

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

GLLH BUILDERS, LLC,

Plaintiff

v.

DR. MARIANA MORENO and JAVIER
ZAYAS,

Defendants,

Case No.: 2023-CA-05168

DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES

Defendants, DR. MARIANA MORENO and JAVIER ZAYAS, hereby file their Answer and Affirmative Defenses to the Complaint, dated June 21, 2023, as follows:

JURISDICTION, PARTIES, AND VENUE

1. Admitted for jurisdictional purposes, otherwise denied.
2. Without knowledge, and therefore denied.
3. Admitted.
4. Admitted.
5. Admitted for jurisdictional purposes, otherwise denied.
6. Admitted for jurisdictional purposes, otherwise denied.

GENERAL ALLEGATIONS

7. Without knowledge, and therefore denied.
8. The Agreement contained in **Exhibit 1** speaks for itself, otherwise denied.
9. The Agreement contained in **Exhibit 1** speaks for itself, otherwise denied.

10. Denied.
11. Denied.
12. Denied.
13. Without knowledge, and therefore denied.
14. Admitted that the Defendants notified GLLH that they were relocating to Utah, otherwise denied.

15. Denied.
16. Denied.
17. Denied.
18. Without knowledge, and therefore denied.
19. Without knowledge, and therefore denied.
20. Without knowledge, and therefore denied.

COUNT I – BREACH OF CONTRACT

21. The Defendants reallege and incorporate by reference their answers to the allegations set forth in paragraphs 1 through 20 above.

22. Admitted that this is a claim for breach of the Agreement, otherwise denied.
23. The Agreement speaks for itself, otherwise denied.
24. Denied.
25. Denied.
26. Denied.

AFFIRMATIVE DEFENSES

First Affirmative Defense – No Loss: As a separate and complete affirmative defense, the Defendants assert that Count I of the Complaint for breach of contract is barred on the basis that

the Plaintiff has not suffered any lost profits that can be proven with a reasonable degree of certainty. “[W]hen a party seeks lost future profits based upon a breach of contract or other wrong, the party must prove that the lost profits were a direct result of the defendant's actions and that the amount of the lost profits can be established with reasonable certainty.” *E.g., Forest's Men's Shop v. Schmidt*, 536 So. 2d 334, 336 (Fla. 4th DCA 1988) (citing several). While it is true that “[d]ifficulty in proving damages or uncertainty as to the amount will not prevent recovery” if the amount lost is substantial rather than nominal, “an award of lost profits cannot be based on mere speculation or conjecture.” *Id.* (emphasis added) (citing *Sampley Enterprises, Inc. v. Laurilla*, 404 So.2d 841, 842 (Fla. 5th DCA 1981); *Mori v. Matsushita Elec. Corp. of Am.*, 380 So.2d 461, 465 (Fla. 3d DCA 1980)). Specifically, the contract sum was originally \$1,698,528.00. The contract sum was based on estimates used by the Plaintiff from a model home built by the Plaintiff in **2017** (and completed in **2018**). The Plaintiff's reliance on 2017 cost estimates for a **2021** project is problematic. First, construction industry costs are continuously increasing because of inflation. Four-year-old estimates make it extremely difficult in any circumstance for GLLH to calculate with any certainty what its estimated costs would have been for the 1630 S. Orange Ave. project. Second, and most importantly, on top of normal inflation, the COVID-19 Pandemic greatly transformed the construction market and the related construction costs. COVID-19 caused significant closures and delays at both local and international factories that produce materials, such as stone, steel, lumber, and the like. As a result, the supply of construction materials dramatically decreased in the United States, and what remained became much more expensive, sometimes even tripling in price. COVID-19's disruption of the construction market has been well-documented across the United States. Here, the Plaintiff's contract sum was so grossly inaccurate based on these two facts that by May 13, 2021, the Plaintiff, when attempting to renegotiate their agreement

in light of the Defendants' anticipated move to Utah, proposed to the Defendants a contract price of \$1,874,000 – **almost \$180,000 more than the original sum contemplated by the Contract.** As a result, the Plaintiff's own communications evidence that the \$1,698,528.00 contract price was based on inaccurate and speculative numbers that did not account for either of these facts. Now, the Plaintiff is filing a lawsuit two years later to attempt to collect lost profits based on a contract sum that it knows was severely underquoted. As a result, Count I of the Complaint for breach of contract is barred on the basis that the Plaintiff has not suffered any lost profits that can be proven with a reasonable degree of certainty.

Second Affirmative Defense – Doctrine of Avoidable Consequences: As a separate and complete affirmative defense, the Defendants assert that Count I of the Complaint for breach of contract is barred under the Doctrine of Avoidable Consequences – specifically that the Plaintiff has failed to mitigate its damages to allow recovery of any speculative lost profits. “In contract cases, there is really no ‘duty to mitigate’ because the claimant ‘is not compelled to undertake any ameliorative efforts’; rather, he is merely prevented from recovering damages he ‘could have reasonably avoided.’ *Forbes v. Prime Gen. Contractors, Inc.*, 255 So. 3d 448, 452 (Fla. 2d DCA 2018) (citing *Sys. Components Corp. v. Fla. Dep't of Transp.*, 14 So.3d 967, 982 (Fla. 2009)). The doctrine of avoidable consequences does not allow a trial court to reduce damages “based on what ‘could have been avoided’ through Herculean efforts, rather it applies only where a claimant fails to undertake measures to avoid damages that are available to him without undue effort or expense.” *Id.* (citing *Sys. Components Corp.*, 14 So.3d at 982). Here, the Plaintiff is attempting to recover lost profits based on this breach of contract case when nothing ultimately prevented the Plaintiff from taking on another project and mitigating its damages that could have been reasonably avoided. As

a result, Count I of the Complaint for breach of contract is barred on the basis that the Plaintiff has failed to mitigate its damages to allow recovery of any speculative lost profits.

Third Affirmative Defense – Failure to Satisfy Requirements for Contract. As a separate and complete affirmative defense, the Defendants assert that Count I of the Complaint for breach of contract is barred because the Plaintiff never satisfied the requirements necessary in the Contract to perform. Specifically, the project was to commence “upon receipt of all necessary permits.” No permits were ever pulled for this project, and as a result the Plaintiff cannot recover lost profits based on never satisfying the conditions to begin the work in question.

RESERVATION OF RIGHTS

The Defendants reserve the right to amend or modify these defenses, and/or to raise such further and additional defenses as may be available upon the facts to be developed in discovery and under applicable substantive law.

REQUEST FOR RELIEF

WHEREFORE, the Defendants, MARIANA MORENO and JAVIER ZAYAS, respectfully request entry of final judgment against Plaintiff, an award of the costs and attorney’s fees incurred in this action, and all other relief the Court deems just and proper.

DATED: July 27, 2023,

Respectfully submitted,

BRUNDAGE LAW, P.A.

/s/ Michael P. Brundage, Esq.

MICHAEL P. BRUNDAGE, ESQ.

Florida Bar No.: 611621

Email: Mike@mpbrundagelaw.com

Email: Paulina@mpbrundagelaw.com

NICOLAOS SOULELLIS, ESQ.

Florida Bar No.: 1031737

Email: Nic@mpbrundagelaw.com

Email: Paulina@mpbrundagelaw.com

Harbour Pointe
100 Main Street, Suite 204
Safety Harbor, Florida 34695
Telephone: (727) 250-2488
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on July 27, 2023, I filed the foregoing via Florida's e-portal electronic case filing system, and as a result, a true and correct copy of the foregoing was served electronically to all registered counsel of record.

/s/ Michael P. Brundage, Esq.
MICHAEL P. BRUNDAGE, ESQ.