

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA**

**GREEN LIFE LUXURY HOMES, LLC, a
Florida limited liability company,
Plaintiff/Counter-Defendant,**

vs.

CASE NO.: 2016-CA-005174

**KENNY WINTERHALTER, a natural person, and
MARSHA WINTERHALTER, a natural person,
Defendants/Counter-Plaintiffs.**

ORDER ON FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came before the Court for a non-jury trial on April 30, 2018 – May 2, 2018; July 16, 2018 – July 24, 2018; August 10, 2018; and August 31, 2018. John R. Hightower, Jr. appeared with Patrick and Darla Cook, as officers of Green Life. Fred E. Moore and Marisa Powers appeared with Ken and Marsha Winterhalter. All the parties and other witnesses testified at trial. After both parties rested their respective cases, each party was invited to submit written rebuttal arguments to their respective closing arguments and proposed judgments. The Court, after hearing the testimony of the witnesses and review of the other evidence and hearing argument of counsel and being otherwise fully advised in the premises, makes the following non-exclusive findings of fact and conclusions of law:

I. FINDINGS OF FACT.

A. Relationship of the Parties.

The plaintiff/counter defendant, Green Life Luxury Homes, LLC (“Green Life”), markets itself as a boutique home builder. Defendants/counter plaintiffs’, Ken and Marsha Winterhalter (collectively, the “Winterhalters”), are the owners of property located at 1707 71st Street NW, Bradenton, FL 34209 (the “Property”).

The Winterhalters, and Pat and Darla Cook (collectively, the Cooks) met in 2012 through their respective children's attendance at St. Stephen's Episcopal School. During various interactions between the Winterhalters and the Cooks, the Cooks identified themselves as the owners of Green Life, a custom luxury home builder. During one of the interactions between the parties, the Winterhalters visited a home owned by the Cooks and which the Cooks had built, and were impressed with the build and design of the Cooks' home. The Winterhalters were looking to find waterfront property and build a custom home. The Winterhalters hired Green Life to do a small renovation on a home they owned during this time. There were no issues.

In late 2012, the Winterhalters purchased a one acre lot (the "DMH Property") with the intention of building a home. In 2014, at the urging of Pat and Darla Cook, the Winterhalters engaged Green Life to build a home on the DMH Property. The parties worked on the DMH Property for about a total of 5 months and the Winterhalters paid Green Life for all costs, and the contractor's fee of fifteen percent (15%), arising out of the DMH Property. Ultimately, the Winterhalters decided not to build on the DMH Property, after they were successful in purchasing the Property. Again, at the urging of Green Life, the Winterhalters, immediately signed a new contract for Green Life to construct a custom home on the Property, despite no plans having been developed.

B. The Contract, Formation, Exclusions, and Terms.

1. Formation of the Contract.

The Winterhalters advised Green Life that their budget for the construction of the home on the Property was approximately \$1.2 million. The Winterhalters based their budget on what Green Life represented to them was the cost to build the Cooks' own home that the Winterhalters had visited and liked the construction and design of the same. Based upon the Winterhalters recent

experience with a monetary loss on a spec home they built, and the sale of a prior home at a loss, the Winterhalters discussed their financial situation with Green Life and their need to have strict controls in place addressing the costs associated with building a home at the Property.

As a result of these discussion, Green Life recommended that a cost plus contract be used for the construction at the Property. A contract the Winterhalters were unfamiliar with; having never constructed a home under such a contract. Green Life represented to the Winterhalters that a cost plus contract would be the most transparent way for the Winterhalters to understand and control the cost of construction of their home throughout the process.

In furtherance of Green Life's recommendation that a cost plus contract be used, on March 10, 2015 Pat Cook provided Ken Winterhalter with articles discussing the benefits of a cost plus contract. (Defendants Trial Ex. 16). The Winterhalters trusted Green Life and its representations that a cost plus contract would give them the transparency they needed to monitor the construction costs throughout the project. Green Life sold the Winterhalters on the idea of a cost-plus contract and the Winterhalters trusted that Green Life was going to act in their best interest and keep them financially abreast of the construction costs of their construction project. It was a result of the trust the Winterhalters had in Pat and Darla Cook and the Cooks' representations as to the benefits of a cost-plus contract, that the Winterhalters agreed to enter into, and continue on, a cost-plus contract for the construction of their home at the Property (the "Project"). The trust the Winterhalters placed in Green Life was specifically expressed and incorporated into the contract and accepted by Green Life. Article 3 of the Contract states that

[t]he contractor accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Architect and exercise the Contractor's skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; to furnish at all times an adequate supply of workers and

materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests. (Emphasis added).

2. Execution of the Contract.

The contract between Green Life and the Winterhalters is dated May 30, 2014 and was executed by the Winterhalters on June 18, 2014 (the "Contract") (Defendants Trial Ex. 1(a) and 2(a)). Article 1 of the Contract states that "The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to the execution of this Agreement, other documents listed in this Agreement, and Modifications issued after execution of this Agreement, all of which form the Contract and are as fully a part of the Contract as if attached to this Agreement or repeated herein." Drawings and specs were not completed until the spring of 2015.

Article 1 of the Contract further states that the Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. If anything in the other Contract Documents, other than a Modification, is inconsistent with this Agreement, this Agreement shall govern. Any changes or modifications were required to be made in writing. Pursuant to the terms of the Contract, the Winterhalters served in the role as "architect" under the Contract. Specifically, page 3 of the Contract states "[t]here is no Architect of Record, therefore, any reference made herein the agreement between Contractor and Owner, as to 'Architect', is understood to be the Owners."

3. Prebuild Exclusions.

At the start of the Project there were a number of prebuild items at the Property that were contracted for, and paid, directly by the Winterhalters. One such item was the demolition of an existing dock and the construction of a new dock. The Contract specifically excluded the dock from the contract at Article 15.6 wherein "the Owner takes full responsibility for the construction

of the dock. Contractor agrees there will be no fees from the Contractor in regards to the dock, and that this scope is not part of the Work of the Contractor.” Additionally, early on in the Project, it was agreed upon between the parties that the Winterhalters would directly purchase certain items for the Project and that Green Life would not charge its contractor’s fee on such purchases. (Defendants Trial Ex. 92).

4. Control Estimate.

The construction loan for the Project was financed by Hancock Bank (the “Bank”). A control estimate was provided by Green Life to the Winterhalters so that the Bank could process the construction loan application and the Winterhalters could have an understanding on what the costs of the project were to be. The initial control estimate was provided to the Winterhalters in March of 2015. Upon review of the initial control estimate provided by Green Life, the Winterhalters were frustrated with Green Life because the control estimate had the cost of the project at \$1.9 million despite the numerous communications the parties had regarding the Winterhalters being comfortable with a \$1.2 million dollar budget for the Project. (Defendants Trial Ex. 17).

The Contract specifically outlines the process for the preparation and submission of a Control Estimate throughout the Project. Article 5.2.1 of the Contract states “The Contractor shall prepare and submit to the Owner, in writing, a Control Estimate within 14 days of executing this Agreement. The Control Estimate shall include the estimated Cost of the Work, plus the Contractor’s Fee. The Control Estimate shall be used to monitor actual costs and the timely performance of the Work. The Contractor shall update the Control Estimate with each Application for Payment as needed to reflect changes in the Work.”

Article 5.2.2 of the Contract states “The Control Estimate shall include:

- i. the documents enumerated in Article 16, including all Addenda thereto, and the Conditions of the Contract;
- ii. a list of the clarifications and assumptions made by the Contractor in the preparation of the Control Estimate, including assumptions under Section 5.2.4, to supplement the information provided by the Owner and contained in the Drawings and Specifications;
- iii. a statement of the estimated Cost of the Work organized by trade categories or systems and the Contractor's Fee;
- iv. a project schedule indicating proposed Subcontractors, activity sequences and durations, milestone dates for receipt and approval of pertinent information, schedule of shop drawings and samples, procurement and delivery of materials or equipment requiring long-lead time, and the Owner's occupancy requirements showing portions of the Project having occupancy priority; and
- v. contingencies for further development of design and construction as required by Section 5.2.4."

Article 5.2.5 of the Contract requires the Contractor to:

develop and implement a detailed system of cost control that provides the Owner with timely information as to the anticipated total Cost of the Work. The cost control system shall compare the Control Estimate with the actual cost for activities in progress and estimates for uncompleted tasks and proposed changes. This information is required to be reported to the Owner, in writing, no later than the Contractor's first Application for Payment and is required to be revised and submitted with each Application for Payment. (Emphasis added).

5. Cost of Work under the Contract.

The Contract specifically defines the Cost of the Work for which Green Life is entitled to be paid:

Article 5.1 of the Contract, Contract Sum, provides that the Contract Sum is the actual Cost of the Work as defined in Article 7 plus the Contractor's Fee.

Article 7.1.1 of the Contract states the term Cost of the Work shall mean costs necessarily incurred by the Contractor in the proper performance of the Work. The Cost of the Work shall include only the items set forth in this Article 7.

Article 7.2.1 of the Contract states wages of construction workers directly employed by the Contractor to perform the construction of the Work at the site, or with the Owner's prior approval, at off-site workshops.

Article 7.2.2 of the Contract states wages or salaries of the Contractor's supervisory and administrative personnel when stationed at the site with the Owner's prior approval.

Article 7.2.4 of the Contract states costs paid or incurred by the Contractor for taxes, insurance, contributions, assessments and benefits required by law or collective bargaining agreements and, for personnel not covered by such agreements, customary benefits such as sick leave, medical and health benefits, holidays, vacations and pensions, provided such costs are based on wages and salaries included in the Cost of the Work under Section 7.2 through 7.2.3.

Article 7.6 states premiums for that portion of insurance and bonds required by the Contract Documents that can be directly attributed to this Contract.

Article 8.1 states the Cost of the Work shall not include the items listed below:

Salaries and other compensation of the Contractor's personnel stationed at the Contractor's principal office or offices other than the site office, except as specifically provided in Section 7.2, or as may be provided in Article 15; Expenses of the Contractor's principal office and offices other than the site office;
Overhead and general expense, except as may be expressly included in Article 7;
Any cost not specifically and expressly described in Article 7. (Emphasis added).

6. Applications for Payment under the Contract.

The Contract specifically outlines the process for the submission of applications for payment and the parties' respective obligations. This is found in Article 12:

Article 12.1.3 states: "Provided that an Application for Payment is received by the [Owner] not later than the Twenty-fifth day of a month, the Owner shall make payment of the certified amount to the Contractor not later than the Tenth day of the following month. If an Application for Payment is received by the [Owner] after the application date fixed above, payment shall be made by the Owner not later than Fifteen (15) days after the [Owner] receives the Application for Payment."

Article 12.1.4 of the Contract states that "With each Application for Payment, the Contractor shall submit the cost control information required in Section 5.2.5 along with, payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached and any other evidence required by the Owner or Architect to demonstrate that cash disbursements already made by the Contractor on account of the Cost of the Work equal or exceed (1) progress payments already received by the Contract; less (2) that portion of those payments attributable to the Contractor's Fee; plus (3) payrolls for the period covered by the present Application for Payment."

Article 12.1.5 of the Contract states “Applications for Payment shall show the Cost of the Work actually incurred by the Contractor through the end of the period covered by the Application for Payment and for which the Contractor has made or intends to make actual payment prior to the next Application for Payment.”

Article 12.1.8 of the Contract states “In taking action on the Contractor’s Applications for Payment, the [Owner] shall be entitled to rely on the accuracy and completeness of the information furnished by the Contractor and shall not be deemed to represent that the [Owner] has made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Section 12.1.4 or other supporting data; that the [Owner] has made exhaustive or continuous on-site inspections; or that the [Owner] has made examinations to ascertain how or for what purposes the Contractor has used amounts previously paid on account of the Contract. Such examinations, audits, and verifications, if required by the Owner, will be performed by the Owner’s auditors acting in the sole interest of the Owner.”

Additionally, Article 9 in the General Conditions portion of the Contract relates to Payment:

Article 9.3.1.2 provides that “Applications for Payment shall not include requests for payment for portions of the Work for which the Contractor does not intend to pay a Subcontractor or material supplier, unless such Work has been performed by others whom the Contractor intends to pay.” (Emphasis added).

Article 9.3.3 provides that “The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates of Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor’s knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.” (Emphasis added).

Article 9.4.1 provides that “the [Owner] will, within seven days after receipt of the Contractor’s Application for Payment, either issue to the Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the [Owner] determines is properly due, or notify the Contractor and Owner in writing of the [Owner]’s reasons for withholding certification in whole or in part as provided in Section 9.5.1.” (Emphasis added).

Article 9.5.3 provides that “if the [Owner] withholds certification for payment under 9.5.1.3, the Owner may, at its sole option, issue joint checks to the Contractor and to any Subcontractor or material or equipment suppliers to whom the

Contractor failed to make payment for Work properly performed or material or equipment suitable delivered. (Emphasis added).

The majority of the applications for payment submitted by Green Life were not in accordance with the terms of these provisions. The Winterhalters paid every Payment Application in accordance with the Contract and on time.

7. Accounting Records.

The Contract specifically outlines the required records and accounting documents that Green Life was to keep relating to the Project. The Contract specifically requires Green Life to provide such records and accounting documents to the Winterhalters, upon request. Article 11 of the Contract states:

“The Contractor shall keep full and detailed records and accounts related to the cost of the Work and exercise such controls as may be necessary for proper financial management under this Contract and to substantiate all costs incurred. The accounting and control systems shall be satisfactory to the Owner. The Owner and the Owner’s auditors shall, during regular business hours and upon reasonable notice, be afforded access to, and shall be permitted to audit and copy, the Contractor’s records and accounts, including complete documentation supporting accounting entries, books, correspondence, instructions, drawings, receipts, subcontracts, Subcontractor’s proposals, purchase orders, vouchers, memoranda and other data relating to this Contract.” (Emphasis added).

8. Change Orders.

The Contract specifically outlines the process by changes to the Project via Change Order are to be handled by the parties. Article 6.1 of the Contract states “The Owner may, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions.” Article 6.3 of the Contract states:

“If the Contractor receives any drawings, specifications, interpretations or instructions from the Owner or Architect which are inconsistent with the Contract Documents, or encounters unanticipated conditions, any of which will result in a significant change in the Cost of the Work or estimated date of Substantial Completion in comparison with the Control Estimate, the Contractor shall promptly notify the Owner and Architect in writing and shall not proceed with the affected

Work until the Contractor receives further written instructions from the Owner and Architect.” (Emphasis added).

Article 7 of the General Conditions also contains provisions relating to changes:

Article 7.1.1 states “Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.”

Article 7.1.2 states that “A Change Order shall be based upon agreement among the Owner, Contractor and Architect;” (Emphasis added).

Article 7.2.1 states that “A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect stating their agreement upon all of the following:

The change in the Work;
The amount of the adjustment, if any, in the Contract Sum; and
The extent of the adjustment, if any, in the Contract Time.”
(Emphasis added).

At trial, Green Life did not produce any executed change orders signed by the Winterhalters.

9. Quality Control Pursuant to the Contract.

There were issues concerning quality of the construction throughout the project, but particularly beginning in August 2016. Pursuant to the Article 3.3.1 of the General conditions “the Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters.” Green Life is responsible to the Owner for acts and omissions of the Contractor’s employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for, or on behalf of, the Contractor or any of its Subcontractors

pursuant to Article 3.3.2 of the General Conditions. Green Life had an obligation to the Winterhalters, and is responsible for the quality issues and defective work existing at the Project.

Article 2.4 of the General Conditions gives the Winterhalters the right to commence and continue corrective work on any quality or defective conditions when the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a ten-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect. When this occurs the Owner is permitted to charge these costs for corrective work to the Contractor. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

Further, Article 12.2.1 of the General Conditions requires Green Life to promptly correct any Work rejected by the [Owner] or failing to conform to the requirements of the Contract Documents, whether discovered before or after Substantial Completion and whether or not fabricated, installed or complete. The costs of correcting such rejected Work, including additional testing and inspections, the cost of uncovering and replacement, and compensation for the Architect's services and expenses made necessary thereby, shall be at the Contractor's expense. Additionally, Article 3.14 of the General Conditions makes the Contractor "responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly. All areas requiring cutting, fitting, and patching shall be restored to the condition existing prior to the cutting, fitting and patching, unless otherwise required by the Contract Documents." As will be detailed more thoroughly below in the Quality Issues section, extensive cutting, fitting, and patching was necessary to correct Green Life's work.

The Winterhalters have the right to withhold payment pursuant to Article 9.5 of the General Conditions. Article 9.5.1 of the General Conditions allows the Winterhalters to withhold a

Certificate for Payment in whole or in part, to the extent reasonably necessary to protect them. Further, the Winterhalters may withhold a Certificate for Payment or, because of subsequently discovered evidence, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary to protect the Winterhalters from loss for which Green Life is responsible, including loss resulting from acts and omissions described in Section 3.3.2, because of defective work not remedied or failure to pay subcontractors, among other reasons.

C. Closing on Construction Loan.

The closing on the loan for the Project occurred on June 29, 2015. Hancock Bank (“Bank”) provided the funding for the construction of the Project. Ken Winterhalter testified that the Bank required the Winterhalters to put additional money down because of the Bank’s past dealings with Green Life. The parties understood that the Bank would pay the monthly payment applications from Green Life and that the Winterhalters would be personally responsible for any change orders they approved in accordance with the Contract. Green Life recommended that the Winterhalters utilize contingencies as a means to handle any overages for a certain cost code so that these overages and changes would be covered under the construction loan; as opposed to being paid directly by the Winterhalters. Green Life advised the Winterhalters as to which cost codes to incorporate these contingency funds to best utilize them.

D. Green Life Practices on the Project

1. Generally.

The invoice process testified to by Green Life is that it would put all invoices into a job folder and then Pat Cook would review the invoices at a weekly accounting meeting and code the invoices to the applicable job code. At that point in time, the invoices would be manually entered into accounts payable via the Timberline Software. The Cost Detail reports entered into evidence

show a significant amount of errors in the data entry. The Cost Detail reports show many additions that were then deleted; with certain codes there are in many instances of the same invoice being entered and deleted in multiple cost codes.

The payment application process testified to by Green Life is that Pat Cook would review a draft of a draw and plug in the necessary information regarding completion either by dollar amount or percent complete. The draw would then be sent to Green Life's accounting department and entered into the Timberline Software. A draw would then be generated through Timberline either by Darla Cook or Karen Yacullo and then the draw would be sent to the Owner and the Bank (if involved).

The payment process testified to by Green Life is that the Bank would receive the draw and then order an inspector to come out to determine if he/she was in agreement with the draw request. If the inspector was in agreement with the draw request, the Bank would approve and send a form to the Winterhalters to allow funds to be disbursed. The Bank would then send Green Life a lien release to execute and upon receipt of the same, would wire the funds to Green Life.

2. Fall of 2015 Project Progress.

Beginning with Draw No. 2 dated June 29, 2015 and ending with Draw No. 11 dated September 17, 2016, the Winterhalters regularly questioned and/or expressed confusion with Green Life's applications for payment and requested back-up documentation. (Defendants Trial Ex.s 20, 28, 30, 31, 33, 34, 37, 52, 75, 79). In response to the Winterhalters request for back-up documentation, Green Life advised the Winterhalters that it would provide the back-up anytime on request; however, Green Life rarely provided the requested documents to the Winterhalters in a timely fashion, or in some instances, at all.

In September of 2015, the Winterhalters questioned the September draw as to why it was drawing on the trusses when the project was not at the point where the trusses would be installed. (Defendants Trial Ex. 20). This issue arose after the bank inspector questioned this line item on the September 2015 draw. Green Life did not actually pay the truss company until January; despite delivery being made in October. Also, Green Life was drawing on the stem wall, but it had not been started at this point. At this point, the Winterhalters requested that Green Life send the payment applications to them first so that they could review.

3. December/January Questions with Costs and Changes.

By December 2015, Ken and Marsha Winterhalter questioned why line items in the Control Estimate were showing as drawn on when no work had been performed or materials ordered. In December of 2015, the Winterhalters questioned the December draw as to why the fireplace was being drawn at 100% when Green Life knew the Winterhalters were buying the fireplace directly and the Winterhalters had not selected the fireplace at the time (Defendants Trial Ex. 30).

The Winterhalters were also discussing making changes to the project. When the total cost of the proposed changes was disclosed, in January of 2016, the Winterhalters advised Green Life to cancel all changes discussed and to not add any additional work to the Project. (Defendants Trial Ex. 36).

4. Spring 2016 Continuing Cost/Payment Questions.

In March of 2016, the Winterhalters questioned the March draw as to why the appliances had been drawn at 50% yet Famous Tate, the business from which the appliances were being purchased, had not received its required deposit for the appliances. Additionally, when Green Life paid Famous Tate the deposit, they only paid 25% of the deposit and not the 50% drawn. In April of 2016, the Winterhalters again requested back-up and an updated control estimate. (Defendants

Trial Ex. 45). The Winterhalters made the request pursuant to Article 11 of the Contract. From approximately December of 2015 through June of 2016, the Winterhalters repeatedly questioned Green Life as to the status of the costs to date and anticipated future costs to complete the Project. (Defendants Trial Ex.s 32, 37, 42, 43, 45, 52, 66, 67, 92). For example, when Green Life was questioned on siding cost overruns, Green Life told the Winterhalters that they would receive a credit. Costs of items even changed between draws. For example, the Winterhalters were informed of a credit on siding, but were then charged an increase cost amount. (Defendants Trial Ex.s 59, 66).

Finally, after the repeated requests of the Winterhalters, the payment application dated June 24, 2016 was submitted to the Winterhalters with the required and requested back-up for the June application for payment.

5. June 2016 Cost to Complete (Green And Gold Spreadsheets).

On June 24, 2016, Green Life finally provided the Winterhalters with an updated control estimate that the parties have referred to as the green and gold spreadsheets (Defendants Trial Ex. 63). The control estimate anticipated the future cost of the project as \$41,666.00. The control estimate anticipated the future savings as \$36,167.35. The control estimate showed the actual cost to date as \$1,590,390.45.

On August 2, 2016, Green Life provided the Winterhalters with an updated control estimate; another green and gold spreadsheet. (Defendants Trial Ex. 64). The control estimate showed anticipated the future costs of the project as \$23,915.00 and the future anticipated savings as \$24,250.00. The control estimate showed the actual cost to date as \$1,727,060.70. As of August 2, 2016, the Winterhalters' understanding of the cost to complete the Project, when taking into consideration the anticipated savings, was approximately \$1,000.00.

During the course of the Project, Green Life did not regularly notify the Winterhalters of any delays with the completion of the Project. On April 18, 2016, Green Life provided an updated schedule to the Winterhalters. (Defendants Trial Ex. 49). The updated schedule provided that the Project would be complete by the end of June 2016. The Project was not complete, or even substantially complete, by the end of June 2016.

6. August 2016 Payment Application Discrepancy.

As of August 2, 2016, the Winterhalters' understanding of the cost to complete the Project, when taking into consideration the anticipated savings, was approximately \$1,000.00. Therefore, it was a surprise to the Winterhalters when they received Draw No. 10 dated August 9, 2016 requesting payment in the amount of \$227,022.21. (Plaintiff's Trial Ex. 10). Because of the discrepancy between the August 2, 2016 control estimate and the August 9, 2016 draw and the complaints from numerous subcontractors about untimely payments, or lack of payment all together, the Winterhalters notified Green Life that they wanted all back-up supporting the costs of the Project and would require the same from that point forward. (Defendants Trial Ex. 67). Also, the Winterhalters notified Green Life of quality issues existing at the Project.

The Winterhalters, desiring to have the Project finished timely, paid the August 2016 draw despite the numerous questions and pending requests for back-up and having been told that the Project would be completed in late June and then again by the end of July. At this point in time, the Winterhalters again advised Green Life that there would be no additional work or changes and that Green Life was to finish the Project without any changes.

7. September 2016 Payment Application Discrepancy.

The Winterhalters received Draw No. 11 dated September 17, 2016 on September 25, 2016. (Plaintiff's Trial Ex. 11). The amount due and owing to Green Life had substantially increased

again. Green Life was requesting payment of \$230,023.37, which included \$105,157.20 in what Green Life called approved change order work; though, there are no written and signed change orders to effectuate this increase. The Winterhalters had retained an accountant to review the prior pay applications and cost back up by this time. While the accountant was still obtaining the records and reviewing them, the Winterhalters approved Draw No. 11 to be paid to them so that joint checks could be issued to the subcontractors that had not been paid; however, Green Life refused to execute the lien release or otherwise agree to joint checks, despite the contractual provisions allowing for joint checks in just this circumstance.

In an effort to insure that all of the subcontractors who performed work at the Project and had not been paid by Green Life were paid, the Winterhalters paid any such subcontractors from their personal banking accounts. The Bank held on to the remaining construction loan funds and such funds were used to pay Mike Carter Construction once it began work on the Project.

8. Continuing Payment Application Discrepancy.

In the control estimate for the Project, Green Life indicated that the cost attributable to the insurance it was required to have pursuant to the Contract was \$1,500. However, after the request for backup costs for the project and in the November 2016 draw request, for the first time on the Project and over a month after abandoning the Project, Green Life invoiced an additional \$14,911.21 in costs for insurance. The only support for this cost was an endorsement page with nothing identifying the cost as one incurred on or for the Project. Additionally, the cost of accounting and clerical were increasing, despite the fact that these items were not considered "costs" under the Contract. Green Life prepared new payment applications in October, November and February that were never sent to the Winterhalters until provided in this litigation.

9. Subcontractor Management/Payment throughout the Project.

In March of 2015, Pat Cook represented to the Winterhalters that Green Life always enters into lump sum contracts with its subcontractors (Defendants Trial Ex. 16). Article 5.1.3. of the Contract requires all subcontract work to be done lump sum. At trial, Green Life produced no contracts it had with subcontractors. To the extent that Green Life had any contracts with its subcontractors and such subcontracts were lump sum, Green Life could not get the subcontractors to abide by the bids they provided to Green Life.

During the course of the Project, many subcontractors and material providers increased their price to complete the Project. During the course of the project, Sunbelt Electric increased its bid by \$13,500. Pat Cook represented to the Winterhalters that it would delay the project to find another electrician and that Sunbelt could sue the Winterhalters and seek its attorney's fees; so, based upon the representations of Pat Cook, the Winterhalters approved the increase of \$13,500. In April of 2016, Green Life advised the Winterhalters that it felt Sunbelt Electric was leveraging the Winterhalter Project to get paid on extras for other Green Life jobs. (Defendants Trial Ex. 46). Faith Drywall, the drywall subcontractor hired by Green Life substantially increased its bid by approximately \$29,000.00. The cost of the siding was increased substantially, despite several communications from Pat Cook that there was a savings on the Hardie Board siding. (Defendants Trial Ex. 59, 66). Green Life failed to include the separate guest house structure for Latite to include in its initial bid resulting in an increased scope and cost.

Green Life failed to pay its subcontractors in accordance with the Contract and/or within a reasonable time pursuant to industry standards. Article 9.6.2 of the General Conditions states "The Contractor shall pay each Subcontractor no later than seven days after receipt of payment from the Owner the amount to which the Subcontractor is entitled, reflecting percentages actually retained

from payments to the Contractor on account of the Subcontractor's portion of the Work." Article 9.6.4 of the General Conditions states "The Owner has the right to request written evidence from the Contractor that the Contractor has properly paid Subcontractors and material and equipment suppliers amounts paid by the Owner to the Contractor for subcontracted Work. If the Contractor fails to furnish such evidence within seven days, the Owner shall have the right to contact Subcontractors to ascertain whether they have been properly paid. Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by law."

At the end of July 2016, subcontractors were advising the Winterhalters directly that they had not been paid on the Project. Steve Samson, owner of Samson Hauling, who performed work at the Project under direction and supervision of Green Life, testified that Green Life did not timely pay him for work performed. Steve Samson testified that Ken Winterhalter paid him directly for work performed at the Project because Green Life had failed to timely pay him. Steve Samson testified that Pat Cook did not have a reputation for truthfulness and honesty in the local community.

Joshua Moffitt, owner of Native Sun Painting, who performed work at the Project under direction and supervision of Green Life, testified that Green Life did not timely pay him for work performed. He testified that Ken Winterhalter attempted to pay him by joint check because Green Life had failed to timely pay him; however, Green Life refused to honor the joint check. Mr. Winterhalter then paid Mr. Moffitt personally. When asked whether he was aware of Pat Cook's reputation in the local community, Mr. Moffitt testified, in summary, that he was taught that if he did not have anything nice to say, not to say anything at all.

Tyler Hamilton, owner of R.T. Hamilton Enterprises, who performed work at the Project under direction and supervision of Green Life, testified that Green Life did not timely pay him for work performed. He testified that there was not adequate labor or supervision on the Project. Mr. Hamilton also testified that the Winterhalters paid him directly for work performed at end of the Project because Green Life had failed to timely pay him.

Bryan Scott Thompson, the general manager of Latite Roofing Company, who performed work at the Project under direction and supervision of Green Life, testified that Green Life failed to timely pay invoices. Mr. Thompson indicated that certain invoices were paid 60 plus days after submission to Green Life and well after work was completed. Latite Roofing threatened to file a lien, which it ultimately did. (Defendants Trial Ex. 7)

In August of 2017, Pat Cook informed the Winterhalters that the well subcontractor was going to pull off the job because it had not been paid. However, the prior draw indicated that the well had been drawn at 40% and paid. (Defendants Trial Ex. 70).

Window & Door Design Center of Sarasota was the window subcontractor hired by Green Life for the Project. Green Life drew on the windows 100%, but did not remit payment to Window & Door Design Center of Sarasota. As a result, Window & Door Design Center of Sarasota recorded a claim of lien against the Winterhalter Property. (Defendants Trial Ex. 10). The Winterhalters directly paid Window & Door Design Center of Sarasota the lien amount even though Green Life had been paid for the work. Window & Door Design Center of Sarasota recorded a satisfaction of lien on January 27, 2017 based upon the direct payment by the Winterhalters. (Defendants Trial Ex. 11).

Interestingly, no subcontractors, laborers, or material providers testified for, or on behalf of, Green Life.

Finally, Laura Chirichigno, the Winterhalters accounting expert testified that on average Green Life paid its subcontractors in excess of 45-60 days from when invoiced.

E. 2016 Audit and Demands for Green Life to Comply with Contract Terms.

Laura Chirichigno, an expert for the Winterhalters, testified that she is familiar with the Timberline Software used by Green Life on the Project. Laura Chirichigno testified that various accounting reports can easily be run from the Timberline Software. Ms. Chirichigno testified that she had to recreate the project accounting because the documents provided by Green Life were so defective. Ms. Chirichigno testified that a cost plus contract is billed based upon work performed, direct supervision, and agreed upon fee.

Ms. Chirichigno testified that the industry standard billing practice for a cost plus contract includes a summary sheet showing costs, all backup supporting the costs, and a calculation of the overhead and profit for the costs in that period. Ms. Chirichigno testified that the industry standard time frame for a contractor to provide documents requested by the owner is 48 – 72 hours, maximum time is a week.

On September 14, 2016, Ms. Chirichigno sent a letter to Green Life informing it that the Winterhalters were exercising their rights under the Contract to receive the accounting documents for the entire project (Defendants Trial Ex. 89). The letter requested the documents be provided by September 16, 2016. Green Life did not provide the documents by September 16, 2016. On September 25, 2016, Ms. Chirichigno received a large portion of the requested information. However, three major cost codes had been omitted. Ms. Chirichigno created a spreadsheet (Defendants Trial Ex. 140) using all of the accounting information she received from Green Life and the Winterhalters as of September 25, 2016. As of September 25, 2016, Ms. Chirichigno determined that the total cost of the Project per Green Life, including the contractor's fee, with

supporting back-up was \$1,747,640.18. Ms. Chirichigno determined that there was \$31,952.21 in costs which did not have back-up to support the same. Ms. Chirichigno determined that the total cost of the project was \$1,779,592.39 when taking into account the \$31,952.21 in costs with no back-up. Ms. Chirichigno determined that Green Life had been paid on Draws 1 through 10, whether by the Bank or by the Winterhalters, the amount of \$1,780,093.52.

On September 30, 2016, in an effort to obtain all of the accounting records, Charles Pratt was retained by the Winterhalters, and he sent a letter to Green Life to obtain copies of all back-up for the Project. (Defendants Trial Ex. 103). The notice also addresses Green Life's failure to pay subs, and other issues the Winterhalters had with the costs Green Life alleged it had incurred. Green Life's attorney, Greg Brown, responded to Mr. Pratt's September 30th letter the same day and advised that he "was preparing a demand to the Winterhalters regarding their nonpayment and interference with the contract work." (Defendants Trial Ex. 104). Mr. Brown alleged in his letter that Green Life was owed \$230,023.27, which included \$105,157.20 in approved change work.

At the time of Greg Brown's letter, the Winterhalters had paid the August 2016 payment application and were still within the contractual timeframe to pay Draw No. 11. Although the September 2016 payment application was dated September 17, 2016, the Winterhalters did not receive the payment application until September 25, 2016.

On October 2, 2016, Green Life abandoned the Project. Green Life never returned to the Property after October 2, 2016, not even to inspect the Project. As of October 2, the Winterhalters were in compliance with their obligations to make payment and had not terminated the Contract nor made a request that Green Life stay away from the Project.

On October 6, 2016, the Winterhalters retained Marisa Powers to request the same information Mr. Pratt sought from Green Life after Mr. Pratt's letter failed to achieve its objective.

In addition, in an effort to continue the project and ensure payment to the subcontractors, Ms. Powers indicated that the Winterhalters were agreeable to providing joint checks. In closing, Ms. Powers indicated that the Winterhalters remained “hopeful that the parties can resolve the outstanding payment issues in an amicable manner and it is the Winterhalters desire to do so.” On October 14, 2016, Mr. Brown emailed Ms. Powers and requested that the Winterhalters pay the entire undisputed amount. (Defendants Trial Ex. 112). On October 16, 2016, Ms. Powers again indicated that the Winterhalters are open to issuing joint checks for work not in dispute. (Defendants Trial Ex. 112). In response, on October 16, 2016, Mr. Brown indicated that “we appear to be losing momentum on this. Our client’s subs appear poised to stand by the company and lien the project.” (Defendants Trial Ex. 113). In response, on October 18, 2016, Ms. Powers represented to Mr. Brown that the Winterhalters are:

ready, willing, and able to discuss an undisputed amount to be paid via joint check. Unfortunately, the issue that remains is that my clients have been asking for months for documentation to support various charges and as it stands right now, they still have not received all documents requested, and most important, required to be provided under the contract. (Defendants Trial Ex. 114).

Ms. Powers also renewed the offer for the parties to meet to discuss the outstanding issues prior to termination of the Contract and litigation.

In October of 2016, Ms. Chirichigno received the missing cost code information and in November she received additional missing documents that had been requested in September of 2016. Based upon Ms. Chirichigno’s audit of the project, she determined that Green Life billed the project as a lump sum and not a cost plus until September of 2016. This was confirmed by Green Life’s bookkeeper, Karen Yacullo, during her testimony.

As a result of the failure of Green Life to comply with the terms of the Contract, on October 26, 2016, Ms. Powers served a seven day notice of the termination of the Contract on Green life.

(Defendants Trial Ex. 116). Ms. Powers notified Green Life that the facts in support of a termination were as follows: (1) documentation supporting the cost of work alleged by Green Life to be due and owing; (2) the disparity between the control estimate and alleged actual cost for subcontractor work and materials; (3) failure to correct quality issues; (4) completion date for the Project; (5) the use of adequate subcontractors and skilled labor; (6) payment to subcontractors; and, (7) mismanagement of the entire project. Ms. Powers also put Green Life on notice that they would move forward with accepting assignments of subcontracts pursuant to Article 5.4 of the Contract, and would finish the work on the project, by whatever reasonable method they deemed expedient.

Green Life did not provide the records and accounting documents to substantiate the costs on the Project as of the date of termination of the Contract as required. The Winterhalters also advised Green Life that they were having to pay subcontractors directly based upon Green Life's failure to do so. The Winterhalters never represented to Green Life that they would not pay any verified amounts due. In January of 2017, a meeting was held at the offices of Green Life between Green Life, the Winterhalters, and the respective attorneys for the parties. After the meeting, on February 3, 2017, Ms. Powers, on behalf of the Winterhalters, sent Mr. Brown a letter confirming that the Winterhalters still had not received all of the requested documentation. (Defendants Trial Ex. 123).

F. 2018 Audit by Laura Chirichigno

Upon receipt of additional accounting documents from Green Life at the trial of this matter in May of 2018, Ms. Chirichigno updated her spreadsheet to detail costs incurred, costs incurred outside of the Contract, and amounts paid (Defendants Trial Ex. 192). Per the updated spreadsheet:

The total costs reported by Green Life is \$2,078,282.96, including the contractor's fee.

The unapproved costs pursuant to the terms of the Contract amount to \$200,887.13, including the contractor's fee.

The owner direct purchases that should not have been included in the Contract amount to \$25,817.50, including the contractor's fee.

The adjusted cost of Green Life is \$1,851,578.33, including the contractor's fee.

The unapproved change orders amount to \$277,205.12, including the contractor's fee.

The unapproved costs due to lack of supporting documentation amount to \$8,983.12.

The approved project costs amount to \$1,565,389.59.

The remedial work performed by Mike Carter Construction amounts to \$286,825.61. This amount is consistent with the testimony of Ashley Matherly and Bill Icely who indicated that the work performed by Mike Carter Construction was 45-50% remedial in nature.

The total adjusted amount that Green Life is entitled to is \$1,278,563.99.

The total amount paid to Green Life is \$1,760,093.52.

Green Life owes the Winterhalters \$489,091.75.

G. Quality Issues/Defects.

Green Life was notified of the quality issues and defects prior to and after termination. In August of 2016, the Winterhalters notified Green Life of quality issues existing at the Project (Defendants Trial Ex. 67). Throughout the fall of 2016, the Winterhalters notified Green Life of these, and additional construction deficiencies and defects. (Defendants Trial Ex. 118). The Winterhalters requested that Green Life correct these issues. On February 24, 2017, Ms. Powers, on behalf of the Winterhalters provided Mr. Brown with an updated quality list. (Defendants Trial Ex. 126). Ms. Powers also advised Mr. Brown that Green Life could inspect the premises upon 5 days' notice. Green Life never inspected the premises after it walked off the Project in October of 2016. Green Life never performed any remedial work at the Project.

The Winterhalters retained Mike Carter Construction to complete the project and remedy all quality issues and defects that existed at the Project after Green Life abandoned the Project. Mike Carter Construction began work at the Project in January of 2017. Ashley Matherly, is a Project Manager for Mike Carter Construction and performed as such on the Project.

At the time that Mike Carter Construction was retained, Ms. Matherly testified that at first glance, the Project appeared almost complete; however, upon inspection, the scope of work was much larger than anticipated. Ms. Matherly testified that the scope of the work increased as Mike Carter Construction discovered more defective work that had been done under the direction and supervision of Green Life. Essentially, Ms. Matherly said that Mike Carter Construction had to take several steps backwards with its work before they could move the Project forward to completion.

Ms. Matherly prepared a list of quality issues and defects in January of 2017 which outlined the issues and defects at the beginning of Mike Carter Construction's work on the Project. (Defendants Trial Ex. 125). The list was updated as more issues and defects were discovered at the Project and as issues and defects were remedied by Mike Carter Construction. The list was compiled based upon the inspection by Ms. Matherly, discussions with the Winterhalters, and input from other Mike Carter Construction employees based upon their inspection of the Project.

Ms. Matherly testified that remedial work performed by Mike Carter Construction included, but was not limited to, the following job cost code categories: pavers, concrete, carpentry, roofing, and painting. Ms. Matherly testified that the painting that had been done at the Project while Green Life was still on the Project, was not the quality you would expect for a multi-million dollar home. Mike Carter Construction had to have the entire Project, both interior and exterior, repainted due to the quality issues that existed with the paint. After the termination of

Green Life from the Project, Marsha Winterhalter took pictures of certain defective work performed under the supervision and direction of Green Life as of the time Green Life left the Project, as well as, defective work discovered once Mike Carter Construction began work at the Project. (Defendants Trial Ex. 188). Ms. Matherly identified, discussed, and authenticated the quality issues and defects existing in each of the pictures in Defendants Trial Ex. 188.

The Winterhalters paid Mike Carter Construction \$498,887.58 per its last draw dated February 28, 2018. (Defendants Trial Ex. 155). Ms. Matherly testified that approximately 45% of the work performed by Mike Carter Construction and paid for by the Winterhalters was remedial work to remedy issues and defects associated with work performed under the supervision and direction of Green Life.

Larry Turgeon is the President of LT Plumbing and has been in the plumbing business for 42 years and testified as to the remedial work LT Plumbing performed at the Project. Mr. Turgeon testified that upon attempting to complete the plumbing work it was discovered that the plumber who performed work at the Project under the supervision and direction of Green Life had created many issues and failed to adhere to industry standards. The prior plumber had capped the line leading from the sink in the wine grotto to the sewer line, instead of tying in the plumbing to the sewer line so that the sink could drain properly. Mr. Turgeon testified that LT Plumbing had to relocate the pipes to the master bathroom tub which had been improperly installed. Mr. Turgeon testified that the vessel sinks were all loose; faucets were loose; regular plumbers putty was incorrectly used on granite; a shower valve had been installed upside down; the main shut off for the water had been glued shut; toilets had to be re-set and re-grouted. Mr. Turgeon testified that the tub purchased by Green Life would not meet code and needed to be replaced. Mr. Turgeon

testified that the quality issues and defects existing at the Project were not “punch out” items and, instead, showed a lack of experience by the plumber selected by Green Life.

Mr. Thompson from Latite Roofing & Sheet Metal testified that there are shiners existing in the metal panels of the roof. Mr. Thompson testified that the shiners could be caused by a nail that did not get seated properly. Mr. Thompson testified that if nails are the cause, the nails would have been put in place by the subcontractor that installed the roof decking. Mr. Thompson testified that Latite did not install the roof decking.

Bill Icely, the construction expert for the Winterhalters, testified that it was his opinion, based on his expertise and review of the matter, that there was an overall lack of quality control in the supervision by Green Life of the work performed at the Project. Mr. Icely testified that the Project was understaffed. Sean Williams, Green Life’s supervisor on the Project, testified that his only responsibility was scheduling. Mr. Icely testified that of the work performed by Mike Carter Construction about 50% was remedial work to address quality issues and defects existing at the Project and which were performed under the supervision and direction of Green Life. Mr. Icely testified that the pergola was not properly braced and the incorrect brackets were used for a home on the water. Mr. Icely testified that the driveway is defective as it has severe discoloration and that it will cost in excess of \$25,000 to remedy. Mr. Icely testified that the roof is defective as it has nails in the sheathing which caused shiners to exist in the roof.

H. Claim of Lien filed by Green Life

On November 17, 2016 Green Life recorded a claim of lien against the Property. (Defendants Trial Ex. 4). On November 22, 2016, Green Life initiated litigation against the Winterhalters. Neither Pat Cook nor Darla Cook were able to testify as to what made up the lien or how it was calculated. At trial, Green Life did stipulate that \$160,457.37 of the \$316,013.88

lien was paid by the Winterhalters directly to the subcontractors, personally, reducing the lien amount to \$155,556.51.

On January 10, 2017, the Winterhalters transferred the Green Life claim of lien to a surety and cash bond. (Defendants Trial Ex. 5). On January 10, 2017, the Clerk of Court for Manatee County issued a certificate of clerk evidencing the transfer. (Defendants Trial Ex. 6). Green Life did not bring an action against the surety within one year of March 29, 2017, or at any time prior to, or at, trial.

II. CONCLUSIONS OF LAW.

A. Green Life's Amended Complaint against the Winterhalters.

Green Life filed a two-count amended complaint against the Winterhalters.

1. Lien Foreclosure.

Chapter 713 of the Florida Statutes governs construction liens. Florida Statute 713.22 provides that “no lien provided by this part shall continue for a longer period than 1 year after the claim of lien has been recorded.” Florida Statute 713.24(1) provides that a lien may be transferred, by any person having an interest in the real property upon which the lien is imposed or the contract under which the lien is claimed, from such real property to other security by filing in the clerk’s office a bond executed as surety by a surety insurer licensed to do business in this state. In addition, Florida Statute 713.24(4) provides:

If a proceeding to enforce a transferred lien is not commenced within the time specified in s. 713.22 or if it appears that the transferred lien has been satisfied of record, the clerk shall return said security upon request of the person depositing or filing the same, or the insurer. If a proceeding to enforce a lien is commenced in a court of competent jurisdiction within the time specified in s. 713.22 and, during such proceeding, the lien is transferred pursuant to this section or s. 713.13(1)(e), an action commenced within 1 year after the transfer, unless otherwise shortened by operation of law, in the same county or circuit court to recover against the security shall be

deemed to have been brought as of the date of filing the action to enforce the lien, and the court shall have jurisdiction over the action.

The mechanics' lien law is to be strictly construed in every particular and strict compliance is an indispensable prerequisite for a person seeking affirmative relief under the statute. *Hiller v. Phoenix Associates of South Florida, Inc.*, 189 So. 3d 272 (Fla 2d DCA 2016). The legislature has provided a statutory scheme under Chapter 713, which the Court must strictly construe. *Rabil v. Seaside Builders, LLC*, 226 So. 3d 935 (Fla 4th DCA 2017). When the words of a statute are plain and unambiguous and convey a definite meaning, courts have no occasion to resort to rules of construction – they must read the statute as written and the courts inquiry should end. *Cool Guys, LLC v. Jomar Properties, LLC*, 84 So. 3d 1076 (Fla. 4th DCA 2012)(quoting *Rothman-Browning v. Marshall*, 83 So. 3d 859 (Fla. 4th DCA 2011). The failure by a lienor to bring an action against the surety within a certain period after the transfer of a construction lien to another security by a property owner results in the extinguishment of the right to make a claim on the bond. *Hiller*, 189 So. 3d at 275. The fact that the lienor has a proceeding pending against the lien at the time of the transfer does not excuse compliance with the other provisions of chapter 713. *Id.* citing *Cool Guys, LLC*, 84 So. 3d at 1078 (explaining that section 713.24(4) unambiguously provides that when a lien is transferred while a foreclosure suit is pending, a claim must still be brought against the surety).

Judgment in favor of property owner is appropriate where the lien has been transferred to bond and the lienor has failed to bring an action against the surety. *See Cool Guys, LLC*, 84 So. 3d at 1078 (affirming summary judgment in favor of property owner and surety based upon its holding that there is no ambiguity in Florida Statute 713.24 as it is clear from the language that if a lien foreclosure suit is pending and the lien is transferred to security during the pendency of that litigation, a claim to recover against the transferred security must be brought within one year of

the transfer).

The evidence, specifically the testimony at trial of Ken Winterhalter was consistent that: (1) the Winterhalters transferred Green Life's lien to bond on January 10, 2017 and that the Certificate of the Clerk dated January 10, 2017 was recorded on January 10, 2017 and indicates that it was sent to Green Life via certified mail, return receipt requested; (2) that an Amended Certificate of Clerk dated March 29, 2017 was recorded on March 29, 2017 and indicates that it was sent to Green Life via certified mail, return receipt requested.

In this case, the Court finds that at the very least, Green Life had until one year from March 29, 2017 to amend its complaint to bring an action against the surety. The Court finds that Green Life failed to do so and the time period for Green Life to bring any such action passed. Therefore, Green Life's lien extinguished as a matter of law.

2. Breach of Contract.

To prevail on a breach of contract, a party must prove (1) the existence of a contract; (2) a breach of the contract; and, (3) damages resulting from the breach. *Ferguson Enters. V. Astro Air Conditioning & Heating, Inc.*, 137 So. 3d 613, 615 (Fla. 2d DCA 2014).

The testimony at trial and the evidence admitted at trial are consistent that a contract existed between the parties. Green Life alleged the Winterhalters breached the Contract by failing to remit payment in accordance with the Contract. The Winterhalters asserted a number of defenses to the amended complaint, including:

First, prior material breach based upon Green Life failing to provide the contractually required accounting documents; failing to pay timely subcontractors or failing to pay subcontractors at all even though Green Life had been paid for the work; failing to properly manage the Project; failing to adequately staff the Project; and, failing to remedy quality issues and defects.

Second, any obligations of the Winterhalters under the Contract were discharged upon the prior material breach of Green Life.

Third, that Green Life hindered the performance of the Winterhalters' obligations under the Contract by failing to provide the contractually required accounting documents to the Winterhalters.

Fourth, that the Winterhalters are entitled to a set off for all of the subcontractors that they directly paid and the cost of the remedial work at the Project.

Fifth, that Green Life failed to mitigate its damages by failing to provide the contractually required accounting documents.

Sixth, that Green Life breached the implied covenant of good faith and fair dealing.

Seventh, that Green Life's damages are barred as a result of its refusal to comply with the Contract.

Eighth, that Green Life failed to satisfy a condition precedent because it failed to provide a contractor's final affidavit prior to filing the litigation against the Winterhalters.

Ninth, that Green Life has unclean hands.

Tenth, that at all relevant times, the Winterhalters acted in accordance with the Contract.

The Winterhalters asserted a counterclaim against Green Life for breach of contract. The affirmative defenses raised by the Winterhalters to the amended complaint go hand in hand with the Winterhalters' claim against Green Life for breach of contract. Based upon the Court's analysis of certain affirmative defenses raised by the Winterhalters and the Winterhalters' claim for breach of contract against Green Life, as discussed in detail below, the Court finds that the Winterhalters did not breach the Contract and that Green Life failed to prove a breach of contract action against the Winterhalters.

B. The Winterhalters Amended Counterclaim against Green Life.

The Winterhalters filed a two-count amended counterclaim against Green Life.

1. Breach of Contract.

To prevail on a breach of contract, a party must prove (1) the existence of a contract; (2) a breach of the contract; and, (3) damages resulting from the breach. *Ferguson Enters. V. Astro Air Conditioning & Heating, Inc.*, 137 So. 3d 613, 615 (Fla. 2d DCA 2014).

All of the evidence admitted at trial is consistent that a contract existed between the parties.

The evidence is consistent that the Winterhalters proved their affirmative defense of prior material breach of Green Life and their counterclaim for breach of contract against Green Life based upon the following:

All the evidence at trial including the testimony from Ken Winterhalter, Marsha Winterhalter, Ashley Matherly, Bill Icely, and Larry Turgeon is consistent that Green Life repeatedly refused or failed to supply enough properly skilled workers or proper materials in accordance with Article 3.3.1 of the Contract. Certain work performed by subcontractors under the direction and supervision of Green Life were defective and had to be remedied by Mike Carter Construction, the replacement General Contractor.

All the evidence at trial including the testimony from Ken Winterhalter, Marsha Winterhalter, and Bill Icely is consistent that Green Life failed to properly manage the Project in accordance with Article 3.3.1 of the Contract. Certain work performed by subcontractors under the direction and supervision of Green Life were defective and had to be remedied by Mike Carter Construction, the replacement General Contractor. In addition, there were numerous instances where subcontractors substantially increased their bid due to the failure of Green Life to either

properly advise as to the scope of work, or its refusal to act in the best interests of the Winterhalters and require the subcontractors to abide by the original bid.

All the evidence at trial including the testimony from Ken Winterhalter, Marsha Winterhalter, Laura Chirichigno, Joshua Moffit, Steve Samson, Tyler Hamilton, and Scott Thompson is consistent that Green Life failed to make payment to subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the subcontractor in accordance with Article 5.1.3 and Article 9.6.2 of the Contract. Green Life did not have lump sum contracts with all of its subcontractors. Furthermore, Mr. Moffit, Mr. Samson, Mr. Hamilton, and Mr. Thompson all testified that they were not paid timely by Green Life. Laura Chirichigno testified that on average, Green Life paid its subcontractors in excess of 45-60 days from the date it was invoiced.

All the evidence at trial including the testimony of Ken Winterhalter, Darla Cook, and Josh Moffit is consistent that the Winterhalters attempted to pay subcontractors via joint check in accordance with Article 9.5.3.

All the evidence at trial including the testimony from Ken Winterhalter, Marsha Winterhalter, Pat Cook, Ashley Matherly, Bill Icely, and Larry Turgeon is consistent that quality issues and defects existed at the Project and were related to work performed under the direction and supervision of Green life; that Green Life was put on notice of such quality issues and defects; and, that Green Life failed to remedy the quality issues and defective work relating to work performed under the direction and supervision of Green Life in accordance with Article 4.14 and Article 12.2.1 of the Contract.

All the evidence at trial including the testimony from Ken Winterhalter is consistent that the Winterhalters had the contractual right to correct the defective work pursuant to Article 2.4 of the Contract and to charge the costs of such corrective work to Green Life.

All the evidence at trial including the testimony from Ken Winterhalter, Marsha Winterhalter, and Pat Cook is consistent that Green Life failed to complete the Project in accordance with Article 4.3 of the Contract. The Project was delayed well over 365 days.

All the evidence at trial including the testimony from Darla Cook and Laura Chirichigno is consistent that Green Life billed for costs excluded under the Contract. For example, accounting and clerical work performed from the main office are excluded from Costs in Article 7 and 8. All the evidence at trial including the testimony from Darla Cook and Laura Chirichigno is consistent that Green Life billed for costs without providing the back-up to support that such cost was directly attributable to the Contract, such as insurance, in accordance with Article 7.6 of the Contract. Ms. Cook could not point to any evidence that the insurance endorsement page was directly related to the Project. The evidence and testimony from Darla Cook and Laura Chirichigno were consistent that Green Life billed for costs where the back-up to support such cost did not support the total amount billed, such as the plumbing cost code. Ms. Cook could not explain the discrepancy for the Arrow Plumbing invoices totaling less than the amount charged for the plumbing cost code. All the evidence at trial including the testimony from Darla Cook, Ken Winterhalter, and Laura Chirichigno is consistent that Green Life billed a contractor's fee on costs specifically excluded by the Contract, specifically, the dock.

The evidence and testimony is clear in that Green Life failed to manage and control the costs and notify the Winterhalters of the anticipated future costs. All the evidence at trial including the testimony from Darla Cook and Laura Chirichigno is consistent that Green Life failed to follow

the appropriate procedure to obtain approval for changes to the work in accordance with Article 6.3 and Article 7.2.1 of the Contract. All the evidence at trial including the testimony from Darla Cook, Pat Cook, and Ken Winterhalter were consistent that Green Life failed to provide an updated control estimate with every payment application in accordance with Article 5.2.5 of the Contract. All the evidence at trial including the testimony from Darla Cook, Laura Chirichigno, and Ken Winterhalter is consistent that Green Life failed to provide records and accounting documents in accordance with Article 11 of the Contract. All the evidence at trial including the testimony from Darla Cook, Laura Chirichigno, and Ken Winterhalter is consistent that Green Life failed to provide back-up support for all costs incurred with each application for payment in accordance with Article 12.1.4 of the Contract. All the evidence at trial including the testimony from Pat Cook, Darla Cook, Ken Winterhalter, and Laura Chirichigno is consistent that Green Life invoiced for costs that had yet to be incurred or were expected to be incurred within the next draw period in violation of Article 12.1.5 of the Contract.

All the evidence at trial including the testimony from Pat Cook, Darla Cook, Ken Winterhalter, Marsha Winterhalter, Ashley Matherly, Bill Icely, Larry Turgeon, Joshua Moffit, Steve Samson, Tyler Hamilton and Scott Thompson were consistent that Green Life failed to further the interests of the Winterhalters in accordance with Article 3 of the Contract.

All the evidence at trial including the testimony from Ken Winterhalter and Laura Chirichigno were consistent that the Winterhalters had the contractual right to withhold payment in September of 2016 in accordance with Article 9.5.1 of the Contract because of defective work not remedied and failure to pay subcontractors.

All the evidence at trial including the testimony from Ken Winterhalter were consistent that the Winterhalters properly terminated the Contract for cause in accordance with Article 14.1.1(.1), (.2), and (.4).

Green Life asserted a number of defenses to the amended counterclaim. First, the Winterhalters failed to state a claim. Second, the Winterhalters failed to satisfy a condition precedent. Third, the Winterhalters failed to mitigate their damages. Fourth, the Winterhalters materially breached the Contract. Fifth, the Winterhalters have unclean hands. Sixth, the Winterhalters have no damages. Seventh, the Winterhalters accepted the work. Eighth, the Winterhalters fraudulently induced Green Life to enter into the Contract. Ninth, the Winterhalters frustrated Green Life's purpose under the Contract. Tenth, the Winterhalters hindered Green Life's performance under the Contract. Eleventh, the Winterhalters abandoned the Contract. Twelfth, the Winterhalters' conduct discharged and excused any of Green Life's contractual and/or statutory violations. Thirteenth, the Winterhalters breached the implied covenant of good faith and fair dealing. Fourteenth, that the Winterhalters' claims are barred by laches.

Preliminarily, the Court notes that Green Life's affirmative defense numbers 1, 2, 3, 6, 7, 11, 12, 13, and 14 are lacking in sufficiency based upon Green Life's failure to provide the ultimate facts supporting such defenses and are nothing more than conclusory statements that are unsupported by any facts. *Cady v. Chevy Chase Savings and Loan, Inc.*, 528 So. 2d 136, 138 (Fla. 4th DCA 1988); *American Nat'l. Growers Corp. v. Harris*, 120 So. 2d 212, 213 (Fla. 2d DCA 1960). However, it is clear from all the evidence at trial including the testimony from Ken Winterhalter, Marsha Winterhalter, Laura Chirichigno, Ashley Matherly, and Bill Icely, that (1) the Winterhalters stated a cause of action; (2) the Winterhalters satisfied all condition precedents under the Contract (3) that the Winterhalters did not have unclean hands; (4) that the Winterhalters

have damages; (5) that the Winterhalters did not fraudulently induce Green Life to enter into the Contract; (6) that the Winterhalters did not frustrate Green Life's purpose under the Contract; (7) that the Winterhalters did not hinder Green Life's performance under the Contract; (9) that the Winterhalters did not abandon the Contract; (10) that Green Life's contractual and/or statutory obligations were not discharged by any conduct of the Winterhalters; (11) that the Winterhalters did not breach any implied covenant of good faith and fair dealing; and, (12) that the Winterhalters' claims were not barred by laches. Therefore, in this case, the Court finds that Green Life's affirmative defense numbers 1, 2, 5, 6, and 8-14 do not bar the Winterhalters' claim against Green Life for breach of contract.

With regards to Green Life's affirmative defense number three that the Winterhalters failed to mitigate their damages, it is clear from all the evidence at trial including the testimony from Ken Winterhalter and Marsha Winterhalter, that the Winterhalters attempted to mitigate their damages by repeatedly providing notice to Green Life as early as August 2016 of quality issues and defective work at the Project performed under the direction and supervision of Green Life; providing Green Life an opportunity to remedy the quality issues and defective work; and, by attempting to have subcontractors retained by Green Life come back to the Project and remedy quality issues and defective work. Therefore, in this case, the Court finds that Green Life's affirmative defense number three does not bar the Winterhalters' claim against Green Life for breach of contract.

With regards to Green Life's affirmative defense number four that the Winterhalters materially breached the contract with Green Life by, among other things, failing to perform under the contract and refusing to pay Green Life for all labor, services, and materials Green Life provided under the Contract, as discussed in more detail above, it is clear from the evidence and

testimony at trial that at all material and relevant times, the Winterhalters acted within their rights as provided in, and in accordance with, the Contract. The Court does not find any breach of the Contract by the Winterhalters. Therefore, in this case, the Court finds that Green Life's affirmative defense number 4 does not bar the Winterhalters' claim against Green Life for breach of contract.

With regards to Green Life's affirmative defense number 7, that the Winterhalters accepted the work as provided by Green Life, it is clear from all the evidence presented at trial including the testimony from Ken Winterhalter and Marsha Winterhalter, that the Winterhalters did not accept the work provided to the Project by Green Life. All the evidence at trial including the testimony was clear that the Winterhalters repeatedly provided notice to Green Life as early as August 2016 of quality issues and defective work at the Project performed under the direction and supervision of Green Life. Furthermore, any prior payment by the Winterhalters for work performed did not deem the Winterhalters to have accepted the work, and, did not waive any right of the Winterhalters to claim that any such work performed had quality issues and/or was defective as provided for in Article 9.5.1 and Article 12.1.8 of the Contract. Therefore, in this case, the Court finds that Green Life's affirmative defense number 7 does not bar the Winterhalters' claim against Green Life for breach of contract.

2. Fraudulent Lien under Florida Statute 713.31.

To prevail on a fraudulent lien claim under Florida Statute 713.31, a party must prove that the lien asserts a willful exaggeration of the lien amount; the lien makes a claim for services not performed or supplies and materials that were not delivered upon the property; or, the claimant compiled the lien in such a grossly negligent manner as to amount to a willful exaggeration. A fraudulent lien is a complete defense to the enforcement of a lien. A fraudulent lien is a criminal violation in Florida. In addition, if the lien is found to be fraudulent, the property owner may assert

an affirmative claim against the contractor. The contractor may be held liable for actual damages, attorney's fees, the amount of any bond premium required to discharge the lien, court costs, and any punitive damages resulting from the fraudulent lien.

All the evidence at trial including the testimony from Darla Cook and Laura Chirichigno is consistent that Green Life billed for costs excluded from Article 8.1 of the Contract, such as accounting and clerical work performed off-site, and overhead and general expense.

All the evidence at trial including the testimony from Darla Cook and Laura Chirichigno were consistent that Green Life billed for costs without providing the back-up to support that such cost was directly attributable to the Contract, such as insurance, in accordance with Article 7.6 of the Contract. Ms. Cook could not point to any evidence that the insurance endorsement page was directly related to the Project. All the evidence at trial including the testimony from Darla Cook, Ken Winterhalter, and Laura Chirichigno is consistent that Green Life billed a contractor's fee on costs specifically excluded by the Contract, specifically, the dock. All the evidence at trial including the testimony from Pat Cook and Darla Cook is consistent that Green Life could not account for what made up the lien or how it was calculated. All the evidence at trial including the testimony from Pat Cook, Darla Cook, Ken Winterhalter and Laura Chirichigno is consistent that the lien included amounts for services not performed and materials not provided.

All the evidence at trial including the testimony from Pat Cook, Darla Cook, Ken Winterhalter, and Laura Chirichigno is consistent that Green Life willfully exaggerated the lien amount. All the evidence at trial including the testimony from Pat Cook, Darla Cook, Ken Winterhalter, and Laura Chirichigno is consistent that Green Life compiled the lien in such a grossly negligent manner as to amount to a willful exaggeration.

Therefore, it is

ORDERED and ADJUDGED that Judgment shall be entered as follows:

1. As to Count I of Green Life's amended complaint for lien foreclosure, judgment is entered in favor of the Winterhalters based upon the extinguishment of the lien, by law, due to Green Life's failure to bring an action against the surety upon the bonding off of the lien.

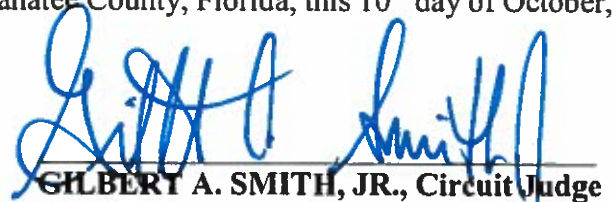
2. As to Count II of Green Life's amended complaint for breach of contract, judgment is entered in favor of the Winterhalters as there was no breach for failure to pay by the Winterhalters' and on the defenses of prior material breach. The Court finds that Green Life materially breached the Contract prior to any failure to pay by the Winterhalters. The Court finds that the Winterhalters were within their rights under the Contract to withhold payment to Green Life pending resolution of the quality and defective conditions.

3. As to Count I of the Winterhalters' amended counterclaim for breach of contract, judgment is entered in favor of the Winterhalters in the amount of \$489,091.75 against Green Life, plus their reasonable attorney's fees and costs and pre and post judgment interest.

4. As to Count II of the Winterhalters' amended counterclaim for fraudulent lien, judgment is entered in favor of the Winterhalters and they shall be entitled to their reasonable attorney's fees and costs and the amount of the bond premium required to discharge the claim of lien recorded by Green Life.

5. The Court reserves jurisdiction to enforce this Judgment and to enter such further orders and judgments consistent with this ruling as may be necessary and proper.

DONE and ORDERED at Bradenton, Manatee County, Florida, this 10th day of October, 2018.


GILBERT A. SMITH, JR., Circuit Judge

Copies to:

John R. Hightower, Esquire
jrh@jrh.law
svc.fla@jrh.law

Fred E. Moore, Esquire
Marisa J. Powers, Esquire
eservice@blalockwalters.com
fmoore@blalockwalters.com
mpowers@blalockwalters.com

Gregory P. Brown, Esquire
Ryan Leuthauser, Esquire
Gregory.brown@hwhlaw.com
Ryan.leuthauser@hwhlaw.com
Jill.kuty@hwhlaw.com
Sharon.donofrio@hwhlaw.com

J