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IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO.: 3D23-0441

SOUTHPOINT SHORE
MANAGEMENT, LLC,

Appellant,

vs.

HOMEXPO MIAMI CORP.,

Appellee.
_____/

APPELLEE, HOMEXPO MIAMI CORP.'S, ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Factual and Procedural Background[1]

HomExpo is in the business of selling flooring materials, including marble. In December, 2017, the principal of Appellant, along with Olga Cotofana ("Cotofana") – an interior designer hired by Appellant – visited HomExpo's showroom interested in purchasing marble for a high end condominium unit located in South Beach. (R. 2134-2136, 2508-2510). After looking at various samples, Appellant decided on white Greek Thassos AAA marble and an order was placed for HomExpo to obtain the marble from a quarry in Greece. (R. 2511).

Paragraph No. 6 of the Terms and Conditions of the contract for the marble states that:

> 6. The Buyer hereby acknowledges that marble, wood and granite are natural occurring substances and are subject to substantial variations in color, shading, width, dimensions, texture, shape, finish, consistency and durability. **It is understood and agreed that HomExpo Miami shall not be held responsible for any and all damages and/or claims resulting from natural variations to the products** or modifications during installation as a result thereof…Marble products due to their brittle and porous nature, are subject to chipping and splitting and HomExpo Miami shall not be responsible for such events.

[1] The record is referenced by page, e.g., R. 15 refers to page 15 of the record on appeal.

(R. 721) (emphasis added).

While Appellant claims in this case that it ordered select marble from HomExpo – which means the best pieces are hand selected from the quarry at a higher cost (R. 2512-2513) – the invoice for the marble does not state "select", yet, was paid by Appellant. (R. 2517-2518). Paragraph No. 10 of the Terms and Conditions of the contract states:

> 10. This is the entire Agreement between the Parties covering everything agreed upon or understood in the transaction. These are no promises, conditions, representations, warranties, guarantees, understandings, interpretations or terms of any kind as conditions or inducements to the execution hereby were in effect between the parties other than as herein set forth. Any agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of the charge modification, discharge or abandonment is sought.

(R. 721).

The first shipment of marble arrived in the U.S. in the summer of 2018, however, Appellant was not ready to have the marble moved to the condominium unit due to construction delays. (R. 2519-2520). The marble stayed in a warehouse – at HomExpo's expense – for seven months. (R. 2520). No one on behalf of Appellant went to the warehouse to inspect the marble. (R. 2520-2521). When the marble was finally moved to the condominium unit, Appellant did not have anyone present to inspect the marble. (R. 2523-2524). Three or four months after the marble was

delivered to the unit, Cotofana complained about marks on some of the marble. In response, HomExpo then purchased additional marble at its cost. (R. 2525-2526).

The new shipment of marble arrived in February 2019. (R. 2526-2527) The marble went into HomExpo's warehouse and was delivered to the unit three months later. (R. 2527-2528).

The Terms and Conditions of HomExpo's contract with Appellant provide in Paragraph No. 7 as to inspection of the marble that:

> 7. It is agreed that the Buyer or its agent has been afforded the opportunity to inspect the goods prior to installation and following such inspection shall be deemed to have accepted the goods in their totality and the natural variations contained therein.

(R. 721).

Appellant did not have anyone go to HomExpo's warehouse to inspect the second shipment of marble. (R. 2529). Appellant did not have a representative at the condominium unit when the second marble shipment was unloaded to inspect the marble. (R. 2530, 2538). According to Cotofana, it was not her job to be on-site for an inspection where the marble had to be unloaded between 10 p.m. and 6 a.m. due to restrictions of the building. (R. 2347-2348, 2530).

HomExpo hired licensed contractors to perform work at the condominium unit. (R. 2542-2543). Deposit money which HomExpo was paid for installation of marble was instead allocated to work performed in other parts of the unit, including the bathrooms, because of delays in construction which did not allow marble installation to proceed. (R. 2548-2549). Due to difficulties at the job site with other workers and money being owed to it, HomExpo eventually ceased work on the project. (R. 2542).

HomExpo's owner inspected the unit in the summer of 2020 after it received a pre-suit demand notice and discovered that portions of the marble of which Appellant claims were not the type and quality it ordered were installed in the unit. (R. 2549-2551).

In August, 2020, Appellant filed its lawsuit against HomExpo and Siran, Inc. (R. 33-99). HomExpo and Siran filed an Answer and subsequently a Counterclaim seeking payment for monies owed for work performed in the condominium unit. (R. 106-119, 156-163). Both parties moved for summary judgment. The Court granted summary judgment for Appellant on the Counterclaim based on HomExpo and Siran not being licensed contractors (although the work was performed by licensed contractors). Summary judgment was granted in favor of HomExpo and Siran on Count II of the Complaint (Fraudulent Inducement). The parties submitted proposed orders

on the summary judgment motions. The trial court entered Appellant's form of Order which did not contain the finding that summary judgment was granted on Count II of the Complaint. As of the day of trial, the trial court had not entered an Order granting partial summary judgment in favor of HomExpo and Siran.

The morning of the first day of trial, Appellant sent revised jury instructions which removed all of HomExpo and Siran's Affirmative Defenses based on its view that the grant of summary judgment in its favor included all of the Affirmative Defenses. Then in the evening after the first day of trial, Appellant filed a Motion in Limine to preclude HomExpo and Siran from arguing any contractual Affirmative Defenses – even though the contract terms were referred to in opening statements and in witness questioning during the first day of trial. (R. 1770-1773).

In response to the Motion in Limine, HomExpo filed a Motion to Vacate the summary judgment order due to confusion the order was causing as it was HomExpo and Siran's position that summary judgment was not granted on all Affirmative Defenses as Appellant now claimed in its Motion in Limine. (R. 1774-1779).

The morning of the second day of trial, the trial court heard argument on the Motion to Vacate and clarified it was not the trial court's intention in

granting summary judgment on the Counterclaim to also grant summary judgment on the Affirmative Defenses. In particular, the trial court made clear that since Appellant sued on the contract by which it purchased the marble, HomExpo and Siran could argue the terms of the contract during the trial. (R. 2294-2295).

Appellant elected not to proceed on its claims against Siran when submitting the case to the jury. (R. 2689). The jury returned a verdict in favor of HomExpo on all claims. (R. 1895-1898). Appellant filed its Motion for New Trial on February 24, 2023 (R. 1866-1886) which was denied on November 14, 2023. (R. 3097-3098).

SUMMARY OF THE ARGUMENT

The trial court acted within its discretion to clarify the summary judgment order as to HomExpo's Affirmative Defenses and its ability to argue Terms and Conditions of the contract with respect to the marble purchased by Appellant. As well, Appellant invited the error of which it complains by removing all of HomExpo's Affirmative Defenses from the jury instructions and filing a Motion in Limine the night after the first day of trial which sought to exclude HomExpo from arguing any of its Defenses or the terms of very contract upon which Appellant sued. Hence, the trial court also properly denied Appellant's Motion in Limine and request for a curative instruction.

The trial court was also correct to deny Appellant's Motion for New Trial. The jury's verdict was not against the manifest weight of the evidence. Appellant did not offer evidence needed to support certain of its claims. Additionally, the jury was not required to blindly accept the testimony of Appellant's expert witness merely because HomExpo did not have an expert testify. The jury properly considered the deficiencies in the expert's opinions in rendering the verdict.

STANDARD OF REVIEW

"The standard of review for the denial of a motion for new trial is whether or not the trial court abused its discretion." *See Miami-Dade Cty. v. Asad*, 78 So. 3d 660, 664 (Fla. 3d DCA 2012)(quoting *Southwin, Inc. v. Verde,* 806 So. 2d 586, 587 (Fla. 3d DCA 2002)).

ARGUMENT

I. The Trial Court Properly Denied Appellant's Motion in Limine and Request for Curative Instruction

A. Clarification of the Summary Judgment Ruling During Trial

In taking issue with the trial court clarifying the ruling on Appellant's summary judgment motion the morning of the second day of trial, Appellant ignores the impetus for HomExpo's Motion to Vacate which resulted in the clarification.[2] At 9:30 p.m. after the first day of trial, Appellant filed a Motion in Limine seeking to preclude HomExpo from arguing as defenses any terms of the contract upon which Appellant sued. (R. 1770-1773). This was after HomExpo's counsel argued those very terms in opening statement – even using an enlargement of the Terms and Conditions of the contract – to which Appellant did not object. (R. 2120-2124).

Additionally, the morning of the first day of trial, Appellant's counsel took the parties' proposed Jury Instructions which had been pending for over eight (8) months, revised the instructions and removed every Affirmative Defense alleged in HomExpo's pleading, taking the position that summary judgment was granted on all Affirmative Defenses. (R. 2280).

[2] Since Appellant did not submit its claims against Siran to the jury, Siran is not a party to this appeal. Accordingly, HomExpo is the only Appellee referred to in this Brief.

Understandably, HomExpo took issue with that position, and due to confusion that existed as HomExpo's proposed summary judgment order had not yet been entered as of the time of trial (summary judgment was granted for HomExpo on Count II for Fraudulent Inducement), HomExpo sought to vacate the summary judgment order entered in favor of Appellant as not being that what the trial court actually granted. (R. 1777).

It is therefore ironic that Appellant suggests the trial court considering HomExpo's Motion the second morning of trial presented a due process issue. Appellant intended to argue its Motion in Limine the second morning of trial, and expected HomExpo's counsel to be prepared to address the Motion in Limine filed at 9:30 p.m. the night before. Further, HomExpo's Motion to Vacate was drafted in Response to the Motion in Limine, thus there cannot be a due process issue where HomExpo raised arguments in opposition to a Motion filed by Appellant.[3]

The second morning of trial, the Court addressed the Motion to Vacate and made clear it did not intend to grant summary judgment on all of

[3] As stated in ¶ 8 of the Motion to Vacate: "Plaintiff now claims that Defendants cannot raise any defenses to the claims directed to whether the marble supplied was the type ordered, even the Order entered did not grant summary judgment on any of the Counts of the Complaint directed specifically to the marble." (R. 1774-1775).

HomExpo's Affirmative Defenses. Most importantly, the trial court noted that Appellant had sued on the contract, thus HomExpo had the right to defend against that claim by arguing terms of the contract:

> THE COURT: My order was not intended to basically say to the defendant you have no defenses to a contract because you entered into the contract when you were not licensed. **The question that this jury is going to have to answer is did your client get the marble that they purchased, that they contracted for, and if they -- and by the way, all the facts and circumstances that surround that, I think, are fair game, including when the marble was ordered, how the marble was stored, when the marble was picked up, and everything else that happened to this marble. That, to me, is fair game.**
>
> There is no way I'm excluding any of that, because to me, if I did that, then really the only question would be damages, and that was never my intention. So if I entered that order, I'm telling you
>
> I will modify that order to say that you are allowed to assert what -- you are allowed to present to this jury all the facts and circumstances surrounding this marble, when it was ordered, when it was stored, when it was picked up, what it is. All of that, to me, is fair game.

(R. 2285-2286).

Notably, Appellant's counsel repeatedly indicated he had no issue with the trial court allowing the terms of the contract and circumstances surrounding the marble storage and delivery – which went to the terms of the contract – to be argued to the jury:

MR. MAMONE: We're not moving to exclude any of that. That's not what we asked, Your Honor.

MR. GORDON: They are.

MR. MAMONE: **Your Honor, no, we only asked for a curative instruction** because, Your Honor, the McKnowley (phonetic) case is right here, and it says that's the statute, Your Honor. That's the Third DCA saying an unlicensed contractor is prevented from enforcing that…

THE COURT: And I'm telling you, because it's not a final order, I have the right to change any order that is not a final order, and I'm telling you that, to the extent that this order precludes the defendant from litigating the issue, all the facts and circumstances surrounding when this marble was ordered, when the marble was delivered, how the marble was stored, how the marble was picked up, what the marble looked like --

MR. GORDON: Installed.

THE COURT: -- and how the marble --

MR. MAMONE: And we're saying that's fine.

THE COURT: -- and how the marble was installed, because your witness just got up on the witness stand yesterday and was talking about the underlayment not being properly done. But he gets to come in and say, for example, well, wait a minute, we -- and I don't know this to be your case, but we installed 900 square feet of the marble; you never complained about any of that.

MR. MAMONE: We have no problem with that, yeah.

THE COURT: We installed all of that, and you didn't have any issue with that. Yeah, you complained about the underlayment, but you know something?· Maybe he can come in and say that the underlayment was installed properly, there was no issues with the underlayment.

MR. MAMONE: And I'm 100 percent in agreement. I have no problem with that, Your Honor, but complete

vacature of the order, it was not the proper thing to ask.

(R. 2286-2287) (emphasis added).

The trial court also explained it was not vacating the summary judgment Order in its entirety – only clarifying the summary judgment ruling:

THE COURT: I didn't say, I didn't say -- I said to the extent -- and **I'm not intending to vacate my order in its totality, but I am prepared to amend that order to say that I believe that defenses survive, and defenses that correlate to the circumstances surrounding the installation, the purchase and storage of the marble.**

MR. MAMONE: <u>And we're okay with that</u>…

THE COURT: You sat here, your --
MR. MAMONE: -- contest it.
THE COURT: -- client, your witness sat here for about, what, two hours, whatever it was, and she testified about everything associated with this marble.

MR. MAMONE:· Yes.

THE COURT: So how can he not get up there in cross examination and point out, and I think that's where he started, and point out well, let's go to your invoices. And then something tells me he's going to go to the contract. The contract required this, and the contract required that. How would I possibly not allow that?

MR. MAMONE: <u>We have no problem with them saying they complied with it</u>. We have no problem with them arguing that they complied with it. You wanted this marble. You guys say that you didn't get this marble; we say that you did get this marble. That's what I'm saying. We have no problem with them doing that.

<u>What I had an issue with is that at later than</u>

the eleventh hour, motion to vacate the entire thing.
Now, I know there's preservation of the record, but I mean, that wasn't -- I don't agree with that, yeah.

THE COURT: I mean, I'm not vacating the entire thing, but I'm clarifying it that I'm allowing the defenses. And by the way, I think the defenses where you say you have no problem with them arguing that they got the marble that they did, I think that's the equivalent to saying we complied with the contract and we complied with the terms of the contract, and here's how we complied with the terms of the contract.

MR. MAMONE: Fair enough, Your Honor.

THE COURT: I don't think that's any different than the defenses that they are raising. They're just being more specific. They're just not saying oh, you got the marble that you wanted. They're basically saying you entered into a contract; we gave you what the contract required. This is how we did that. These are our defenses…

(R. 2288, 2293-2295) (emphasis added).

The excerpts from the hearing on the Motion to Vacate cited above show that a) Appellant's counsel agreed that HomExpo could argue it complied with the contract as to marble which included arguing the terms of the contract, and b) what Appellant took issue with was HomExpo attempting to vacate the entirety of the summary judgment order, which the trial court made clear it was not going to do, as the trial court only clarified the ruling

as it related to HomExpo's Defenses and its ability to argue terms of the contract.[4]

Despite the trial court clarifying its summary judgment ruling, and Appellant consenting to terms of the contract being an item which HomExpo could argue and utilize during trial, Appellant argues on appeal that the trial court granting summary judgment on HomExpo's Counterclaim due to a finding that HomExpo acted as an unlicensed contractor for installation work in the condominium unit meant HomExpo could not maintain any defenses. *See* p. 16 of Initial Brief. Appellant exaggerates the ruling on summary judgment. Any finding by the trial court on the issue of unlicensed contractor did not extend to HomExpo merely selling the marble, and Appellant offered no legal authority to argue that a company must be a licensed contractor to sell flooring materials.

Appellant's reliance upon Section 489.128, Florida Statutes for this

[4] Appellant's position that it could rely upon only some of the terms of the contract in pursuing its claim and not allow the jury to consider all terms of the contract violates the most basic rule of contract construction that "contracts should be interpreted to give effect to all provisions." *See Herrington v. Certain Underwriters*, 342 So. 3d 767, 769 (Fla. 4th DCA 2022)(quoting *City of Homestead v. Johnson,* 760 So. 2d 80, 84 (Fla. 2000)(citing *Sugar Cane Growers Coop. of Fla., Inc. v. Pinnock,* 735 So. 2d 530, 535 (Fla. 4th DCA 1999)). The contract with the terms HomExpo argued during trial was an exhibit which the jury considered in rendering its verdict.

proposition is misplaced. As noted by the Florida Supreme Court in *Earth Trades, Inc. v. T & G Corp.*, 108 So. 3d 580, 585 (Fla. 2013), "[i]n the title of the 2003 session law amending section 489.128, the Legislature stated that its intent was to 'clarify[] that the prohibition on enforcement of construction contracts extends only to enforcement by the unlicensed contractor.' Ch.2003-257, at 1290, Laws of Fla". The Fifth District in *Brock v. Garner Window & Door Sales, Inc.*, 187 So. 3d 294, 296 (Fla. 5th DCA 2016), concluded as to the availability of a statute of limitations defense to a claim against an unlicensed contractor that:

> *Section 489.128 precludes an unlicensed contractor from enforcing a contract.* ***It does not preclude an unlicensed contractor from defending against an action to enforce a contract by the owner****…Here, Appellee is not attempting to enforce the contract. Nothing in section 489.128 or Earth Trades, Inc., precludes a defendant in this circumstance from asserting statutory defenses such as the statute of limitations.*

Id. at 296 (emphasis added).

Appellant incorrectly relies on this Court's opinion in *John Hancock-Gannon Joint Venture II v. McNully*, 800 So. 2d 294 (Fla. 3d DCA 2001) because in that case this Court found that an unlicensed contractor could not enforce his contract. HomExpo did not seek to enforce its contract after summary judgment was granted on its Counterclaim. The contract that is the basis of that which Appellant sought to exclude with its Motion in Limine

was only for the sale of marble. Again, Appellant offered no legal authority that the mere selling of flooring materials requires a license. The portions of the contract upon which HomExpo relied during trial had nothing to do with installation work. Therefore, neither the summary judgment ruling nor Section 489.128 precluded HomExpo from arguing the Terms and Conditions of the contract or any Affirmative Defenses related to the sale of the marble.

B. Appellant Invited the Error of Which it Complains as to Clarification of the Summary Judgment Ruling

By filing the Motion in Limine the evening of the first day of trial, Appellant invited the error of which it now complains as to the trial court clarifying its summary judgment ruling.

As stated in the Motion in Limine:

> 3. However, as this Court is well aware, in its Order granting Plaintiff's Motion for Summary Judgment on Defendant's Counterclaims and Affirmative Defenses [D.E. #143], this Court previously determined that Defendants were unlicensed contractors at the time they entered into a contract with Plaintiff to perform this work. And thus, Defendants cannot rely upon Defendant's contract with Plaintiff (which is set forth in the Invoices)…
>
> 5. Accordingly, Plaintiff respectfully moves in limine to exclude Defendants from asserting any defenses based on their contractual terms with Southpoint, and respectfully requests a curative instruction instructing the jury that it cannot rely upon any such references that were made during Defendant's opening statements.

(R. 1771-1772).[5]

"A party cannot successfully complain about an error for which he or she is responsible or of rulings that he or she has invited the trial court to make." *Hernandez v. Gonzalez*, 124 So. 3d 988, 993 (Fla. 4th DCA 2013)(citing *Gupton v. Village Key & Saw Shop,* 656 So. 2d 475, 478 (Fla.1995)). *See also Bryan v. Bryan*, 930 So. 2d 693 (Fla. 3d DCA 2006)("'[U]nder the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal.'")(quoting *Goodwin v. State,* 751 So. 2d 537, 552 n. 8 (Fla. 1999)).

Appellant sought a ruling from the trial court on whether the grant of summary judgment precluded HomExpo from arguing terms of the contract upon which Appellant sued, and sought a curative instruction for reference to the contract terms argued by HomExpo's counsel during opening statement. Despite that Appellant obtained a ruling to which it largely consented, Appellant requests that ruling be undone because Appellant does not like the ruling after it lost at trial. The invited error doctrine precludes that which Appellant seeks.

[5] Appellant's failure to seek a curative instruction for matters addressed in opening statement at the time the statements were made should be construed as a waiver of the grounds of the curative instruction requested the morning of the second day of trial.

C. Since the Jury Did Not Find That Appellant Met its Burden to Prove its Claims, the Jury Did Not Consider HomExpo's Defenses

The jury instructions which Appellant did not have substantive objections to during the charge conference (and thus waived any objection to those instructions, or any objection it made was sustained and is not the basis of challenge here) (R. 2691-2717), provide that (using as an example the instruction for the Breach of Implied Covenant of Good Faith and Fair Dealing claim):

> If you find by the greater weight of the evidence that one or more of these elements has not been proved by Southpoint, then your verdict should be in favor of HomExpo on this claim.
>
> **If, however, the greater weight of the evidence does support Southpoint's claim** for Breach of the Implied Covenant of Good Faith and Fair Dealing against HomExpo, **then you shall consider the defenses raised by HomExpo**.

(R. 1844) (emphasis added).

The Verdict Form shows the jury found that all of Appellant's claims were not proved by the greater weight of the evidence. (R. 1895-1898). Thus, the jury never reached the point of having to consider HomExpo's Defenses which Appellant claims were improperly permitted to be raised during trial. Consequently, Appellant's argument that the defenses swayed the jury's determination is inaccurate.

An additional flaw of Appellant's argument is that the Affirmative Defenses contained in the jury instructions were not defenses based on the contract as Appellant claims.

The Waiver Defense states that: "HomExpo claim that Southpoint had the option not to accept delivery and install the marble that it received, and subsequently changed its position by giving up that right when it accepted and installed the marble." (R. 145).

The Failure to Mitigate Defense states that: "Southpoint reasonably could have avoided certain damage, and failed to reduce or minimize its damage, by choosing to install marble that Southpoint's claims it rejected." (R. 143).

The Unclean Hands Defense states that: "HomExpo claims that Southpoint failed to timely inform them of its claims prior to installing the marble and relied upon the fact that Southpoint would not have installed the marble if it had been rejected resulting in harm to HomExpo." (R. 144-145).

The Unjust Enrichment Defense (the epitome of a defense that is not contractual) states that: "HomExpo also claims that it would be unfair for Southpoint to keep the marble without paying for it." (R. 145).

Appellant goes onto to claim that the trial court's clarification was somehow inconsistent with the summary judgment ruling. On its face this is

illogical for if Appellant were correct, clarification which deviates in any way from a summary judgment ruling is inconsistent and therefore erroneous. Clarifying the summary judgment order – which is an interlocutory order that may be reconsidered at any time, even after trial – does not constitute a separate ruling. *See AC Holdings 2006, Inc. v. McCarty*, 985 So. 2d 1123, 1125 (Fla. 3d DCA 2008)("An order granting summary judgment is an interlocutory order, and a trial court has inherent authority to reconsider and modify its interlocutory orders."); *Benzrent 1, LLC v. Wilmington Sav. Fund Society, FSB*, 273 So. 3d 107, 110 (Fla. 3d DCA 2019)("[A] court always has jurisdiction during the progress of a case to set aside or modify an interlocutory order before final judgment.")(quoting *Dawkins, Inc. v. Huff*, 836 So. 2d 1062, 1065 (Fla. 5th DCA 2003)).

The trial court stated it was amending the summary judgment order, which was within its jurisdiction. (R. 2288). Moreover, merely because Appellant does not agree with the trial court's clarification does not make it an inconsistent ruling.

II. The Jury's Verdict is Not Against the Manifest Weight of the Evidence, thus the Trial Court Properly Denied the Motion for New Trial

Appellant's Motion for New Trial requested the trial court reweigh the evidence which is not within the province of the trial court to do on a Motion

for New Trial. "For a motion for new trial based on manifest weight of the evidence, the trial court's role is to assess the totality of the evidence presented at trial and intervene only when that evidence is manifestly weighted to the movant's side." *Valenty v. Saraiva*, 292 So. 3d 50, 54 (Fla. 2d DCA 2020). "The role of the trial judge is not to substitute his or her own verdict for that of the jury, but to avoid what, in the judge's trained and experienced judgment, is an unjust verdict." *Graham Companies v. Amado*, 305 So. 3d 572, 578 (Fla. 3d DCA 2020)(quoting *50 State Sec. Service, Inc. v. Giangrandi*, 132 So. 3d 1128, 1133 (Fla. 3d DCA 2014)). "Where…the evidence presented at trial is in conflict, it is also well settled that it is within the jury's province to resolve that conflict, and the trial court may not act as a seventh juror with a 'veto' power to decide that the verdict is against the manifest weight of the evidence." *Miami-Dade Cty. v. Davis*, 307 So. 3d 883, 890 (Fla. 3d DCA 2020). "A motion for new trial should not be granted unless no reasonable jury could have reached the verdict rendered." *Tenny v. Allen*, 858 So. 2d 1192, 1195 (Fla. 5th DCA 2003(citing *Wilson v. The Krystal Co.,* 844 So. 2d 827 (Fla. 5th DCA 2003)).

Appellant's position that the evidence completely supported its claims and no other ruling from the jury could have come but for a win in its favor requires ignoring the evidence presented at trial. Appellant disregards that

the invoice for the marble at issue does not state that "select" marble was ordered, which the jury was permitted to consider as to whether Appellant received the correct type of marble. Cotofana, testifying as Appellant's corporate representative, conceded the lack of "select" being stated in the invoice. (R. 2330). Further, Cotofana acknowledged receipt of the invoice, that Appellant did not cancel the order because the invoice did not state "select" marble and that Appellant paid the invoice. (R. 2330-2332). Also, Cotofana testified that she nor anyone else on behalf of Appellant was present to inspect the marble when it was delivered. (R. 2348-2350). The lack of inspection is fundamental to the failure of Appellant's claim as to the marble based on Paragraph No. 7 of the contract which provides that:

> 7. It is agreed that the Buyer or its agent has been afforded the opportunity to inspect the goods prior to installation and following such inspection shall be deemed to have accepted the goods in their totality and the natural variations contained therein.

(R. 721). Appellant did not deny it had the opportunity to inspect the marble, and its failure to do so means under Paragraph No. 7 that Appellant accepted the marble with any natural variations.

Further, Appellant installed 920 sq. ft. of the marble in the condominium unit which it claims was not the correct type of marble. (R. 2360, 2486). Certainly the jury could consider that fact in rendering its verdict

where Appellant complained about quality of marble, but chose to use the marble anyway.

As well, Appellant sought as damages every dollar it paid HomExpo even though it installed 920 sq. ft of marble and had additional marble in a warehouse. (R. 2480, 2731). Further, installation work was performed in the bathrooms which included materials and fixtures, and Appellant offered no evidence of that work being defective and did not offer any dollar figure as damages claimed for such work. The jury could and properly did consider these facts as to the legitimacy of Appellant seeking every dollar it paid HomExpo as damages.

Appellant goes on to imply that merely because its expert testified that in his opinion the marble was not of the quality he deems to be AAA Thassos and had variations (veining or shading), the jury had no choice but to blindly accept this testimony. The jury was free to reject or accept the expert's opinion. *See Basel v. McFarland & Sons, Inc.*, 815 So. 2d 687, 697 (Fla. 1994)("a jury is not required to accept even uncontroverted opinion evidence from an expert."); *Walls v. State*, 641 So. 2d 381, 390 (Fla. 1995)("[E]xpert opinion testimony [is] not necessarily binding even if uncontroverted."). Not to mention that Cotofana also admitted that marble has natural variations. (R. 2319).

Appellant further claims that the trial court failed to consider "certain crucial evidence, such as the sole expert witness's testimony and the expert's report, when ruling on Appellant's motion for new trial." *See* p. 26 of Initial Brief. No so. Appellant ignores the gaps in its expert, Howard Grundland's, testimony brought out during cross-examination regarding the marble by which his testimony was rebutted, a number of which were raised in HomExpo's Response to the Motion for New Trial:

- Marble which was in storage for seven months due to delays in construction can be damaged in storage including by humidity and water. (R. 2468-2471);[6]

- Mr. Grundland was not given any invoices for the marble for purposes of his opinion which show the type of marble that was ordered. (R. 2474);

- He did not know if the marble was chipped while being stacked in or moved around the condominium unit by the installers (R. 2477-2478);

- When he did his inspection, construction was not complete and buffing or polishing marble to improve its appearance is not typically done until after construction is completed (R. 2478);

- He did not know if chipping in the marble was present when it was shipped from the manufacturer in Greece or if chipping occurred during delivery. He also admitted chipping can occur during installation. (R. 2479);

[6] During her testimony, Appellant's corporate representative confirmed the construction delays as the cause of the marble being in storage for seven months. (R. 2345).

- He did not go to the warehouse where Appellant had additional marble stored, for which it sought to recover, to inspect any of that marble. (R. 2480);[7]

- Mr. Grundland acknowledged that people can differ on what qualifies as "select" marble and it is a subjective determination. (R. 2480);

- Marble pieces that were not within what he deemed an acceptable variation of the 30x60 dimensions for the marble could be and were cut for use for smaller pieces, such as around the staircase. (R. 2485);

- Despite veining or shading in some of the marble which he claimed to be evidence of a defect, 920 sq. ft. of that marble was installed in the unit. (R. 2486);

- Appellant installed marble in the unit which he opined was not AAA quality. (R. 2486-2487); and

- His report did not state the amount of marble installed which he determined met his quality standard, and the amount of marble that did not meet his quality standard. (R. 2489-2490).

Mr. Grundland's opinion as to items such as natural variation of marble and responsibility for chipping had to be considered by the jury in conjunction with Paragraph No. 6 of the Terms and Conditions of the contract which states that:

[7] The lack of evidence from Mr. Grundland as to the quality of marble in the warehouse which was not installed in the unit particularly cuts against the argument that the jury's verdict was against the manifest weight of the evidence. There was a lack of evidence that a significant portion of marble for which Appellant sought damage was not of the quality ordered, and no evidence was offered by Mr. Grundland as to the condition of that marble because he never went to the warehouse to inspect the marble.

> 6. The Buyer hereby acknowledges that marble, wood and granite are natural occurring substances and are subject to substantial variations in color, shading, width, dimensions, texture, shape, finish, consistency and durability. It is understood and agreed that HomExpo Miami shall not be held responsible for any and all damages and/or claims resulting from natural variations to the products or modifications during installation as a result thereof…Marble products due to their brittle and porous nature, are subject to chipping and splitting and HomExpo Miami shall not be responsible for such events.

(R. 721). Appellant's acknowledgment in Paragraph No. 6 that a) marble has natural variations, b) HomExpo is not liable for damages due to natural variations of the marble, and c) chipping can occur in the marble for which HomExpo is not responsible, undermined Mr. Grundland's opinions.

A similar situation with a claim of unrebutted expert testimony was addressed in *Ring Power Corp. v. Rosier*, 67 So. 3d 1115 (Fla. 1st DCA 2011) where the First District reversed the granting of a motion for new trial based on manifest weight of the evidence with what was claimed to be unrebutted expert testimony:

> *Here, the order granting a new trial focused on the 'unrebutted' testimony of Rosier's expert that Ring Power did not competently inspect the loader in accordance with industry standards because the inspector was unable to say how long the brake system would work after the inspection.* ***The record does not support the trial court's finding that the expert's testimony on this issue was unrebutted; rather, the record reflects that the issue of whether Ring Power competently inspected the loader was highly controverted at trial****…*

> *Moreover, other circumstantial evidence was presented to support each party's position regarding the competency of the inspection, including conflicting testimony as to whether the brake pads were replaced after the accident and conflicting testimony as to whether there were problems with the loader's brake system after the inspection and before Rosier's accident.* ***These conflicts in the evidence were for the jury to weigh and resolve in determining whether Ring Power breached its duty under the CSA.*** *Accordingly, the trial court abused its discretion in granting a new trial on the basis that the verdict was contrary to the manifest weight of the evidence.*

Id. at 1118-1119 (emphasis added).

Appellant further contends that in denying the Motion for New Trial the trial court "made no findings on the witnesses' testimonies and their credibility." *See* p. 26 of Initial Brief. A trial court is to consider the credibility of witnesses when ruling on a motion for new trial. *See Hashmi-Alikhan v. Staples*, 241 So. 3d 264, 267 (Fla. 5th DCA 2018). However, ["a] trial court may not invade the province of the jury by reweighing the credibility of witnesses because the jury determines when 'the truth is out there'". *See Allstate Ins. Co. v. Hinchey*, 701 So. 2d 1263, 1265-1266 (Fla. 3d DCA 1997). There is no requirement when considering a Motion for New Trial that findings be made as to the credibility of witnesses because that would be tantamount to reweighing credibility which is not permitted. Nonetheless, Appellant failed to offer any substantive evidence in its Motion for New Trial

that credibility of the witnesses other than Mr. Grundland, if considered, should result in a new trial.

Regarding Appellant's Negligence claim, that addressed soundproofing of the floor of the living room which received a code violation from the City of Miami Beach because the membrane was punctured. The evidence showed that the violation issued on Wednesday, July 24, 2020 was cleared by the City on the following Monday, July 29, 2020. (R. 2392-2394). The violation existed for five days – two of which were over the weekend. (R. 2395). Appellant did not offer any evidence of the amount of money it claims to have spent to address the soundproofing issue. No contractor testified as to any work performed. No invoices were offered in evidence of such work. The jury's verdict as to the Negligence claim can hardly be against the manifest weight of the evidence when there was essentially no evidence offered to support this claim.

CONCLUSION

The trial court properly exercised its jurisdiction to clarify the summary judgment order as to HomExpo's Affirmative Defenses and thus correctly denied Appellant's Motion in Limine and its request for a curative instruction. In addressing HomExpo's Motion to Vacate and the Motion in Limine, Appellant repeatedly consented to HomExpo being able to argue the Terms

and Conditions of the contract as well as the circumstances surrounding the order, storage and delivery of the marble. Moreover, by attempting to preclude HomExpo from arguing such evidence to the jury, Appellant invited the error of which it complains thus precluding the relief it seeks in this appeal.

The jury's verdict was not against the manifest weight of the evidence. Aside from the jury not being required to accept Appellant's expert testimony without question, his opinions contained numerous glaring omissions as to the marble at issue.

Accordingly, this Court should affirm the jury verdict in favor of HomExpo and the denial of Appellant's Motion for New Trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this 5th day of July, 2024 via Florida's e-filing portal to: Tyler Mamone, Esq., Mamone Villalon, Miami Tower, 100 S.E. 2nd St., Suite 2000, Miami, FL 33131.

/s/ Jason Gordon
Jason Gordon, Esq.

CERTIFICATE OF COMPLIANCE FOR COMPUTER GENERATED BRIEFS

I HEREBY CERTIFY that the foregoing brief has been submitted in Arial 14 point font in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure and in compliance with the word/page limitations of Rule 9.210(a)(2)(B).

/s/ Jason Gordon
Jason Gordon