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

PRESTIGE LUMBER & SUPPLIES, INC., a Florida corporation,

CASE NO.: 2003 CA 008772 NC

Plaintiff,

vs.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Maryland corporation, BERMUDA ESTATES ASSOCIATES, LTD., a Florida limited partnership, PENN-FLORIDA VENTURE VII, INC., as general partner of BERMUDA ESTATES ASSOCIATES, LTD., and JENCRA, INC., a Florida corporation,

Defendants.
_____/

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff, Prestige Lumber & Supplies, Inc. ("Prestige") files this Memorandum of Law in Support of its Motion for Partial Summary Judgment as to Count III against Bermuda Estates Associates, Ltd. ("Bermuda"), Penn-Florida Venture VII, Inc. ("Penn-Florida") and Fidelity & Deposit Company of Maryland ("FDCM" or the "Surety") (collectively the "Bermuda Defendants").

I. Background

Prestige supplied lumber and materials (the "Materials") to a 220-unit apartment complex in Sarasota County, Florida (the "Project" or "Project site") owned by Bermuda. Bermuda, through its general partner Penn-Florida, contracted with Jencra, Inc. ("Jencra"), the general contractor, to construct the Project. Jencra ordered the Materials from Prestige. Jencra, however, failed to pay Prestige for all of the Materials delivered to the Project site.

After Prestige perfected its lien against the Project for the balance owed, Bermuda, by and through its general partner, Penn-Florida, as principal, and FDCM, as surety, executed a bond to transfer and secure Prestige's lien. The Sarasota County Clerk subsequently transferred Prestige's lien to the bond. Count III is an action against the transfer bond.

II. Procedural History

Prestige sued Bermuda, Penn-Florida and FDCM on the bond (Count III) and also sued Bermuda and Penn-Florida for unjust enrichment (Count IV). Bermuda and Penn-Florida filed a motion to dismiss arguing that the Complaint failed to state a claim of unjust enrichment against them, which this Court denied. The Surety then filed a motion for a more definite statement which this Court also denied. Bermuda subsequently filed a counterclaim which this Court dismissed upon Prestige's motion. Bermuda and Penn-Florida subsequently filed an amended counterclaim.

III. Summary of the Argument

This memorandum and the evidentiary materials filed herewith demonstrate that there is no genuine issue of material fact and that Prestige is entitled to summary judgment as a matter of law pursuant to Fla. R. Civ. P. 1.510 on its count against the bond because Prestige (1) supplied and delivered Materials to the Project site valued at more than $200,000 for which it has not been paid, and which were by statute presumptively incorporated into the Project, (2) perfected its Claim of Lien (which was subsequently transferred to bond by the Bermuda Defendants) and (3) the Bermuda Defendants' affirmative defenses are without any substance in law or in fact and are refuted by the evidentiary materials being filed herewith.

IV. Statement of Facts

A. Affidavit of Prestige's President, Stephen L. Rominger.

All of the following facts are taken from paragraphs 5-41 of Mr. Rominger's Affidavit, which is attached hereto as part of **COMPOSITE EXHIBIT A**:[1]

1. During 2002, Jencra, Inc. (Jencra), as general contractor, placed an order with Prestige to supply lumber and materials for a 220 unit garden style rental apartment complex located in Sarasota County, Florida on property owned in fee simple by Bermuda Estates Associates, Ltd. (Bermuda), which is more specifically described in the Claim of Lien, a true and accurate copy of which is attached as part of Composite Exhibit 9 to the Rominger Affidavit, and which is referred to as the Project.

2. Prestige gave Jencra an estimated price quote based solely upon information given by Jencra. Each of Prestige's estimated price quotes was clearly and conspicuously marked: "QUOTE PURPOSE ONLY", "MATERIAL QUANTITIES ARE ESTIMATES ONLY", "ANY ERRORS ARE SUBJECT TO CORRECTION" and "PRICES SUBJECT TO CHANGE WITHOUT NOTICE." A true and accurate copy of Prestige's June 10, 2002 quote is attached as Exhibit 1 to the Rominger Affidavit.

3. Stephen L. Rominger ("Mr. Rominger") told Craig Harris, Jencra's president, that the total price would, as was usual and customary, depend upon the total amount of materials actually ordered and delivered. Craig Harris agreed to these terms and assured Mr. Rominger that he would communicate the same to Bermuda. Craig Harris' faxed memorandum communicating these terms to Bermuda Estates is attached hereto as part of **COMPOSITE EXHIBIT F**.

4. Prestige did not agree to provide the Materials for the Project for a lump sum or under any guaranteed maximum price agreement.

5. Prestige has never entered, and would not enter, into a lump sum or guaranteed maximum price contract on a project of this magnitude because as a material supplier it cannot control the use of materials after they are delivered to the jobsite. Prestige has no control over waste caused by inefficient framers, over failure to properly store materials on site or other jobsite conditions.

6. Prestige's standard terms by which it routinely operates are reflected on Prestige's invoices. Prestige was to supply and deliver Materials to the Project site, according to its standard terms, as Jencra ordered them. The Materials were shipped and delivered to the Project site at the order of Allen Stearns, Jencra's Project Superintendent.

7. Consistent with Prestige's routine business practice for delivering materials ordered by a customer, Prestige delivered the Materials, or had the Materials delivered by other

[1]Paragraphs 1-37 herein correlate to paragraphs 5-41 in the Rominger Affidavit.

parties, to the "SHIP TO" address on each invoice attached to the Complaint, 4030 MACINTOSH ROAD, BERMUDA ESTATES, SARASOTA (the Project site). True and accurate copies of the invoices for which Prestige has not been paid are attached to the Rominger Affidavit and true and accurate copies of the invoices for which Prestige has been paid are attached as part of COMPOSITE EXHIBIT B to the Complaint (all of which are collectively referred to as the "invoices" hereafter).

8. The invoices are the standard documents used and relied upon by Prestige as part of its routine business practice to document materials ordered, shipped and delivered, to collect payment from customers and to pay third party suppliers such as other lumber mills and wholesalers. The invoices were made and kept in the regular practice and ordinary course of Prestige's regularly conducted business activity.

9. The invoices bear Prestige's standard terms, including a 1.5% monthly service charge on amounts not paid on the 12th of the month following the date of invoice, and recovery of attorney's fees in all efforts to collect amounts due. Both of these terms appear on the front of the invoice, and various other terms and limitations appear on the back of the invoices.

10. The invoices (excluding those used for issuing credits and adjustments) along with additional proof of delivery documents in some cases, bear handwriting indicating delivery and acceptance of the Materials at the Project site. Prestige accepts and relies upon such invoices and handwriting as part of its routine business practice as proof of delivery to document materials ordered, shipped and delivered. Prestige is routinely paid by its customers based upon such proof of delivery and Prestige routinely pays its consignors and wholesalers based upon such proof of delivery. It is also a routine practice and custom of the trade to accept such documents as proof of delivery of materials and to rely upon them, as Prestige did in this case, to obtain payments and to make payments.

11. The invoices were prepared at or near the time of the transaction reflected on each invoice, by a person, or from information provided by a person, with knowledge as to each such transaction, were made as a part of the regular and routine business practice of Prestige and/or were accepted and relied upon by Prestige as proof of delivery as part of Prestige's regular and routine business practice.

12. At Jencra's order, Prestige shipped and delivered to the Project site, both directly and indirectly by order to consignors and wholesalers, Materials valued at $952,220.40, less credits explained herein. To date, Prestige has been paid only $735,447.19 for the Materials delivered to the Project site. As part of its routine business practice, Prestige periodically reviewed and issued credits and adjustments to billings for the Materials. Those credits and adjustments, with the exceptions explained herein, were accounted for in the calculation of the $216,775.73 Claim of Lien amount.

13. Prestige delivered the first of the Materials to the Project site on or about June 12, 2002.

14. On or about June 24, 2002, Prestige served a Notice to Owner on Bermuda by

United States certified mail, return receipt requested, postage prepaid. A true and accurate copy of the Notice to Owner, with its United States Mail Return Receipt, is attached as part of Composite Exhibit 2 to the Rominger Affidavit.

15. Prestige's routine business practice, which was followed with respect to the Materials for which it is still owed payment and those for which it has already been paid, was as follows:

i. Jencra's order was taken by one of Prestige's employees and entered into Prestige's computer and printed on the invoices.

ii. On occasion, certain information was entered on the invoices by hand by one of Prestige's employees (or by persons at the Project site).

iii. For Materials that Prestige had locally on hand, the invoices were sent to one of Prestige's local warehouses.

iv. Drivers employed by Prestige then delivered the Materials to the Project site.

v. For Materials on hand, Prestige drivers obtained the signature of the person on the Project site who unloaded or accepted the Materials. Upon receipt of proof of delivery, Prestige billed Jencra for the Materials actually delivered to the site. When less than the total amount of Materials ordered was delivered, an appropriate credit or adjustment was made.

vi. For Materials that Prestige did not have locally on hand, the order was transmitted to lumber mills, OSB mills, reload warehouses or wholesale suppliers, whose signed bills of lading or delivery tickets were returned to Prestige after the Materials were delivered to the Project site.

vii. Upon receipt of proof of delivery for Materials that Prestige did not have locally on hand (typically bills of lading or delivery tickets) Prestige issued an invoice to Jencra. Therefore, Prestige's invoice dates are often several weeks later than the "ship/delivery" dates appearing on the bills of lading and delivery tickets from third parties.

viii. After Prestige received proof of delivery of the Materials, Prestige billed Jencra and, if the Materials had been delivered by another lumber mill or supplier, Prestige also paid the other lumber mill or supplier.

16. Prestige delivered the last of the Materials to the Project site on or about January 2, 2003.

17. The claim of lien amount of $216,775.73, less the credits and adjustments explained herein, plus the 1.5% monthly service charge, was due on March 12, 2003.

18. The Materials were delivered to the Project site and are accurately reflected on the

invoices, less credits and adjustments reflected on the invoices and herein.

19. Also attached to Composite Exhibit 3 to the Rominger Affidavit are the original affidavits of Gilberto Garcia, Alberto Diaz and Allen Stearns as well as the original affidavits of two third party carrier delivery drivers.

20. Mr. Rominger has examined the invoices attached to the affidavits referenced in the preceding paragraph and to the Complaint. The Materials reflected therein were ordered, shipped and delivered to the Project site by Prestige or on behalf of Prestige, except as explained herein. Only those invoices for Materials for which Prestige has not been paid are attached to Mr. Rominger's affidavit and to the affidavits attached thereto.

21. In each case in which the description of Materials and/or quantities of Materials differs on the invoice from the delivery tickets, Prestige has either (1) confirmed that the Materials shipped were those received (the description sometimes varied because the items were ordered from a third party and the third party's description was different, e.g., using a board foot measure instead of a lineal foot measure, or, using a different nomenclature though the Materials referred to on the invoice and delivery ticket were the same) or (2) issued an appropriate credit, except as explained herein.

22. After filing the Claim of Lien and the Complaint, Prestige discovered an additional $50.00 tax credit and a $2.52 mathematical error, which reduces the principal sum owed to Prestige from $216,775.73 to $216,723.21.

23. As part of its investigation of this lawsuit, Prestige also discovered a necessary credit of $1,150.10 for Materials which were not delivered (invoice no. 82373) which reduces the principal sum owed to Prestige from $216,723.21 to $215,573.11.

24. The errors described in the preceding two paragraphs were unintentional and represent approximately 0.13% of the total amount of Materials delivered to the Project site by Prestige. No "intentional over billing" was done by Prestige. Based upon a thorough accounting review of all of the invoices and payment history, the only errors discovered were unintentional and are mentioned herein.

25. No Materials were returned to Prestige by Jencra or Bermuda or anyone else for which an appropriate and corresponding credit or adjustment has not been made.

26. The materials that Prestige delivered to the site for which Prestige has not been paid are listed on a three-page table, a true and accurate copy of which is attached hereto at the beginning of Composite Exhibit 3 to the Rominger Affidavit as Exhibit A.3(i). That table accurately reflects that the sum of the principal amount due, $215,573.11, plus the 1.5% monthly service charge of $54,971.14 through August 12, 2004, is $270,544.25.

27. Prestige made numerous requests for payment to the owner, through Mummaw and Associates, Inc., the Owner's representative ("Mummaw").

28. Mummaw repeatedly represented to Prestige that payment would be forthcoming, and, when Mummaw requested documents and proofs of delivery, Prestige provided them.

29. Mummaw assured Prestige that Prestige's account reconciliation was at the "top of the list" and that upon receipt of the requested documents, funding would be sought from the lender.

30. However, instead of paying the outstanding invoices, Mummaw sent a Request for Sworn Statement to Prestige on or about February 17, 2003, a true and accurate copy of which is attached as Composite Exhibit 4 to the Rominger Affidavit.

31. On or about February 18, 2003, Prestige served a Sworn Statement of Account upon Mummaw by United States certified mail, return receipt requested, postage prepaid. A true and accurate copy of the Sworn Statement of Account along with the United States Mail Return Receipt showing delivery to Mummaw on February 20, 2003, is attached as Composite Exhibit 5 to the Rominger Affidavit.

32. After sending the Sworn Statement of Account, a check written by Jencra to the order of Prestige for Materials delivered to the Project site was returned for insufficient funds.[2] Accordingly, on or about March 4, 2003, Prestige served a Revised Sworn Statement of Account upon Mummaw by United States certified mail, return receipt requested, postage prepaid. A true and accurate copy of the Revised Sworn Statement of Account along with the United States Mail Return Receipt showing delivery to Mummaw on March 7, 2003, is attached as Composite Exhibit 7 to the Rominger Affidavit.

33. On or about March 21, 2003, Prestige's President met with and went over all of the outstanding invoices with Mummaw's assistant, Brendy Baker. They agreed on all of the outstanding invoices and Mummaw's assistant promised that payment would be forthcoming.

34. After Mummaw failed to pay Prestige as promised, on or about March 27, 2003, Prestige served a Notice of Non-Payment upon Bermuda by United States certified mail, return receipt requested, postage prepaid. A true and accurate copy of the Notice of Non-Payment

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[2]On or about February 3, 2003, as payment for monies owed to Prestige under the contract for Materials supplied by Prestige, Jencra, as maker, executed and delivered a written order for the payment of $58,967.00, commonly called a check, payable to the order of Prestige. A true and accurate copy of the worthless check (check number 8629) is attached as Composite Exhibit 6 to the Rominger Affidavit. Payment of the check was refused upon presentment to the drawee bank and the check was returned for insufficient funds on or about February 14, 2003, and re-deposited and then returned again on February 26, 2003. Pursuant to Florida Statute § 68.065, Prestige made written demand to Jencra on or about March 3, 2003, for payment in full of the amount of the check plus 5% of its face value, or $61,915.35. A copy of Prestige's written demand, along with proof of receipt by Jencra on March 5, 2003, as reflected by United States Return Receipt, is attached to the Complaint as part of COMPOSITE EXHIBIT G. More than thirty (30) days have passed since Prestige made its written demand to Jencra, yet Jencra has failed to comply with Florida Statute § 68.065 by paying the amount owed to Prestige in cash for tendering the worthless check. The $58,967.00 amount represented by the worthless check was included in the claim of lien amount, however, the additional 5% of the face amount of the check demanded under Florida Statute § 68.065 was not included in the claim of lien amount.

along with the United States Mail Return Receipt showing delivery to Bermuda on March 31, 2003, is attached as part of Composite Exhibit 8 to the Rominger Affidavit.

35. On or about March 27, 2003, Prestige served its Claim of Lien and Final Contractor's Affidavit upon Bermuda by United States certified mail, return receipt requested, postage prepaid. A true and accurate copy of the Claim of Lien and Final Contractor's Affidavit along with the United States Mail Return Receipt showing delivery to Bermuda on March 31, 2003, is attached as part of Composite Exhibit 9 to the Rominger Affidavit.

36. On or about March 28, 2003, within 90 days of Prestige's last delivery of Materials to the Project site, Prestige duly recorded its Claim of Lien.

37. This lawsuit was filed within one year after the last furnishing of Materials under the contract and within one year after recording the Claim of Lien.

B. Admissions of Jencra, Inc.

Jencra, as the general contractor, and the owner's agent, was responsible for ordering and accepting, and did in fact order and accept delivery of, the Materials at the Project site. Rominger Affidavit at ¶¶6, 7, 12, 15, 18, 21, 22; *see also* Bermuda/Jencra Contract at Article 3 (Jencra to furnish efficient business administration and supervision and to furnish an adequate supply of workers and materials) (attached as **COMPOSITE EXHIBIT B**). Jencra admitted that all of the Materials reflected on the invoices attached to the Complaint were not only delivered to the Project site, but were also incorporated into the Project. *See* Jencra Responses to Prestige Request for Admission Nos. 10 and 11 (attached as **COMPOSITE EXHIBIT C**).

C.
Affidavit of the Project Superintendent.

Allen Stearns, the Project Superintendent, was responsible for ordering, accepting and directing the use of rough carpentry materials (the Materials supplied by Prestige) for the Project. Stearns Affidavit at ¶¶ F, Composite Exhibit 3 to the Rominger Affidavit. Stearns personally ordered all of the Materials supplied and delivered by Prestige and, as part of Jencra's routine business practice, accepted or authorized and caused subcontractors to accept all of the Materials

supplied and delivered by Prestige to the Project. *Id.* at ¶¶ G, H. Stearns further caused the Materials supplied and delivered by Prestige to the Project to be incorporated into the Project or to be used or consumed in the Project. Stearns Affidavit at ¶ I, Composite Exhibit 3 to the Rominger Affidavit.

D.
Interrogatory Answer of Bermuda Estates Associates, Ltd. to Interrogatory No. 2.

Bermuda testified under oath that the following people signed field delivery tickets: Gilberto Garcia, Cesar Moreno, Miguel Gonzales, Juan Gonsales, Alberto Diaz, Luis Cara (should be "Garcia"), Jose Carillo, Fidel Garcia, Fidel Gonsales, John Haman, Hayward Jones, Chris Keary and Cecil Garrett. **COMPOSITE EXHIBIT D**. All of the Materials for which Prestige has not been paid were signed for at the Project site by one of the foregoing, except for Materials signed for by Allen Stearns, whose affidavit is submitted herewith.

E.
Affidavits of Gilberto Garcia and Alberto Diaz.

Gilberto Garcia was the foreman of R.L. Jones, the framing subcontractor on the Project who actually used the Materials delivered by Prestige. *See* First Affidavit of Gilberto Garcia, Composite Exhibit 3 to Rominger Affidavit. Gilberto Garcia signed for a substantial portion of the Materials and also directed Luis Garcia, Fidel Garcia, Fidel Gonsales and others to offload the Materials at the Project site. *See id.*; *see also* Second Affidavit of Gilberto Garcia, ¶D, Composite Exhibit 3 to Rominger Affidavit.

Alberto Diaz was a sub-subcontractor of R.L. Jones who signed for a portion of the Materials. *See* Affidavit of Alberto Diaz, Composite Exhibit 3 to Rominger Affidavit.

F.
Documents produced by Bermuda Estates.

In response to this Court's order granting Prestige's motion to compel production of documents, Bermuda Estates produced documents that further support Prestige's motion, including the following:[3]

1. *The Bermuda/Jencra Contract.* (Attached as **COMPOSITE EXHIBIT B**). Exhibit "C" to the Contract, the Schedule of Values, establishes that Bermuda budgeted $985,000[4] in its Guaranteed Maximum Price (GMP) contract with Jencra for rough carpentry materials, the materials provided by Prestige. *See* Schedule C, line item 0601.

2. *Letter from Douglas A. Mummaw, President, and John R. Standish, Construction Manager, Mummaw and Associates, Inc., to Craig Harris, Jencra, Inc. (July 11, 2002).* (Attached as **COMPOSITE EXHIBIT E**.) This letter also establishes that Bermuda, through its Construction Manager, Mummaw and Associates, Inc., actually budgeted $985,000.00 for rough carpentry materials, the materials provided by Prestige.

3. *Memorandum from Craig Harris, Jencra, Inc. to John Standish, Mummaw & Associates, Inc. dated July 2, 2002.* (Attached as part of **COMPOSITE EXHIBIT F**). This facsimile establishes that before approving the budgeted amount of $985,000.00 to Prestige, Bermuda had actual knowledge that the total cost for lumber and materials supplied by Prestige

[3]Bermuda Estates authenticated these documents in "Defendant, Bermuda Estates' Response to Second Request for Admission", which is being filed contemporaneously herewith along with Plaintiff's Second Request for Admissions to Bermuda Estates Associates, LTD. and the documents attached thereto.

[4]The $985,000.00 budgeted by Bermuda for rough carpentry materials exceeds the value of Materials provided by Prestige by over $30,000, and is substantially greater (over $240,000) than Bermuda's consultant's "after-the-fact qualified estimate" of $744,001.71. *Compare* **COMPOSITE EXHIBITS B, E** and **F** *with* **G**.

would depend upon "**the amount of material actually delivered to the site, regardless of pre-construction estimates**." *See id.* at ¶2 (bold emphasis supplied).

V. Argument and Authorities

Although Prestige has the initial burden of demonstrating that there is no genuine issue of any material fact, once it does that by competent evidence (as it has done here), the Bermuda Defendants must "come forward with counterevidence sufficient to reveal a genuine issue." *The Florida Bar v. Mogil*, 763 So.2d 303, 307 (Fla. 2000). "*It is not enough for the opposing party merely to assert that an issue does exist*." *Id.* (quoting *Landers v. Milton*, 370 So.2d 368, 370 (Fla. 1979) (emphasis in *Mogil*). Instead, the opposing party must offer evidence sufficient to generate a genuine issue of material fact. *Harvey Building, Inc. v. Haley*, 175 So.2d 780, 783 (Fla. 1965) (reversing Second DCA and holding that a summary judgment movant does not bear the burden of excluding every possible inference that the opposing party might have other evidence to support its case).

A.
Prestige's delivery of the Materials to the Project site raises the statutory presumption of incorporation which shifts the burden of proof to the Bermuda Defendants to prove that the Materials were not incorporated into the Project.

Under Florida law, Prestige's delivery of the Materials to the Project site constitutes "prima facie evidence of incorporation of such materials in the [Project.]" FLA. STAT. § 713.01(12). Here, delivery of the Materials is established by the affidavits of individuals (1) who ordered the Materials, (2) who shipped the Materials, (3) who signed for the Materials at the

Project site, (4) who directed other individuals to offload the Materials at the Project site[5] and (5) Bermuda's sworn interrogatory answer.[6]

Delivery is also established by the routine business practice of Prestige as explained in Mr. Rominger's affidavit. These undisputed facts raise the statutory presumption of incorporation of the Materials into the Project. FLA. STAT. § 713.01(12) ("The delivery of materials to the site of the improvement is prima facie evidence of incorporation of such materials in the improvement."). In addition, Jencra has admitted that the Materials were incorporated into the Project,[7] and, the Project superintendent has testified that the Materials were incorporated into the Project.[8]

1.
Prestige's routine business practices constitute additional evidence that the Materials were delivered to the Project site.

"Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice." FLA. STAT. § 90.406 (2003); *accord Florida East Coast Properties v. Coastal Construction Products*, 553 So.2d 705, 706 (Fla. 2d DCA 1989) (affirming portion of judgment in favor of materialman relying upon statutory presumption of incorporation and testimonial evidence regarding routine business practice of delivering materials to address indicated on invoice). By affidavit, Prestige's president (Mr. Rominger) testified that "[c]onsistent with Prestige's routine business

[5]*See* Affidavit of Stephen Rominger, Affidavits of Gilberto Garcia, Affidavit of Allen Stearns and Affidavit of Alberto Diaz, attached hereto as part of **COMPOSITE EXHIBIT A**.

[6]*See* **COMPOSITE EXHIBIT D**.

[7]*See* Jencra Responses to Prestige Request for Admission Nos. 10 and 11 (attached as **COMPOSITE EXHIBIT C**).

[8] *See* Stearns Affidavit at ¶ I, Composite Exhibit 3 to the Rominger Affidavit.

practice for delivering materials ordered by a customer, Prestige delivered the [M]aterials, or had the [M]aterials delivered by other parties, to the "SHIP TO" address on each invoice attached to the Complaint, 4030 MACINTOSH ROAD, BERMUDA ESTATES, SARASOTA (the Project site)." Rominger Affidavit at ¶ 11; *see also id.* at ¶¶15, 19 (explaining Prestige's routine business practices which were followed with respect to the Materials).

Mr. Rominger further testified that, as part of its routine business practice, Prestige accepts and relies upon such invoices as proof of delivery to document lumber and materials ordered, shipped and delivered; that it is a routine practice and custom of the trade to accept such documents as proof of delivery of materials and to rely upon them, as Prestige did in this case, to obtain payments and to make payments for the Materials; and that Prestige is routinely paid by its customers based upon such proof of delivery documents and routinely pays its consignors and wholesalers based upon the same. Rominger Affidavit at ¶ 15.

2.
Jencra's admissions, the Project Superintendent's affidavit and Bermuda's interrogatory answer constitute additional evidence that the Materials were not only delivered to the Project site, but were also incorporated into the Project.

As noted above, Jencra admitted that all of the Materials were not only delivered to the Project site, but were also incorporated into the Project. *See* Jencra Responses to Prestige Request for Admission Nos. 10 and 11, **COMPOSITE EXHIBIT C**; *see* Fla. R. Civ. P. 1.370(b) (any matter admitted is conclusively established). Bermuda, by way of sworn interrogatory answer, listed numerous persons that signed field delivery tickets. **COMPOSITE EXHIBIT D**. Included in that sworn list is the name of every person who signed a delivery ticket for the Materials for which Prestige has not been paid (except Allen Stearns, whose affidavit is submitted herewith). *Id*.

Allen Stearns, the Project Superintendent, was responsible for ordering, accepting and directing the use of rough carpentry materials (the materials supplied by Prestige) for the Project. Stearns Affidavit at ¶¶ F, Composite Exhibit 3 to the Rominger Affidavit. Stearns personally ordered all of the Materials supplied and delivered by Prestige and, as part of Jencra's routine business practice, accepted or authorized and caused subcontractors to accept all of the Materials supplied and delivered by Prestige to the Project. *Id.* at ¶¶ G, H. Stearns further caused the Materials supplied and delivered by Prestige to the Project to be incorporated into the Project or to be used or consumed in the Project. Stearns Affidavit at ¶ I, Composite Exhibit 3 to the Rominger Affidavit.

Having thus established delivery (and incorporation), the burden of proof shifts to the Bermuda Defendants (the parties attempting to defeat recovery of the unpaid purchase price) to rebut the statutory presumption of incorporation of the Materials into the Project. *See Clutter Construction Corp. v. State of Florida ex rel. Westinghouse Electric Corp.*, 139 So.2d 426, 429 (Fla. 1962) (affirming judgment in favor of materialman—public works contract). In *Clutter Construction*, the Florida Supreme Court reversed one of its former decisions that required materialmen to prove actual incorporation of the materials into the building project. *Clutter Construction*, 139 So.2d at 429.

In reversing its former decision, the Florida Supreme Court reasoned that the language then in Fla. Stat. § 255.05 (which was then substantively identical to the language now found in FLA. STAT. § 713.01(12)), required a materialman to prove only that the material was delivered to the job site. *Id.* at 428-29. The burden then shifts, according the court, to the party attempting to defeat recovery of the unpaid purchase price (in that case, the general contractor, here, the

owner and the bonding company) to demonstrate that the materials were not used in the prosecution of the work. *Clutter Construction*, 139 So.2d at 429.

Here, the Bermuda Defendants must not only overcome the statutory presumption of incorporation of the Materials, but must also overcome the sworn testimonial evidence of Allen Stearns, the Project Superintendent, employed by Jencra, the general contractor, who testified that as part of Jencra's "routine business practice" he caused "the lumber and materials supplied and delivered to the Project by Prestige to be incorporated in the Project, or to be used or consumed in the construction of the Project." Stearns Affidavit at ¶I, Composite Exhibit 3 to Rominger Affidavit. Thus, even if the Bermuda Defendants could overcome the statutory presumption of incorporation of the Materials into the Project (they cannot), they must also overcome the sworn testimonial evidence of the Project Superintendent, the man in the field in charge of the Project on a day-to-day basis. To do this, Bermuda cannot merely sit on its paper defenses to avoid summary judgment against it. *See Reflex, N.V. v. UMET Trust*, 336 So.2d 473, 474-75 (Fla. 3d DCA 1976) (affirming final summary judgment of foreclosure and holding that mere paper affirmative defenses are insufficient to forestall summary judgment—nonmovant must come forth with evidence sufficient to generate an issue of material fact to defeat a properly supported motion for summary judgment); *Wolk v. Resolution Trust Corp.*, 608 So.2d 859, 860 (Fla. 5th DCA 1992) (paper defenses are insufficient to avoid summary judgment). The Bermuda Defendants must instead now offer sufficient evidence to generate a genuine issue of material fact or summary judgment must be entered against them. *See Mogil*, 763 So.2d at 303; *Clutter Construction*, 139 So.2d at 429.

B.

Prestige is entitled to foreclose on the transfer bond because its Claim of Lien is valid.

Prestige's Claim of Lien is valid because Prestige complied with all of the requirements of Florida law to perfect its lien:

1. The amount of the contract for the improvement (the Bermuda/Jencra contract) was in excess of $13,000,000, exceeding the $2,500 trigger for lien rights under Fla. Stat. § 713.02(5), **COMPOSITE EXHIBIT B** at ¶5.2.1;

2. Jencra placed an order with Prestige to supply the Materials to the Project, Rominger Affidavit at ¶¶ 5-13;

3. Prestige delivered the first of the Materials to the Project site on or about June 12, 2002, and served Bermuda with a Notice to Owner on or about June 24, 2002, well within the 45-day period required by Fla. Stat. § 713.06(2)(a), Rominger Affidavit at ¶¶ 17-18;

4. Prestige's Notice to Owner is substantially in the form required by Fla. Stat. § 713.06(3), *see* Composite Exhibit 2 to the Rominger Affidavit;

5. After receiving a Request for Sworn Statement from Mummaw on or about February 17, 2003, Prestige served a Sworn Statement of Account on Mummaw on February 20, 2003, and a Revised Sworn Statement of Account (as a result of the worthless check written by Jencra) on Mummaw on March 7, 2003, substantially in the form required by, and within the 30-day period required by, Fla. Stat. § 713.16, *see* Rominger Affidavit at ¶¶34-37 and Composite Exhibits 4, 5 and 7 to the Rominger Affidavit;

6. Prestige delivered the last of the Materials to the Project site on or about January 2, 2003, and served its Notice of Non-Payment upon Bermuda on or about March 27, 2003, *see* Rominger Affidavit at ¶¶20, 38 and Composite Exhibit 8 to the Rominger Affidavit;

7. Prestige duly recorded its Claim of Lien on or about March 28, 2003, within 90

days after its last furnishing of Materials to the Project site as required by Fla. Stat. § 713.08(5), *compare* Rominger Affidavit ¶20 *with* ¶¶39-40; *see also* Composite Exhibit 9 to the Rominger Affidavit;

8. Prestige served its Claim of Lien and Final Contractor's Affidavit upon Bermuda before it filed its Claim of Lien and Bermuda acknowledged actual receipt of the Claim of Lien and Final Contractor's Affidavit on March 31, 2003, within the period required by Fla. Stat. § 713.08(4)(c), *see* Rominger Affidavit at ¶39;

9. Prestige's Claim of Lien is substantially in the form required by Fla. Stat. § 713.08 (2002)[9], *see* Composite Exhibit 9 to Rominger's Affidavit;

10. At Jencra's order, Prestige shipped and delivered to the Project site, both directly and indirectly by order to consignors and wholesalers, Materials valued at $952,220.40, less credits and adjustments explained herein, for which it has been paid only $735,447.19, *see* Rominger Affidavit at ¶16;

11. Prestige has established that the Materials were delivered to the Project site and is entitled to the statutory presumption of incorporation into the Project, *see id.* pp. 10-14;

12. Jencra has admitted that the Materials were delivered to and incorporated into the Project, *see* Jencra Responses to Prestige Request for Admission Nos. 10 and 11, **COMPOSITE EXHIBIT C**;

13. The Project Superintendent testified by affidavit that he caused "the lumber and materials supplied and delivered by Prestige to the Project to be incorporated in the Project, or to be used or consumed in the construction of the Project." Stearns Affidavit at ¶I, Composite Exhibit 3 to Rominger Affidavit;

[9]The new language of the notice requirement of FLA. STAT. § 713.08(3) did not become effective until after Prestige perfected its Claim of Lien on March 28, 2003. *See* FLA. LAWS CH. 177, SECTION 10 (effective date October 1, 2003).

14. After filing the Claim of Lien and the Complaint, Prestige discovered an additional $50.00 tax credit and a $2.52 mathematical error, which reduces the principal sum owed to Prestige from $216,775.73 to $216,723.21, Rominger Affidavit at ¶26;

15. As part of its investigation of this lawsuit, Prestige also discovered a necessary credit of $1,150.10 for Materials which were not delivered (invoice no. 82373) which reduces the principal sum owed to Prestige from $216,723.21 to $215,573.11, Rominger Affidavit at ¶27;

16. The errors described in the preceding paragraphs were unintentional and represent less than 0.13% of the total amount of Materials delivered to the Project by Prestige, Rominger Affidavit at ¶28;

17. No "intentional over billing" was done by Prestige, *id.*;

18. The only errors discovered were unintentional and are mentioned herein, Rominger Affidavit at ¶28;

19. No Materials were returned to Prestige by Jencra or Bermuda or anyone else for which an appropriate and corresponding credit or adjustment has not been made, Rominger Affidavit at ¶29;

20. Prestige's Claim of Lien, reduced to $215,573.11, plus a 1.5% monthly service charge since March 12, 2003, is valid;

21. Upon the Court's determination that its Claim of Lien is valid, Prestige is entitled to judgment on the transfer bond filed by Bermuda, through its general partner, Penn-Florida, as principal, with FDCM as surety, recorded on or about April 15, 2003, plus prejudgment interest, *International Community Corp. v. Overstreet Paving Co.*, 493 So.2d 25, 26 (Fla. 2d DCA 1986) (lien claimant not in privity with owner is entitled to prejudgment interest on

bond to transfer lien);

22. Prestige is entitled to its attorneys' fees and court costs pursuant to Fla. Stat. § 713.24(1)(b), Fla. Stat. § 713.29 and its agreement with Jencra; Rominger Affidavit at ¶13;

23. Prestige is entitled to the principal amount of $215,573.11, which was due on March 12, 2003, plus the 1.5% monthly service fee ($54,971.14 as of August 12, 2004) until the date judgment is rendered. *See* Rominger Affidavit at ¶¶13, 30; *see also Argonaut Insurance Co. v. May Plumbing Co.*, 474 So.2d 212 (Fla. 1985) (prejudgment interest is an element of pecuniary damages to be awarded from the date of the loss).

C.

The Bermuda Defendants' affirmative defenses are without substance in fact or in law—they are mere paper defenses insufficient to forestall the entry of summary judgment.

"While it is true that it is necessary for a plaintiff to show that affirmative defenses have no basis in fact in order to be entitled to a summary judgment, this does not mean that by the raising of purely paper issues the defendant can forestall the granting of relief to the plaintiff where the pleadings and evidentiary matters before the trial court show that the defenses are without substance in fact or in law." *Reflex v. UMET Trust*, 336 So.2d 473, 474-75 (Fla. 3d DCA 1976) (affirming grant of summary judgment to plaintiff where there was no genuine issue as to the defendant's affirmative defenses) (citations omitted). Here, the three[10] affirmative defenses

[10]Fidelity "conditionally" raises a fourth affirmative defense by alleging "that to the extent that the counterclaim of Bermuda and Penn-Florida constitutes and affirmative defense, such is adopted by Defendant Fidelity." Amended Affirmative Defenses and Counterclaim of Defendants Fidelity, Bermuda, and Penn-Florida at ¶4. Fidelity's incorporation of Bermuda and Penn-Florida's counterclaim for fraud is duplicative in that the Bermuda Defendants assert fraud as their second affirmative defense. Consequently, the deficiencies pointed out in Bermuda's second affirmative defense of fraud are likewise applicable to the fourth affirmative defense of fraud "conditionally" asserted by Fidelity. The only additional allegation in the counterclaim conditionally asserted as an affirmative defense by Fidelity is that Prestige "willfully exaggerated" its Claim of Lien or compiled its Claim of Lien with such "willful and gross negligence" as to amount to willful exaggeration. "Willfulness" under Florida Statute 713.31 (under which the counterclaim is made) requires proof of an act "done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, ignorantly or inadvertently. A willfully exaggerated amount is an amount known and

raised by the Bermuda Defendants are without substance in fact or in law.

1.
The Bermuda Defendants' first affirmative (and paper) defense, payment, has no basis in fact.

The Bermuda Defendants' first affirmative defense alleges that "before commencement of this action Defendants discharged Plaintiff's claim and each item of it by payment." Amended Affirmative Defenses and Counterclaim of Defendants Fidelity, Bermuda, and Penn-Florida at ¶1. This paper defense is not raised in good faith—it has no underlying factual basis. Prestige's claim is that it delivered Materials to the Project site with a value of $215,573.11 for which it has not been paid. That the Materials were in fact delivered and incorporated into the Project is established by affidavits, by other evidentiary materials and by the statutory presumption of incorporation. *See id.* at pp. 3-17. Thus, the Bermuda Defendants' first paper defense of payment, even if it had any basis in fact (and it does not), has been conclusively refuted by Prestige.

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intended to be in excess of that allowed by the law under the circumstances and claimed, not in ignorant good faith, but for bad reasons, motives or purposes." *Stevens v. Site Developers,* 584 So.2d 1064, 1065 (Fla. 5th DCA 1991); *see also Wal-mart Stores v. AAA Asphalt*, 677 So. 2d 93, 94 (Fla. 1st DCA 1996) ("to prove fraud, a plaintiff must establish that the defendant made a *deliberate and knowing misrepresentation* designed to cause, and actually causing detrimental reliance by the plaintiff") (reversing summary judgment under § 713.31 against owner because no intent to defraud was shown) (emphasis in original). Bermuda has failed to identify a single stick of lumber that it alleges was not "furnished for the subject Project." Moreover, Bermuda, while on the one hand baldly alleging that Prestige has engaged in "intentional overbilling", has on the other hand failed to identify with particularity a single act that Prestige allegedly did that was intentional, knowing, purposeful, or without justifiable excuse, with intent to claim an amount in excess of what it is owed. Nor has Bermuda identified a single act that Prestige allegedly did for bad reasons, motives or purposes. Furthermore, Bermuda has failed to allege any detrimental reliance. In contrast, by sworn affidavits, Prestige has demonstrated conclusively that the Materials for which it seeks payment were in fact delivered to the Project site and that the only mistakes made, which constitute approximately 0.13 % of the total value of Materials delivered by Prestige, were unintentional. *See*, *e.g.*, Rominger Affidavit at ¶28; *see also supra* pp. 10-14.

2.

The Bermuda Defendants' second affirmative (and paper) defense, fraud, is likewise without any substance in law or in fact.

The Bermuda Defendants' second affirmative defense alleges "fraud in that Plaintiff seeks recovery for materials which were not incorporated into the subject Project." Amended Affirmative Defenses and Counterclaim of Defendants Fidelity, Bermuda, and Penn-Florida at ¶2. As their apparent basis for this conclusory allegation, the Bermuda Defendants state that they "verily believe" that "Plaintiff and Jencra, Inc. have engaged in intentional overbilling to obtain monies from Defendants for materials that were not incorporated into the subject Project" and that the Defendants "employed an independent engineering company to perform independent take-off calculations . . . and said engineers concluded that the materials furnished by Plaintiff should have been in the amount of $744,001.71." *Id.*

The Bermuda Defendants' statement that they "verily believe" that Prestige has engaged in overbilling is of no consequence—courts are not concerned with "beliefs", but rather with facts, and with facts stated with particularity when it comes to allegations of fraud. *See Midway Shopping Mall v. Airtech Air Conditioning*, 253 So.2d 900, 902 (Fla. 3d DCA 1971) (affirming dismissal of owner's claim of fraudulent lien because it failed to allege fraud with sufficient particularity).[11]

[11]*See also* FLA. R. CIV. P. 1.120(b) (a claim of fraud must be plead "with such particularity as the circumstances may permit."); *U.S. ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301, 1310 (11th Cir. 2002) ("The particularity rule serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior.") (affirming dismissal of a 28-page second amended complaint because it failed to identify a single false claim, i.e., the complaint lacked sufficient particularity); *compare Savage v. Rowell Distributing Corp.*, 95 So.2d 415, 417 (Fla. 1957) (interpretations of the Federal Rules by the federal courts are persuasive in interpreting similar provisions of the Florida Rules of Civil Procedure); *with* cmt., FLA. R. CIV. P. 1.120 (Rule 1.120 is almost identical to Federal Rule 9); *cf. W.R. Townsend Contracting, Inc. v. Jensen Civil Construction, Inc.*, 728 So.2d 297, 300 (Fla. 1st DCA 1999) (courts need not accept conclusory allegations or mere legal conclusions) (citation omitted); *Clark v. Boeing Company*, 395 So.2d 1226, 1229 (Fla. 3d DCA 1981) ("Pleadings must contain ultimate facts supporting each element of the cause of action; mere conclusions are

Moreover, a "belief" is not proof or a basis for proof and is not sufficient to support the affirmative defense of fraud (or a counterclaim of fraud). *Cf. Wal-mart Stores v. AAA Asphalt*, 677 So. 2d 93, 94 (Fla. 1st DCA 1996) ("to prove fraud, a plaintiff must establish that the defendant made a *deliberate and knowing misrepresentation* designed to cause, and actually causing detrimental reliance [which Bermuda failed to allege] by the plaintiff") (reversing summary judgment under § 713.31 against owner because no intent to defraud was shown) (italic emphasis in original, underline emphasis supplied). And even if a mere "belief" constituted evidence, which it does not, *see id.*, *see also Crowder v. Wolary*, 198 So. 9, 11 (Fla. 1941) (mere belief does not establish a fact), the evidentiary materials submitted herewith, including the affidavits of Mr. Rominger, Mr. Stearns, Mr. Garcia and Mr. Diaz, Jencra's admissions and Bermuda's own sworn interrogatory answer, conclusively refute Bermuda's baseless "belief" of intentional overbilling. *See*, *e.g.*, Rominger Affidavit at ¶28 (the only mistakes made were unintentional and represent approximately 0.13% of the total amount of Materials ordered and delivered to the Project site); *see supra* pp. 12-15.

Furthermore, Bermuda's allegations regarding its "independent engineering company's" after-the-fact estimate of the materials needed for the Project are red herrings and misleading. Bermuda misstates what its "independent engineering company" ("consultant" hereafter) did and what it said. For example, Bermuda fails to mention to the Court that its "consultant's" after-the-fact estimate specifically excluded the following:

> Specifically excluded from our scope of work was estimation of prefabricated roof truss framing system, formwork materials, interior and exterior finishing lumber and cladding, all framing connectors and hardware, millwork and associated timbers to facilitate installation thereof and pool deck framing.

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insufficient.") (affirming dismissal for failure to state a claim) (citations omitted); *Doyle v. Flex*, 210 So.2d 493, 494 (Fla. 4th DCA 1968) ("Clearly mere legal conclusions in a complaint are insufficient to state a cause of action unless substantiated by allegations of ultimate fact.") (affirming dismissal for failure to state a claim) (citations omitted).

Bermuda also fails to mention to the Court that its "consultant's" after-the-fact estimate was further expressly qualified as follows in bold underlined print:

> **Please note that the quantities and materials specified within our correspondence are based on review of the construction documents submitted. Material types and quantities could fluctuate based on the framing contractor's effectiveness in materials utilization and the framing methods implemented to complete the work.**

COMPOSITE EXHIBIT G.

Contrary to Bermuda's allegations, its "consultant" clearly did not "conclude[] that the materials furnished by the Plaintiff should have been in the amount of $744,001.71." Nowhere in the "consultant's" estimate does it mention the "Plaintiff" or Prestige. Nowhere in the "consultant's" estimate does it suggest or otherwise state that the materials "furnished by Prestige should have been in" any particular amount. Nowhere in the "consultant's" estimate does it mention or suggest fraud. Nowhere in the "consultant's" estimate does it suggest or opine on the value of materials delivered to the site that Prestige has been paid for or for which it has not been paid for.

The "consultant's" estimate does, however, specifically exclude waste and other usage that would have been dependent upon the framers and other jobsite conditions outside Prestige's control (which is the very reason Prestige does not enter into lump sum or GMP contracts; it has no control over waste caused by framers, over failure to properly store materials on site or other jobsite conditions). In other words, the Bermuda Defendants' "consultant", who did not even visit the Project site, concedes that he was not on site to see what materials were used during construction, concedes that he does not know what materials were used, consumed or wasted during the framing process, concedes that he does not know the framing methods used by the framer, and, completely fails to mention what materials were spoiled during the five-month plus

Project delay during which time many of the materials stored on site and incorporated into the Project were left exposed to the Florida weather.

Finally, contrary to the Bermuda Defendants' attempts to fabricate a defense of fraud, Bermuda's own Construction Manager pre-approved a total budgeted amount of $985,000.00 to be paid for rough carpentry materials (materials to be supplied by Prestige). *See* Letter from Douglas A. Mummaw, President, and John R. Standish, Construction Manager, Mummaw and Associates, Inc., to Craig Harris, Jencra, Inc. (July 11, 2002) (**COMPOSITE EXHIBIT E**). The Bermuda Defendants' late-in-the-day suggestion that the value of materials delivered to the Project site by Prestige is $200,000 more than what could possibly be used in the Project, based upon their "consultant's" after-the-fact qualified estimate, in the face of Bermuda's own pre-approved budgetary number of $985,000.00 for the same materials, is disingenuous.

The Bermuda Defendants' claim of surprise at the amount of materials supplied is likewise disingenuous. Bermuda clearly knew (before pre-approving the budgeted amount of $985,000.00 to Prestige) that **the total cost for lumber and materials delivered by Prestige would depend upon "the amount of material actually delivered to the site, regardless of pre-construction estimates."** *See* Facsimile from to Craig Harris, Jencra, Inc. to John Standish, Mummaw & Associates, Inc. (July 2, 2002) (**COMPOSITE EXHIBIT F**) (emphasis supplied). Bermuda also clearly knew that the quote provided by Prestige was just that, a quote, which was clearly and conspicuously marked: **"QUOTE PURPOSE ONLY", "MATERIAL QUANTITIES ARE ESTIMATES ONLY", "ANY ERRORS ARE SUBJECT TO CORRECTION" and "PRICES SUBJECT TO CHANGE WITHOUT NOTICE."** *See* Exhibit 1 to the Rominger Affidavit (emphasis supplied).

Hence, the Bermuda Defendants' conclusory allegation of "fraud in that Plaintiff seeks recovery for materials which were not incorporated into the subject Project" is just another mere paper defense, insufficient as a matter of law to defeat Prestige's motion for summary judgment,[12] which demonstrates the lengths that the Bermuda Defendants are willing to go to delay payment to Prestige.

3.
The Bermuda Defendants' third affirmative (and paper) defense, estoppel, is again without any substance in law or in fact.

The Bermuda Defendants' third affirmative defense asserts that Prestige is "estopped from maintaining this action." Amended Affirmative Defenses and Counterclaim of Defendants Fidelity, Bermuda, and Penn-Florida at ¶3. As their basis for this bald legal conclusion, the Bermuda Defendants state that "the amounts for which Plaintiff seeks recovery have been identified by Prestige as "extras" for which proper approval was not received by Prestige prior to any alleged delivery to the subject Project" and that "no authorized person ordered or requested that said extra materials be delivered to the subject Project for incorporation into said Project." *Id.*

The Bermuda Defendants' statements in support of the conclusory defense are not true and are not supported by the record evidence. Each and every one of the invoices for which Prestige has not been paid that bears the marking "extra material" was ordered by Allen Stearns, the Project Superintendent. *See* Stearns Affidavit (Invoice No. 87069), First Garcia Affidavit (Invoice Nos. 81011, 81099, 81100, 84725, 88572) and Second Garcia Affidavit (Invoice No. 81307), all of which are attached as part of Composite Exhibit 3 to the Rominger Affidavit.

[12] *See Reflex*, 336 So.2d at 474-75 (mere paper affirmative defenses are insufficient to forestall summary judgment—nonmovant must come forth with evidence sufficient to generate an issue of material fact to defeat a properly supported motion for summary judgment); *Wolk*, 608 So.2d at 860 (paper defenses are insufficient to avoid summary judgment).

Allen Stearns was the Project Superintendent throughout the period during which all of the "extra" materials were ordered. *Compare id. with* Stearns Affidavit at ¶¶ E, F, Composite Exhibit 3 to the Rominger Affidavit. Stearns not only ordered the Materials that are marked as "extra" materials, but also ordered all of the Materials that Prestige supplied and delivered to the Project. *Id.* at ¶¶ G, H. Stearns clearly had the authority to order and request the "extra" materials. *Id.* at ¶¶ E-H; *see also* Bermuda/Jencra Contract at Article 3 (Jencra to furnish an adequate supply of materials) (attached as **COMPOSITE EXHIBIT B**); *see also* **COMPOSITE EXHIBIT E** (pre-approved budget of $985,000 for the materials); **COMPOSITE EXHIBIT F** (cost of lumber and materials would depend upon total amount ordered and delivered). Thus, the Bermuda Defendants' assertion that "no authorized person ordered or requested . . . [the] extra materials" is without any substance.

The Bermuda Defendants' other assertion, that "proper approval was not received by Prestige prior to any alleged delivery to the subject Project" of the extra material, is at best misleading. The "extra" materials were ordered by the Project Superintendent, the duly authorized representative of Jencra, the general contractor, who was responsible for ordering all of the materials for the Project on behalf of the owner, Bermuda. Stearns Affidavit at ¶¶ E-H, Composite Exhibit 3 to the Rominger Affidavit; Bermuda/Jencra Contract at Article 3.

Bermuda's suggestion that Prestige had to obtain approval directly from the owner before supplying the "extra" materials is disingenuous. Bermuda already argued in paragraph 6 of its Motion to Dismiss (filed on or about July 10, 2003) that "'Unjust Enrichment' brought by a supplier [Prestige], not in privity with the Owner [Bermuda], is really an action for a contract implied at law or quasi-contract, as distinguished from an action on a contract implied in fact." (emphasis supplied). The Bermuda Defendants are now taking a directly contrary position, i.e.,

that there is privity between it and Prestige or that there is some contractual basis or obligation barring Prestige from payment for materials which have been conclusively shown to have been ordered by the general contractor and delivered and incorporated into the Project. There is neither a factual basis nor a legal basis for such a position.

The construction lien laws under Chapter 713 provide the mechanism by which owners such as Bermuda are protected from parties providing goods and services to general contractors and others in direct privity with them. Those laws require specified types of notice at specific time intervals, which in this case Prestige fully complied with. *See supra* at pp. 16-19. There simply is no common law or statutory requirement that requires a supplier of lumber and materials to obtain double permission from both the general contractor and the owner before delivering materials to a project site that are ordered by the general contractor. Such a requirement would wreak havoc in the construction industry and introduce tremendous delays in the construction process. The Bermuda Defendants have no basis in fact or in law upon which to assert a defense based upon the theory of estoppel.

Moreover, even under the inapplicable theory of estoppel offered by Bermuda, Jencra, under its GMP contract with Bermuda, had authority to order materials up to the GMP budgeted number, in this instance $985,000. **COMPOSITE EXHIBIT B** at Article 3. If Jencra was able to come in at less than the budgeted number, Bermuda would receive the first $275,000 and then share the cost savings (75% Bermuda, 25% Jencra) thereafter. *Id*. at Article 9. In this case, the amount of Materials ordered by Jencra and delivered to the Project site was less than the amount budgeted by Bermuda.

Prestige has thus conclusively established that it is entitled to final summary judgment as to Count III and that the Bermuda Defendants' affirmative defenses are without any substance in

fact or in law. Accordingly, the Bermuda Defendants must now "come forward with counterevidence sufficient to reveal a genuine issue", or summary judgment must be entered in favor of Prestige. *Mogil*, 763 So.2d at 307. It will not be enough for the Bermuda Defendants to simply assert that an issue does not exist, *id.*, instead, they must offer evidence sufficient to generate a genuine issue of material fact. *Harvey Building*, 175 So.2d at 783 (reversing Fla. 2d DCA and holding that a summary judgment movant does not bear the burden of excluding every possible inference that the opposing party might have other evidence to support its case).

VI. Conclusion

The Florida Supreme Court long ago held that Florida courts are to construe the Mechanic's Lien statute liberally "so as to afford laborers and materialmen the greatest protection compatible with justice and equity." *Hendry Lumber Co. v. Bryant*, 138 Fla. 485, 189 So. 710 (Fla. 1939). Here, Prestige, a mechanic's lien claimant, has gone to great expense and effort to conclusively demonstrate the nonexistence of genuine issues of material fact about its right to payment of the principal sum of $215,573.11, plus a 1.5% monthly service charge of $54,971.14 (as of August 12, 2004), plus attorney's fees, which have been substantially increased as a result of the dilatory tactics engaged in and meritless defenses raised by the Bermuda Defendants. For these reasons, and in the interest of justice and equity, Prestige asks the Court to enter final summary judgment in its favor against the Bermuda Defendants on Count III against the transfer bond.