Thomas Burrington. As part of that back and forth, Mr. Wu provided ROA with a picture of the Long Island Mausoleum and another sketch concerning the mausoleum.

Mr. Burrington is the Vice President in charge of mausoleums and memorials for Rock of Ages. He has been with the company for 38 years. Mr. Burrington was the main point of contact with Mr. Wu. Most of the communications between Mr. Wu and Rock of Ages went through Ms. Hsi as translator. Mr. Burrington informed Ms. Hsi that Rock of Ages constructed mausoleums and could do so in New York. The parties understood this was to be a private mausoleum for Mr. Wu and his wife, not a communal or public mausoleum.

Rock of Ages has done business in New York City for approximately 100 years. The New York City area is a major market for Rock of Ages mausoleum

sales, and the area accounts for approximately 15% of Rock of Ages mausoleum sales annually. This was to be ROA's first job at All Faiths, however.

Ms. Hsi and Mr. Wu travelled to Vermont to visit the ROA factory to determine whether he felt comfortable with their undertaking the task. The parties spoke generally about Mr. Wu's needs and the dimensions of the Mausoleum. Mr. Wu stated that he liked the "quality, workmanship, and size" of the Long Island Mausoleum. He also indicated that he wanted it to be built "strong" like that mausoleum. He was also very concerned that he be provided a warranty to ensure against later problems.

ROA indicated that they could construct a quality mausoleum and accommodate Mr. Wu's needs if Mr. Wu chose them to move forward. Mr. Burrington assured Mr. Wu that he would have a lifetime warranty. Though the evidence is in tension, the Court concludes that the balance of the evidence shows Mr. Wu never stated that he wanted an exact replica of the Long Island Mausoleum. Indeed, during the later design process Mr. Wu requested a number of significant changes to the design that made the mausoleum less similar to the Long Island Mausoleum.

On June 7, 2016, Mr. Wu, Ms. Hsi, Mr. Burrington, and others met at All Faiths. William Wenz, who was to be the local contractor to erect the mausoleum was also there. The parties discussed the construction of the mausoleum. At the meeting, Mr. Wu indicated that he wanted to have 10-inch walls, as opposed to the 8-inch walls they had discussed previously.

At that point, ROA presented Mr. Wu with a proposed contract. Exhibit 1 (the “Contract”). He had the opportunity to review it and confer about it with Ms. Hsi. Ms. Hsi agreed that she translated the Contract for him and that they took some time to review it together. Prior to signing it, Mr. Wu requested other changes to the Contract, in addition to the ten-inch walls. ROA agreed and those were noted as handwritten changes to the Contract. ROA and Mr. Wu signed the Contract that day.

Mr. Wu was hopeful that the Contract would have more detail. But, before he agreed to sign, Ms. Hsi testified that Mr. Wu was told and understood that, as part of the Contract, detailed plans for the mausoleum would be created, that he would be provided with those plans, and that he would have the opportunity to review and approve them by signing the final design plans.

Mr. Wu and Ms. Hsi also asserted in testimony that ROA “pressured” them to sign the contract. The persuasive evidence from other witnesses does not lend support to that assertion, and the Court makes no such finding. To the extent Mr. Wu, a successful business owner in a large city, suggested that he did not understand that the “Mausoleum Agreement” signed by both parties was a contract, as opposed to a “payment provision,” the Court does not find such testimony credible.

In addition to other provisions, Section 5 of the Contract specifies the amounts and timing of payments. It states that Mr. Wu was to make:

- (a) Payment of \$150,000 to ROA upon the execution of the Mausoleum Agreement;

- (b) Payment of \$75,000 upon approval by Mr. Wu of the final plans from ROA;  
  
(added with a handwritten notation);
- (c) Payment of \$112,500 prior to shipping of the mausoleum to the Cemetery; and
- (d) Payment of \$112,500 within thirty (30) days after completion of construction and erection of the mausoleum, at which time keys will be transferred and the internment can be made.

Exhibit 1 at § 5. There is no dispute that Mr. Wu made all but the final payment contemplated above.

Paragraph 7 of the Contract provides as follows:

**ENTIRE AGREEMENT:**

This Agreement contains the entire contract between the parties, and no agents, representative, or sales person of the parties hereto has the authority to make or have any statement or agreement or representation whether oral or written in connection herewith modifying, adding to or changing the terms or conditions set forth herein. Any changes, modifications, or alterations to this Agreement shall be in writing and shall be duly executed by the parties hereto.

The Contract also states that ROA shall provide a perpetual warranty for all mausoleums, including Mr. Wu's. Exhibit 2. Among other things, ROA's Full Perpetual Mausoleum Warranty ensures that:

**ROCK OF AGES CORPORATION WILL REPAIR OR REPLACE, AT ITS OPTION AND WITHOUT CHARGE, ANY GRANITE PORTION OF YOUR ROCK OF AGES MAUSOLEUM SHOULD THAT PORTION CRACK, CHECK OR PROVE DEFECTIVE IN ANY WAY ATTRIBUTABLE TO THE GRANITE OR WORKMANSHIP ON THE MAUSOLEUM AND VERIFIABLE BY OUR FIELD INSPECTORS.**

Exhibit 2.

ROA's Perpetual Warranty states that it "is valid in perpetuity and becomes effective upon the date when the terms and conditions of the purchase agreement have been met between the purchaser and the Authorized Rock of Ages Retailer."

## Exhibit 2

After the Contract was signed, Mr. Wu paid ROA the initial \$150,000 due to ROA, and ROA began the actual and detailed design process. The process proceeded over the summer and was interactive. Mr. Wu proposed and ROA incorporated a number of significant changes to the design. He had specific concerns regarding water intrusion into the mausoleum, and as a result, requested that his mausoleum have a widened keystone. He asked for two large vases out front and extended the front of the mausoleum to accommodate those vases. He also extended the bars that go over the roof and extended the roof itself so that it jutted out further from the walls to divert water further away from the mausoleum. Mr. Wu also requested that the floor of the mausoleum be comprised of two large pieces, which added weight to the structure. (Mr. Wu had requested a modification to a single slab, but the parties settled on two-slab approach as the single slab was not feasible.)

Mr. Wu also made a number of changes in the interior, including elevating the crypts higher off of the ground.

ROA incorporated the changes made by Mr. Wu into the design elements. Final plans were then sent to Mr. Wu for his review. Mr. Wu signed and approved the plans as provided in the Contract in late July 2016. Ex. 4. He also made the

\$75,000 payment required by the Contract at that point. Mr. Wu was told that his approval of the final plans was the last step prior to ROA beginning actual fabrication of the components of the mausoleum.

Ms. Hsi had also indicated that Mr. Wu wanted to make an additional change to the color of the granite in a cameo portion. Mr. Burrington agreed and told her to have Mr. Wu mark the plans “as corrected” in that regard. Exhibits 6 and 29. The final plans containing that notation were sent back to ROA. Exhibit 4.

All Faiths also reviewed the final plans after they were approved by Mr. Wu to ensure compliance with any of its requirements. The cemetery approved the plans as well. Exhibit 7.

Fabrication of the actual stone began in Barre, Vermont, in the latter part of the summer of 2016.

Mr. Wu visited ROA on his own to take stock of the fabrication in November 2016. Mr. Wu had earlier provided to ROA a written version of the Chinese lettering he desired on the mausoleum and worked with ROA designers on how to scale it up to the appropriate size for the mausoleum. He spent a good portion of the morning with them.

Mr. Wu returned with Ms. Hsi in early December 2016. During that visit, he reviewed the Chinese lettering that had been requested for the mausoleum. Both Mr. Burrington and Ms. Hsi agree Mr. Wu inspected the engraving during his December trip. He made no objection to the Chinese lettering but was concerned about the depth of both the English and Chinese carvings and requested a deeper

etching. He also asked that vents be changed to a 45-degree angle to better keep out water. He discussed it with ROA. ROA voiced concerns that a deeper etching created a greater likelihood of damage to the lettering from the freeze-thaw cycle. ROA also indicated the existing venting design actually posed a greater risk of water intrusion and would be difficult to anchor to the mausoleum. Though there is countervailing testimony, the Court concludes that Mr. Wu agreed with those concerns and did not press for a deeper etching or the angle alteration.

At trial, both Mr. Wu and Ms. Hsi attempted to describe what they asserted were errors in the Chinese lettering. Their testimony was not fully consistent. Given the inconsistency, Mr. Wu's failure to make pre-litigation complaint about the lettering, and the persuasive evidence that Mr. Wu had approved the etchings in Vermont, the Court is not persuaded that ROA failed to provide the lettering as requested.

David Fournier is a Project Manager and fabricator at ROA, with over forty years of experience. He credibly provided detail to the Court as to the intricate nature of the fabrication process, as the need for precision is especially felt in weighty granite monuments and mausoleums that will need to stand the test of time. He was in charge of fabricating the components of Mr. Wu's mausoleum in this instance. He credibly testified as to the cutting process and that each cut is made to individual specifications and each stone needs to be approved as comporting with the planned design.

William Wenz is the present principal of Earl Wenz, Inc., which is a fifth-generation family memorial company. Mr. Wenz regularly services Pennsylvania, New Jersey, New York, and Delaware. Rock of Ages is Mr. Wenz's largest wholesale supplier of memorials. Mr. Wenz is a subcontractor for Rock of Ages, erecting and placing their mausoleums, feature works, and other projects for them. He has significant experience and has erected roughly 300 mausoleums. He credibly testified as to the very high quality and workmanship of ROA products and that it has the "closest cuts" of any in the industry. He was present when the Contract was executed and also credibly testified that no pressure was applied to Mr. Wu in that regard.

Mr. Wenz began erecting the mausoleum in December 2016. He credibly testified that "no corners were cut with this building." He found that the stone pieces and joints were cut to the precise specifications of the plans and were not defective.

Mr. Burrington and Mr. Wenz both persuasively testified that they have built many similar mausoleums in New York City, and a permit is not required. Mr. Wenz credibly stated that he has built approximately 50 mausoleums in New York City over the past five years, and, provided it is a private mausoleum, no permit has ever been required. ROA builds 3-5 mausoleums per year, and no permits have been required.

During the erection of Mr. Wu's mausoleum, a New York City building inspector came to inquire as to whether the project had a permit. Mr. Wenz

informed the inspector that it was a private, family mausoleum, as opposed to a community mausoleum. The inspector left without stopping the job or telling Mr. Wenz a permit was needed. The inspector confirmed to Mr. Wenz that, as regards private mausoleums: “We don’t have jurisdiction.” The Court accepts that conclusion.<sup>1</sup>

Mr. Wenz completed the construction of the mausoleum over fourteen days, spanning three to four weeks. Mr. Wu was generally there for portions of each day of construction and occasionally had questions that Mr. Wenz answered. Mr. Wenz encountered no areas of concern during the construction of the mausoleum.

Upon completion of the project, Mr. Burrington performed his own inspection and concluded that the mausoleum was completed according to plans, and he saw no areas of concern.

The parties scheduled a final walk through in early January 2017. Mr. Burrington, Mr. Wenz, Mr. Wu and Ms. Hsi were present. It did not go well. Mr. Wu became angry and upset, claiming various construction errors. He was especially upset over what he viewed as inadequate shelf supports for the caskets. He refused to make the final payment due under the Contract and take the keys unless ROA deducted \$20,000. He made no mention of the Long Island Mausoleum

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<sup>1</sup>Against this, Mr. Wu offers his own hearsay of a document from the City of New York indicating that some type of permit might be required for the mausoleum. It was obtained by Mr. Wu in 2022, however, and it is not clear from the document exactly what may be required and whether such requirements were in effect when the mausoleum was completed back in 2016. In any event, as between the competing hearsay, the Court endorses that which is also supported by the years of on-the-ground experience of Mr. Wenz and Mr. Burrington.

or the Chinese lettering. The meeting ended at that point. ROA documented the results of the walk through in Exhibit 9, which the Court concludes accurately describes the substance of the walk through.

Because Mr. Wu did not make the final payment due under the Contract, ROA did not provide him with the keys to the mausoleum. That situation has remained through today.

Mr. Wu later retained counsel and provided ROA with a summary of his complaints regarding workmanship in 2018. At that juncture, he did not complain about the lack of similarity to the Long Island Mausoleum or the lettering but identified five alleged defects.

After receipt of Mr. Wu's complaints, in August 2018, Mr. Burrington and Mr. Fournier returned to the Mausoleum to conduct a detailed inspection. They reviewed each of Mr. Wu's five complaints. They determined the allegations were unfounded. Exhibit 13.

Later in 2018, ROA filed suit in Vermont to recover its claimed damages. In July 2019, Mr. Wu filed his counterclaim. Exhibit 27. There, he alleged the same five defects and, again, did not mention the lack of similarity to the Long Island Mausoleum or the lettering.

Later in the litigation, Mr. Wu's complaints about the mausoleum blossomed into a lengthier set of concerns. Exhibit 12. While the Exhibit is pictorial, the testimony established that the pictures were meant to represent the following alleged defects:

Point 1 – Mr. Wu claims there is a “gap” in the connecting roof granite pieces, making it uneven.

Points 2 and 3 – Mr. Wu claims that the columns of the mausoleum are not straight.

Points 4 and 5 – Mr. Wu alleges that the door to the mausoleum does not have proper ventilation and is leaking.

Points 6, 7, 8, and 9 – Mr. Wu claims that the shelves inside the mausoleum for the coffins are insufficient to provide support and short.

Point 10 – Mr. Wu alleges that the foundation of the mausoleum has empty spaces and is insufficient to support the structure, such that the entire mausoleum is “slanted.”

Points 11, 12, 13 and 14 – Mr. Wu alleges that the exterior air vents to the mausoleum are not set at a 45-degree angle and therefore allow water to intrude. (Additionally, Mr. Wu and Ms. Hsi asserted that they returned to the mausoleum and looked through the window at a later point. They “thought” that they could see water on the floor.)

Point 15 – Mr. Wu claims that the roof of the mausoleum should extend an additional two inches in its overlay.

Point 16 – Mr. Wu claims that the mausoleum is 7 inches shorter from front to back than it should be as compared to the model mausoleum in the photograph he provided to ROA.

Point 17 – Mr. Wu complains that the lettering on the mausoleum is not deep enough and that there are errors in the Chinese lettering.

After receipt of Mr. Wu's complaints, ROA returned to the mausoleum to examine it again. ROA inspected and determined the allegations were unfounded. Specifically, the substance of the trial testimony persuasively establishes that:

- The joint on the roof lines up properly and in accordance with the approved plan, and there no material gaps or unevenness.
- The entire mausoleum was level. The pillars were plumb, even, dimensionally accurate and positioned properly.
- No water has entered into the mausoleum.
- The mausoleum door and the exterior had properly functioning vents and were constructed per the approved plans.
- The shelving was installed in accordance with the approved plans and was sufficient to support the caskets.
- The foundation was secure and stable, and there is no convincing evidence of sinking.
- The roof was fabricated and constructed in accordance with the approved plans and is dimensionally accurate with consistent overhang around the entire building.
- The mausoleum was fabricated and constructed in accordance with the plans approved by Mr. Wu, including all of its dimensions. The weight of the

evidence shows that an exact replica was not asked for or part of the agreement between the parties.

-- The lettering was done in accord with what was agreed to in December 2016 as to depth and consistent and the lettering was approved by Mr. Wu.

The Court finds the testimony of Mr. Burrington, and Mr. Fournier and Exhibit 13 persuasive as to those points.<sup>2</sup> ROA has been back multiple times to inspect the mausoleum and those same conclusions continue to be true.

That determination is further reinforced by the credible testimony of Mr. Wenz who also visited the mausoleum to investigate Mr. Wu's claims. He confirmed that the foundation, base, and mortar were all installed correctly and that there was no movement whatsoever. He also confirmed there was no evidence of sinking, although he stated that the cemetery does spread dirt as other burial vaults are constructed, which can give the appearance of a higher ground level.

The evidence as to lack of defects is further reinforced by the testimony of Mr. Burrington. Part of Mr. Burrington's job is performing inspections of granite works. He has done over 100 inspections. He credibly testified that he has been back to the mausoleum at least ten times since January 2017 to inspect it. He has

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<sup>2</sup> Additionally, given the countervailing testimony from ROA, Mr. Wu's requests for various alterations of the design plans, Mr. Wu's specific approval of the amended design plans, his presence during construction without complaint, his failure to raise the issue as an initial matter at the walk through, his failure to raise the issue in his 2018 objections, and his failure to raise the issue until well after filing his counterclaim in this case, the Court is not convinced by Mr. Wu's testimony that his intent was to obtain an exact replica of the Long Island Mausoleum.

not seen any areas of concern and has found no water to have intruded into the mausoleum. To the extent moisture might have been present at any particular juncture, such as when Mr. Wu and Ms. Hsi visited at one point, he credibly testified that condensation is normal and can occur for brief periods while the vents “catch up” to the moisture level.

The evidence of lack of defects is also supported by the credible testimony of Mr. Fournier, who stated that he has returned to the mausoleum two additional times and has seen no evidence of water intrusion or other defects.<sup>3</sup>

ROA suggests that the countervailing testimony and Exhibits C and K that were used by Mr. Wu to attempt to establish the alleged defects were purposely fabricated to create that misperception and that Mr. Wu purposely attempted to vandalize the mausoleum to lend false credence to his points. Some of the photographic evidence is stapled together and depicts different views, and some photographs are taken from different places and angles and have some attendant issues with the visual perspectives. There is also some evidence that someone may have vandalized the mausoleum and its mortar in ways that may support Mr. Wu’s position in this case. The Court does not, however, make any determination that Mr. Wu fabricated evidence or engaged in any misconduct. Suffice to say, though, the Court concludes that the quality and force of Mr. Wu’s exhibits and evidence as

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<sup>3</sup> To the extent Mr. Wu added additional alleged defects during his trial testimony, those have also not been established by a preponderance of the evidence.

to the alleged defects is well lacking as compared to the persuasive and experience-based evidence of ROA on those points.<sup>4</sup>

There is no evidence before the Court establishing that ROA does not have a license to do business in New York.

### Conclusions of Law

#### I. ROA's Claims

The Court makes the following determinations as to ROA's affirmative causes of action.

#### B. ROA's Breach of Contract Claim

To prevail on a breach-of-contract claim, a plaintiff must prove the following elements: “(1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages.” Abad v. People's United Bank, No. 286102009, 2011 WL 11555546, at \*6 (Vt. Super. Ct. May 02, 2011) (internal quotation omitted); *accord Lapoint v. Dumont Const. Co.*, 128 Vt. 8, 10 (1969) (“In the obligation assumed by a party to a contract is found his duty, and his failure to comply with the duty constitutes a breach.”); 31 *Williston on Contracts* § 79:118 (4th ed.) (summarizing case law describing the basic “four elements of a claim for breach of contract [as]: (1) a valid contract between the parties; (2) an obligation or duty arising from that contract; (3) a breach of that duty; and (4) damages caused by that breach.”). Whether the parties

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<sup>4</sup> This matter has been pending for years. Despite having an opportunity for inspection and discovery, Mr. Wu offered no expert evidence in service of his contention that the ROA's convincing claims of proper engineering, fabrication, and construction were not well founded.

entered into a contract is a determination for the factfinder. *See Bemis v. Lamb*, 135 Vt. 618, 620 (1978).

Here, the Court concludes that the parties entered into the Contract on June 7, 2016. The Contract contains all material terms needed to establish a valid contract. The Court has considered the terms of the contract and the surrounding circumstances and apprehends no ambiguity in its provisions. *Isbrandtsen v. N. Branch Corp.*, 150 Vt. 575, 577-80, 556 A.2d 81, 83-85 (1988).

The Court further finds that Mr. Wu assented to the terms of the Contract through signing it and approving the designs. *See Quenneville v. Buttolph*, 2003 VT 82, ¶ 17, 175 Vt. 444, 453 (“The intent of the parties to be bound . . . is a question of fact to be determined by examining the objective words and deeds of the parties.”).

Mr. Wu’s contention that, subjectively, there was “no meeting of the minds,” *cf. Sweet v. St. Pierre*, 2018 VT 122, ¶ 12, 209 Vt. 1, 7, because he always intended to obtain an exact replica of the Long Island Mausoleum is not persuasive on the law or the facts. As to the law, the Court finds that the Contract is an agreement that contains all materials terms, is plain in its meaning, has some handwritten alterations done by the parties, is signed by both parties, and is enforceable on its face. *Lamoille Grain Co. v. St. Johnsbury & Lamoille County R.R.*, 135 Vt. 5, 8 (1976) (“Where the language of the agreement is clear, the intention and understanding of the parties must be taken to be that which their agreement declares.”). It even contains an integration clause stating, in part:

This Agreement contains the entire contract between the parties, and no agents, representative, or sales person of the parties hereto has the authority to make or have any statement or agreement or representation whether oral or written in connection herewith modifying, adding to or changing the terms or conditions set forth herein.

Both sides' intent is, thus, shown in the Contract itself.

Against such a valid and unambiguous written agreement containing all material terms, the proffer of an inconsistent intention of a contracting party is not persuasive and amounts to inadmissible parole evidence. *See State v. Blaise*, 2012 VT 2, ¶ 19, 191 Vt. 564, 569 (2012) (citing *Isbrandtsen*, 150 Vt. at 577 (parole evidence can only be used in construing the written contract if that contract is ambiguous); *Beldock v. VWSD, LLC*, 2023 VT 35, ¶ 27 (“When the plain language of a contract is clear, the contract is unambiguous and the plain language controls as a matter of law.”); *Harrison v. Fred S. James, P.A., Inc.*, 558 F. Supp. 438, 444 (E.D. Pa. 1983) (“parole evidence rule which plaintiff is seeking to avoid through his allegation of lack of intent to contract under the terms of the written agreement, bars consideration of testimony regarding the parties’ intent prior to the time when the contract was executed.”); *Nelson v. 15 White Barn Drive LLC*, 517 P.3d 1062, 1067 (Utah Ct. App. 2022) (no meeting-of-the-minds argument barred by parole evidence rule); *Atl. Ins. Brokers, LLC v. Slade Hancock Agency, Inc.*, 652 S.E.2d 577, 579 (Ga. Ct. App. 2007) (“Because the contract is unambiguous, we will not consider parole evidence that there was not a meeting of the minds.”); *Roman v. Roman*, 193 S.W.3d 40, 54 (Tex. Ct. App. 2006) (parole evidence rule barred consideration of contention that contractor’s intent did not match clear words of

contract); *cf. Sisters & Bros. Inv. Grp.. v. Vermont Nat. Bank*, 172 Vt. 539, 543 (2001) (rejecting no-meeting-of-the-minds argument where no dispute that “each party assented to the same written contract” despite fact that parties may have had different understandings of the meaning of the contract terms).

Further, even if the Court could consider such evidence of subjective intent, as noted in footnote 2, *supra*, the Court does not find Mr. Wu’s evidence consistent or persuasive as to that point.

Nor does Mr. Wu gain any traction from his contention that the parties must come to a meeting of the minds on all terms at the exact point when the contract is signed. In this instance, the parties’ minds met on all material terms of the Contract in June 2016. That one of those terms required Mr. Wu’s later approval of plans prepared pursuant to the agreement in no way nullifies that agreement. Instead, Mr. Wu’s review and approval or disapproval of the ROA plans was an essential and contemplated term of the agreement when it was made. As the Contract specifically provides: “once approved and signed by the Owner, [the design plans] will be incorporated herein and made a part of this Agreement.” Ex. 1. It additionally states, in a handwritten notation, that a \$75,000 payment was to be made when the final plans were approved. Both of those events occurred in the summer of 2016.

The provision of the Contract requiring Mr. Wu to approve the design produced by Rock of Ages merely creates a condition as to the parties’ further

duties of performance. Conditions are mundane features of many contracts. As the current *Restatement* describes by way of introduction:

An obligor will often qualify his duty by providing that performance will not become due unless a stated event, which is not certain to occur, does occur. Such an event is called a condition. An obligor may make an event a condition of his duty in order to shift to the obligee the risk of its non-occurrence. In this case the event may be within the control of the obligee (e.g., his furnishing security), or of the obligor (e.g., his satisfaction with the obligee's performance), or of neither (e.g., the accidental destruction of the subject matter). An obligor may also make an event a condition of his duty in order to induce the obligee to cause the event to occur.

*Restatement (Second) of Contracts*, ch.9, topic 5 Intro. Note (1981); see also *Sisters & Bros. Inv. Grp.*, 172 Vt. at 542 (“Once a special condition or condition precedent in the contract is fulfilled, the contract becomes binding on both parties.

Alternatively, nonoccurrence of the condition discharges the parties' duty to perform.”) (citation omitted)).

In sum: the Contract was a binding agreement between the parties, ROA performed its obligations under the Contract and provided Mr. Wu with a mausoleum consistent with the Contract and the approved plans. Mr. Wu breached the Contract by failing to make the final payment of \$112,500.00 within 30 days of January 11, 2017.

Mr. Wu's additional defenses of improper or deficient performance are simply not borne out by the facts. As determined in the findings of fact, Mr. Wu has not provided persuasive evidence that the mausoleum is defectively constructed or erected, or that it is in any way defectively made.

## B. ROA's Remaining Claims

Given the Court's determination as to ROA's contract claim, it need not delve into its claims for violation of the covenant of good faith and fair dealing and for unjust enrichment. Its claim under the covenant is merely the mirror image of its contract claim and is not actionable on that basis. *Tanzer v. MyWebGrocer, Inc.*, 2018 VT 124, 209 Vt. 244, 262-62 (“[W]e will not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when the plaintiff also pleads a breach of contract based upon the same conduct.” (quotation omitted)). Similarly, an equitable remedy such as unjust enrichment is not available where relief is founded within the four corners of a contract, *See, e.g., Beldock v. VWSD, LLC*, 2023 VT 35, ¶¶ 77-78 (unjust enrichment may be available in the face of an alleged contract only if contract is void or otherwise unenforceable).

## II. Mr. Wu's Counterclaims

### A. Breach of Contract and Breach of Implied Warranty.

Mr. Wu's First and Third Counterclaims are for Breach of Contract and Breach of the Implied Warranty of Workmanlike Construction. The facts determined above fail to support those claims. The evidence shows that the mausoleum was constructed as set out in the Contract and the approved design plans, and Mr. Wu has not established any defects in the construction or workmanship that would support these counterclaims.

B. Breach of Express Warranty

Mr. Wu's Second Counterclaim is for Breach of Express Warranty. Mr. Wu has failed to prove that the terms of the Perpetual Warranty have become effective. The Warranty provides that it is not effective until "the date when the terms and conditions of the purchase agreement have been met between the purchaser and the Authorized Rock of Ages Retailer." Exhibit 2. There is no dispute that Mr. Wu has failed to make the final payment due under the Contract. Accordingly, the Court agrees with ROA that the terms of the Warranty have yet to come into effect.

Additionally, as determined by the facts, Mr. Wu has not yet provided convincing evidence of any defective aspects of the mausoleum that would be covered by the Warranty. Nonetheless, the Court is cognizant that it is a Perpetual Warranty and that Mr. Wu has yet to gain full access to the mausoleum. As a result, the Court relies solely on the legal determination that the Warranty has not yet come into effect. Any additional claims are dismissed only on that basis. Should the final payment be made and should greater access or the passage of time identify matters covered by the Warranty, this decision poses no barrier to enforcement of the Warranty by Mr. Wu.

C. Fraudulent Inducement/Consumer Protection Act

Mr. Wu's Fourth Counterclaim asserts Fraudulent Inducement and violation of Vermont's Consumer Protection Act (CPA), 9 V.S.A. § 2461. Both claims are predicated on the notion that ROA represented that it could do business in New York (or failed to disclose the opposite); but that, in actuality, it lacked a license to

do business in that state. Even assuming that the CPA applies to such a privately negotiated deal,<sup>5</sup> both counterclaims fail for want of proof. Specifically, there is no evidence in the record to support the conclusion that ROA lacks a license to do business in New York. Furthermore, the inferential evidence from the facts that ROA has done work in New York for years, builds 3-4 mausoleums in New York City per year, and derives 15% of its business from New York strongly suggests otherwise.

D. Restitution and Unjust Enrichment

Mr. Wu's Fifth Counterclaim is for restitution and unjust enrichment. These claims do not stand where, as here, there is a valid and enforceable contract that has been fully performed by the opposing party. *See Beldock*, 2023 VT 35, ¶¶ 77-78. Nor would the established facts support such claims in any event.

E. Violation of New York Law

Mr. Wu's Sixth Counterclaim is for Violation of New York Law based on the alleged claim that ROA was not authorized to do business in the State of New York. N.Y. Bus. Corp. Law § 1301 (McKinney). The Court has already rejected that assertion as unsupported by the existing record. The Court's prior ruling on that point disposes of this claim as well.

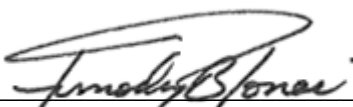
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<sup>5</sup> Given the Court's resolution of this issue, it need not determine the legal question of whether this private contract is subject to the CPA under *Foti Fuels v. Kurrle Corp*, 2013 VT 111, 195 Vt. 524. *See Barton Solar, LLC, v. RBI Solar, Inc.*, No. 5:21-Cv-25-Gwc, 2021 WL 3109620, at \*9 (D. Vt. July 22, 2021) (CPA not applicable to negotiated, private contract to build solar array).

## Conclusion

In light of the foregoing, ROA has established its claim for breach of contract and damages in the amount of \$112,500. Mr. Wu has not proven his defenses or any of his counterclaims. The Court concludes that the damages due amount to a readily ascertainable sum that, per the Contract, was due thirty days from January 11, 2017, or February 10, 2017. As a result, ROA is also entitled to prejudgment interest in the amount of 12% annually on the judgment amount of \$112,500.00. *See* Vt. R. Civ. P. 54(a); 9 V.S.A. § 41a(a); *see also Greenmoss Builders v. King*, 155 Vt. 1, 8 (1990); *Newport Sand and Gravel Co. v. Miller Concrete Const., Inc.*, 159 Vt. 66, 71-72 (1992). That interest equates to \$13,500 per year, or \$36.99 *per diem*. The total interest as of the date of judgment (July 10, 2024) is \$100,131.93. Judgment will be entered in favor of Plaintiff for \$112,500.00 in principal, and for \$100,131.93 in prejudgment interest, for a total judgment of \$212,631.93. Plaintiff is also entitled to its costs of suit. Vt. R. Civ. P. 54. Any request for taxation of costs shall be filed within 21 days.<sup>6</sup> Any objection shall be made 14 days thereafter.

Electronically signed on July 10, 2024, 2024, per V.R.E.F. 9(d).

  
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Timothy B. Tomasi  
Superior Court Judge

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<sup>6</sup> ROA appears to have abandoned in post-trial briefing any request for attorney's fees. In any event, such a claim would not be well founded. Vermont has long followed the American Rule. *See DJ Painting, Inc. v. Baraw Enterprises, Inc.*, 172 Vt. 239, 246 (2001) ("We apply the 'American Rule' with regard to attorneys' fees, which means that parties must bear their own attorneys' fees absent a statutory or contractual exception."). Absent some contractual or statutory provision for attorney's fees, or misconduct or bad faith, none of which has been shown here, no valid claim for fees can be made.