IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

RV SALES OF BROWARD, INC. CASE NO. CACE 21-009885 (09)

Plaintiffs,

vs.

595 ANNEX, LLC.,

Defendant.
_____/

PLAINTIFF, RV SALES OF BROWARD, INC.'S, MOTION FOR NEW TRIAL

COMES NOW Plaintiff, RV SALES OF BROWARD, INC. (hereinafter the "Plaintiff"), by and through the undersigned counsel and, pursuant to Rule 1.530, Fla. R. Civ. Pro., files this Motion for New Trial and in support thereof avers the following:

I. ***Introduction and Background Facts***

a. Overview of Trial and Verdict

The instant matter arises out of a Complaint filed by the Plaintiff for *inter alia*, (i) negligence; (ii) breach of lease (breach of the covenant of quiet enjoyment); (iii) constructive eviction; and (iv) unjust enrichment. After several years of litigation, and prior to trial, Plaintiff filed its Motion for Sanctions due to Spoliation of Discovery and requested that the trial court provide the jury with an adverse inference jury instruction. The trial court denied the Plaintiff's Motion and subsequent Motion for Reconsideration on the same. Additionally, the Plaintiff filed a Motion in Limine to preclude the Defendant from arguing that it was not liable for any damages due to Plaintiff's prior breach. Again, the trial court denied Plaintiff's Motion and Motion for Reconsideration on the same.

During the trial jury in the instant matter which occurred between June 12 and June 21, 2023[1], the trial court also precluded the Plaintiff from entering specific emails as evidence in its' case in chief. After the close of the Plaintiff's case in chief, the Defendant, 595 ANNEX, LLC (hereinafter "595") orally argued a Motion for Directed Verdict as to all allegations brought against it by the Plaintiff, including, *inter alia*, the claim for damages due to "lost profits". The Court denied Defendant's Motion for Directed Verdict and reserved ruling *only* upon the "lost profits" issue. Thereafter, at the close of the Defendant's case in chief, Plaintiff moved for a directed verdict as to Defendant's affirmative defenses of "prior breach". The Court denied Plaintiff's Motion for Directed Verdict. The trial court also, over objection from the Plaintiff, utilized Defendant's version of the jury instructions. Plaintiff specifically objected to the Defendant's proposed jury instructions regarding the definition of "gross negligence" as well as Plaintiff's allegations of Constructive Eviction and Unjust Enrichment.

Moreover, Plaintiff specifically objected to the verbiage in various areas of the Defendant's proposed verdict form, including, *inter alia*, the language regarding Plaintiff's counts for Unjust Enrichment and Breach of Contract. The Court decided to utilize the Defendant's proposed verdict forms and then subsequently relinquished the case to the jury for deliberation. During deliberations, the jurors submitted a question about the verdict form regarding the language in the *Unjust Enrichment* portion of the Verdict Form. The Court, having already articulated the directions to the jury, again instructed the jury to follow the form accordingly. After deliberation, the jury returned the following verdict:

a. No liability on the part of the Defendant for Gross Negligence;
b. Defendant was Grossly Negligent in Breaching the Contract and the jury awarded $557,728 to Plaintiff;
c. Defendant was Unjustly Enriched and the jury awarded $210,000 to the Plaintiff; and

[1] Trial did not occur in the instant matter on either June 16 or June 19, 2023, due to closure of the Court and/or unavailability of the presiding judge.

d. Defendant constructively evicted the Plaintiff and the jury awarded $1,870,000 to the Plaintiff.

Subsequently the parties renewed their various Motions for Directed Verdict. Defendant stated that, while it was re-asserting the arguments it set forth in its various Motions for Summary Judgment, argued that the verdict form the jury was "inconsistent" with the verdict form accepted by the court – the same form drafted by the Defendant. The Defendant also articulated its *ore tenus* Motion for a New Trial, which was denied by the Court. Plaintiff argued that it tried to rectify the issue prior to the case going to the jury, but was precluded from doing so and that the Court accepted the Defendant's version of the verdict form. The Court directed all parties to re-appear in court the following morning to argue and discuss the very narrow issue regarding the inconsistencies of the verdict *vis a vis*, Plaintiff's causes of action for Breach of Contract and Unjust Enrichment (the subject matter of Defendant's Renewed Motion for Directed Verdict).

However, the following morning the Court, *sua sponte*, commented that the Plaintiff's claims for Breach of Contract and Constructive Eviction (a claim which was never brought up by the court following the verdict) seem to be "one and the same" and that it was considering a directed verdict on three counts now: Breach of Contract, Unjust Enrichment, and Constructive Eviction. Defendant remarked that this was the argument it was making "all along" and that a directed verdict would thus be appropriate. Plaintiff, in turn, argued that Breach of Contract and Constructive Eviction are separate causes of action and that it would be inappropriate for the Court, at this juncture. Plaintiff additionally argued that such a determination should have been made earlier in litigation (i.e. on a Motion for Summary Judgment and/or Motion to Dismiss). Nonetheless, the Court *sua sponte* entered a Judgment Notwithstanding the Verdict ("JNOV") and stripped the Plaintiff of $2,080,000 which the jury *clearly intended* to award thereto. Plaintiff intends to supplement and amend this motion with specific references from portions of the trial

transcript, once they have been transcribed, certified by the court reporter, and are available for review.

Plaintiff's Motion for New Trial timely follows. *See* Rule 1.530(b), Fla. R. Civ. P. ("A motion for new trial or rehearing shall be served not later than 15 days after the return of the verdict in a jury action …"). Plaintiff requests that this Court grant its Motion for New Trial as several errors of law that individually, and cumulatively, deprived Plaintiff of its right to a fair trial and ultimately the validity of the jury verdict.

II. Memorandum of Law

Plaintiff is entitled to a new trial due to reversible errors of law that individually, and cumulatively, deprived it of a fair trial and ultimately affected the validity of the jury verdict. A motion for new trial may be based on any ground that raises an issue affecting the validity of a jury verdict. *See* Fla. R. Civ. P. 1.530; *see also Bolton v. Bolton*, 787 So. 2d 237, 238-39 (Fla. 2d DCA 2001). The remedial purpose of a new trial "derives in part from the equitable principle that neither a wronged litigant nor society itself should be without a means to remedy a palpable miscarriage of justice." *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 356 (Fla. 1995) (internal citations omitted). While a trial court is afforded broad discretion in determining the propriety of a new trial, "the closer an issue comes to being purely legal in nature, the less discretion a trial court enjoys in ruling on a new trial motion." *Tri-Pack Mack, Inc. v. Hartshorn*, 644 So. 2d 118, 119 (Fla. 2d DCA 1994) (quoting *Office Depot, Inc. v. Miller*, 584 So. 2d 587, 589 (Fla. 4th DCA 1991). Thus, a trial court confronted with a motion for new trial premised upon errors of law "need only ask [itself] if there was error and if so whether the error was substantially prejudicial." *Krolick v. Monroe ex rel. Monroe*, 909 So. 2d 910, 914 (Fla. 2d DCA 2005) (explaining that trial courts are not given the full benefit of abuse of discretion review on appeal when the reason for granting a new trial involves questions of law). Therefore, where a trial court "concludes that reversible

error has been committed, the judge *is obliged* to grant a new trial." *Id.* (emphasis added). Six issues of law that constitute reversible error, deprived Plaintiff of a fair trial and ultimately affected the validity of the jury verdict.

a. Plaintiff's Motion for Sanctions due to Spoliation of Evidence

First, the Court committed reversible error in denying Plaintiff's Motion for Sanctions due to Spoliation of Evidence and Plaintiff's Motion for Reconsideration of the same. On or about March 7, 2023, Plaintiff filed its Motion for Sanctions due to Defendant's Spoliation of Material Evidence. In its Motion, Plaintiff argued that the subject property it was renting was all but destroyed by a fire and that, while Defendant's experts were able to inspect the subject property, the Plaintiff's rebuttal expert, Steve Hebert, was precluded from doing so as the Defendant had already demolished the property. In its argument(s) for spoliation, Plaintiff asserted that it provided the Defendant with a preservation letter (a copy of which is attached hereto as **Exhibit "A"** and by this reference incorporated herein) and in turn, Defendant provided an insufficient "notice" that it was going to demolish the property. A true and correct copy of Defendant's "notice" is attached hereto as **Exhibit "B"** and by this reference incorporated herein. Specifically, Defendant's "notice" failed to assert any date certain as to when the subject material evidence would be destroyed. It is axiomatic that Defendant, at all material times hereto, knew that the electrical components and electrical wiring of the subject property were material evidence in the instant litigation, and that Plaintiff was arguing the foregoing was negligently maintained as part of its cause of action for negligence. This material evidence was, at all times material hereto, in the Defendant's custody and control.

It is well settled in Florida that cases in which evidence has been destroyed, either inadvertently or intentionally, are discovery violations involving the application of Florida Rule of Civil Procedure 1.380. *See Fed. Ins. Co. v. Allister Mfg. Co.*, 622 So. 2d 1348 (Fla. 4th DCA

1993). When a party has intentionally interfered with the adverse party's access to critical evidence, "a wide range of sanctions is available to the trial court under Florida Rule of Civil Procedure 1.380(b)(2)." *Pub. Health Tr. of Dade Cnty. V. Valcin*, 507 So. 2d 596, 599 (Fla. 1987). *See also Adamson v. R.J. Reynolds Tobacco Co.*, 325 So. 3d 887 (Fla. Dist. Ct. App. 2021. The sanctions listed in Fla. R. Civ. P. 1.380(b)(2), as applied to spoliators, *inter alia*, include a court order establishing certain facts as claimed by the non-spoliating party, forbidding the spoliator from supporting or opposing designated claims or defenses, prohibiting the spoliator from introducing designated matters in evidence, striking the spoliator's pleadings, entering dismissal or default judgment against the spoliator, finding the spoliator in contempt, and/or awarding costs and attorneys' fees caused by the spoliation to the non-spoliating party. Additionally, courts have held that "an adverse inference may arise in any situation where potentially self-damaging evidence is in the possession of a party and that party either loses or destroys the evidence." *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 391 (Fla. 2015), citing *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 781 (Fla. 4th DCA 2006) (quoting *Martino v. Wal-Mart Stores, Inc.*, 835 So. 2d 1251, 1257 (Fla. 4th DCA 2003), *approved*, 908 So. 2d 342); *see also Nationwide Lift Trucks, Inc. v. Smith*, 832 So. 2d 824, 826 (Fla. 4th DCA 2002) (stating that "[c]ases in which evidence has been destroyed, either inadvertently or intentionally, are discovery violations" that may be subject to sanctions).

In order to obtain sanctions for spoliation of evidence, a party must show that "(1) the evidence existed at one time, (2) the spoliator had a duty to preserve the evidence, and (3) the evidence [is] crucial to the opposing party being able to prove its prima facie case or defense." *Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So. 3d 389, 392 (Fla. 2d DCA 2012). Moreover, "[b]ecause a duty to preserve evidence does not exist at common law, the duty must originate

either in a contract, a statute, or a discovery request." *Gayer v. Fine Line Const. & Elec., Inc.*, 970 So. 2d 424, 426 (Fla. 4th DCA 2007) (citation omitted).

Here, it is abundantly clear that the Plaintiff advised the Defendant to preserve the subject evidence (i.e. electrical wiring of the building). *See* **Exhibit "A".** However, at no time since the beginning of litigation in the instant matter did the Defendant notify the Plaintiff that it was intending, commencing or otherwise definitively planning on demolishing the subject property (including the material evidence – i.e. the electrical components and wiring) on any *date certain*. Instead, on August 29, 2022, Defendant advised the Plaintiff, in *very general terms*, that the subject proper would, at some *unspecified point in time*, need to be demolished pursuant to a notice from the Town of Davie – a notice received by the Defendant nearly *eight (8) months prior* to the August 29, 2022 email. A true and correct copy of the Notice from the Town of Davie is attached hereto as **Exhibit "C"** and by this reference incorporated herein. Plaintiff did not receive any further communication from the Defendant regarding the date, time or whether the demolition of the material evidence (i.e. electrical components and wiring) was *actually going to occur*. The very general "notice" could have been taken to mean that the property was going to be destroyed the next day or in a year. Instead of providing an actual date for demolition, Defendant simply demolished the subject property (including the electrical components and wiring) and precluded the Plaintiff's expert from physically inspecting the property including the electrical wiring and components, which materially prejudiced the Plaintiff in the instant matter. As such, Plaintiff filed its Motion for Sanctions due to the Defendant's Spoliation of Material Evidence.

On or about April 28, 2023, this Court heard arguments from the parties on Plaintiff's Motion for Sanctions due to Spoliation of Material Evidence and denied Plaintiff's Motion. In so holding, this Court, in essence, determined that Defendant's August 29, 2022 notice of demolition was sufficient to preclude any determination of spoliation. *See* transcript of hearing on Plaintiff's

Motion for Spoliation dated April 26, 2023 at 35: 14-25, a copy of which is attached hereto as **Exhibit "D"** and by this reference incorporated herein. However, a date uncertain is simply not sufficient notice. Additionally, this Court impermissibly took issue with Plaintiff finding the Plaintiff waited to inspect the subject property and by doing so, waived its rights to spoliation. IN rehearing, the Court went so far as to say that it was on the fence on the spoliation issue, but considered the Plaintiff's personality, which is not evidence, in determining that she waived her right to inspect the property, creating a duty to inspect on the non-spoliating party that does not exist anywhere at law.

As discussed *supra*, in order to determine whether a party has spoliated evidence, the Court is obliged to answer *only three (3) questions*: (1) whether the evidence existed at one time, (2) whether the spoliator had a duty to preserve the evidence, and (3) whether the evidence was critical to an opposing party being able to prove its prima facie case or a defense. *See Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 781 (Fla. 4th DCA 2006). Thus, the Court must determine the duties placed upon the parties to determine whether spoliation occurred in this case.

It is well settled in Florida that a duty to preserve evidence can arise from actual or constructive notice to preserve material evidence. *See e.g. St. Mary's Hospital, Inc. v. Brinson*, 685 So. 2d 33 (Fla. 4th DCA 1996); *see also, Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088 (Fla. 4th DCA 2001). Actual notice arises through "a contract, a statute, or a discovery request." *Gayer v. Fine Line Const. & Elec., Inc.*, 970 So. 2d 424, 426 (Fla. 4th DCA 2007). Constructive notice arises when any material, product, or device in a party's possession is foreseeably necessary to some future litigation. *Hagopian*, 788 So. 2d at 1090. Here, undeniably the Defendant had both actual and constructive notice that the electrical components and wiring on the subject property were pivotal evidence in Plaintiff's case in chief. As such, it is axiomatic

that the Defendant had a duty to preserve the evidence, which Defendant ultimately and willfully destroyed.

None of the foregoing three (3) questions, however, contemplate a duty or timeframe to inspect the material evidence by the non-spoliating party. Instead, courts are required to weigh whether the spoliating party destroyed evidence in bad faith as a factor in determining whether sanctions may be appropriate for the spoliation of evidence. *See Landry v. Charlotte Motor Cars, LLC*, 226 So. 3d 1053, 1058 (Fla. 2d DCA 2017) (finding that when there is spoliation of evidence, "the appropriate sanction varies according to [(1)] the willfulness or bad faith, if any, of the party who lost the evidence, [(2)] the extent of the prejudice suffered by the other party, and [(3)] what is required to cure the prejudice.") (internal quotations omitted). As such, with regard to the threshold issue of whether the Defendant spoliated evidence, **it is irrelevant to determine whether the Plaintiff had sufficient time to inspect the evidence or whether the Plaintiff was on notice of the evidence's destruction.** The foregoing is relevant *only* in determining whether Defendant destroyed the evidence willfully or in bad faith. *Id.* at 1058.

However, in its April 26, 2023 ruling, this Court articulated that:

> The spoliation situation is – this is a pretty peculiar case. Okay. [The Plaintiff] had lots and lots of time. You were on notice about that but then you put that on notice. Well, that's lost time to retain an expert, have your expert evaluate the evidence, inspect and so forth. Your client was there. You chose not to do it until it was too late. Therefore, your Motion for Spoliation is denied.

See **Exhibit "D"** at 35: 14-25. However, this ruling fails to engage the proper analysis for spoliation of evidence and uses a finding related to the willfulness and bad faith of the spoliating party to improperly support its denial of Plaintiff's spoliation motion. A jury instruction for an adverse inference would have *clearly* been supported by the facts in this case and would have, accordingly, shifted the burden of proof to the Defendant as a sanction for the destruction of

material evidence. Plaintiff was unfairly and impermissibly prejudiced by this Court's error in denying the Motion for Spoliation as an adverse inference to the jury. Defendant's spoliation of the material evidence and resultant inability of Plaintiff's expert to inspect the material evidence precluded the Plaintiff's rebuttal expert from being able to determine the cause of the fire which destroyed the property. The imposition of a sanction, specifically an adverse inference instruction, would have removed some of the prejudice suffered by the Plaintiff and provided the necessary foundation to *properly* proceed with the trial in the instant matter. Based upon the foregoing and the Court's denial of Plaintiff's Motion for Spoliation, the Court should issue a new trial in the instant matter.

b. The Preclusion of Certain Items of Plaintiff's Evidence

During trial in the instant matter, the Plaintiff attempted to lay the foundation and introduce into evidence, and an exhibit, *inter alia*, an email between it and Norka Rodriguez, a representative of the Defendant. *See* Correspondence between Norka Rodriguez and Gigi Stetler, attached hereto as **Exhibit "E"**. The email concerned which party (i.e. Plaintiff or Defendant) was required to purchase certain insurances (i.e. flood v. property) for the subject property, and extremely salient issue in the instant matter. The Court sustained Defendant's objection to the entry of the email both during the cross-examination of Norka Rodriguez and the re-direct of Gigi Stetler, the only two individuals involved in the communication, based on Fla. Stat. §90.403. The Court improperly found that e-mail was "more prejudicial than probative". The email clearly identifies that RV Sales was only to pay for the flood insurance on the property and that, because of the foregoing, coupled with the prior communications between Gigi Stetler and Norka Rodriguez, Defendant was responsible for the "property insurance", the exact issue asserted as one of Defendant's affirmative defenses. In contrast, the e-mail, while prejudicial, presents no *undue* prejudice, i.e. prejudice that goes "beyond the inherent prejudice associated with any relevant evidence," as Defendant's

corporate representative authored and received the e-mails presented in this exhibit and would have been presented with the opportunity to contextualize the e-mails if she felt they were in anyway misrepresented. *Martinez v. State,* 265 So. 3d 704, 705 (Fla. 4th DCA 2019) (holding that all "relevant evidence is inherently prejudicial… So [i]n order for relevant, probative evidence to be deemed unfairly prejudicial, it must go beyond the inherent prejudice associated with any relevant evidence.") (internal quotations excluded).

Along the same lines, based on Fla. Stat. §90.403, the Court excluded the Defendant's mortgage, which clearly outlines the requirements of insurance as well as the requirement for any property insurance proceeds to be used to restore the subject property. This goes to two of the central issues at trial: 1) whether Defendant was required to rebuild the subject property/ whether Defendant breached its duty to rebuild the subject property; and 2) the party obligations regarding insurance (i.e. Defendant's affirmative defense). *See* ¶¶ 2, 3, and 10 of the Defendant's Mortgage, attached hereto as **Exhibit "F"**. Once again, while the mortgage may be prejudicial, the mortgage does not present any undue prejudice to the Defendant and, as such, the Court improperly excluded the same from evidence. *See Martinez*, 265 So. 3d at 705; *see also, Valentine v. State,* 307 So. 3d 726, 735 (Fla. 4th DCA 2020).

c. Plaintiff's Motion in Limine to Preclude Testimony of "Prior Breach"

A hotly litigated topic in the instant matter is whether the Plaintiff breached the contract prior to the Defendant's alleged breach, thereby absolving the Defendant of any liability to the Plaintiff. *See* ¶93 of Defendant's Answers and Affirmative Defenses ("Plaintiff did not comply with all terms and conditions of the Lease/Contract by failing to obtain Property Insurance on the building in the amount of $500,00 and therefore Plaintiff's recovery is barred in its entirety and/or diminished accordingly). In both 2020 and 2021 (Counterclaim in the instant matter), Defendant filed a lawsuit against the Plaintiff for a Breach of Contract and Eviction. As such, Defendant was

required, under Florida law, to assert any cause of action it may have against the Plaintiff, including, *inter alia*, the foregoing affirmative defense in one (1) of the foregoing (2) actions. However, the Defendant failed to raise its claim regarding "prior breach" and thus waived its right to assert the same as an affirmative defense in the instant matter pursuant to the Doctrine of Res Judicata.

The doctrine of *res judicata* prohibits a party from asserting related claims in multiple lawsuits, and instead requires that all such claims be brought *in one action*. In describing the rationale underlying *res judicata* principles, the Eleventh Circuit has stated: "[t]he Supreme Court has explained that following 'a full and fair opportunity to litigation, *res judicata* protects a party's adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *O'Connor v. PCA Family Health Plan, Inc.*, 200 F. 3d 1349, 1355 (11th Cir. 2000) (*quoting Montana v. United States*, 440 U.S. 147, 153-54 (1979)). The doctrine of *res judicata* thus precludes claims in a subsequent proceeding in which a party actually raised *or could have raised* in a prior suit when (1) there is a final judgment on the merits in a prior suit; (2) the decision in the prior suit is rendered by a court of competent jurisdiction; (3) the parties in both suits are identical; and (4) both suits involve the same cause of action. *See Id.* at 1355 (citing *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 (11th Cir. 2990)); *see also Leahy v. Batmasian*, 960 So. 2d 14, 17 (Fla. 4th DCA 2007) ("[a] judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, *but as to every other matter which might with propriety have been litigated and determined in that action.*") (emphasis added); *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1187 (11th Cir. 2003) ("[i]mportantly, this bar pertains not only to claims that were raised in the

prior action, but also to claim s that *could have been raised previously*) (emphasis added); *Dalbon v. Women's Specialty Retailing Group*, 674 So. 2d 709 (1996 Fla. App. LEXIS 4676) ("res judicata or claim preclusions, bars the filing of claims which were raised or *could have been raised* in an earlier proceeding); *Liberty Transp., LLC v. Banyan Air Servs., LLC*, 982 So. 2d 1231, 1232 (Fla. 4th DCA 2008) ("[i]f the elements of *res judicata* are satisfied, [then] claims, *defenses*, and compulsory counterclaims are all barred in a subsequent action.").

Additionally, on or about August 25, 2015, the Parties in the instant lawsuit entered into a commercial lease for the rental of the property located at 3300 Burris Road, Davie, FL. A true and correct copy of the lease (the "Lease") is attached hereto as **Exhibit "G"** and by this reference incorporated herein. A cursory review of the Lease indicates that the Lease commenced on August 25, 2015 and terminated thirty six months thereafter. *See* ¶ 2 of the Lease. It is also axiomatic that the Plaintiff renewed the Lease pursuant to ¶ 2(A)(4) of the Lease (Defendant brought a counter-claim against the Plaintiff in the instant matter for eviction). Paragraph 2(A)(4) of the Lease provides, in pertinent part:

> **First Renewal Option**: At the end of the Term, *should Tenant be fully compliant with its obligations under this lease, Tenant shall have the option of renewing the lease for an additional 60 months* ("First Option Term"), and the monthly rent will then increase by 1.5% semi-annually. (Emphasis added).

Clearly, the Defendant determined that, as of August, 2018, Plaintiff was "fully compliant with its obligations" when it allowed the Plaintiff to renew the Lease. Due to the foregoing, Defendant not only waived its right to raise the defense of "prior breach" but then subsequently ratified the fact that Plaintiff was "fully compliant" by virtue of allowing Plaintiff to renew the Lease pursuant to the express and unambiguous terms of the Lease's foregoing provision. Here, Defendant asserts that Plaintiff violated the Lease, because it never provided proper insurance, ostensibly from the commencement of the Lease. However, the Defendant also allowed the Plaintiff to renew the

Lease, which clearly provides that the Plaintiff must have been in full compliance with the terms and conditions of the Lease. As such, Defendant has waived its right to assert the defense the Plaintiff committed a prior breach and that it therefore has been obviated from having to comply with the terms and conditions of the Lease.

Of important note is the "Stipulation and Waiver" that the Parties entered into after the 2020 litigation was terminated by a settlement agreement. This Stipulation, a copy of which is attached hereto as **Exhibit "H**", and by this reference incorporated herein, provides, in pertinent part:

> [t]hat by entering into this Stipulation for Settlement *all parties specifically, intend to extinguish* ***any and all claims against the other***. This Stipulation shall act as a *Mutual Release* by *all parties* and their respective assigns, heirs, officers and directors *of any and all claims that any party may have against the other known or unknown from the beginning of the world until date of signing* of this Stipulation by the parties.

Here, the Court not only *denied* Plaintiff's Motion in Limine but then allowed the Defendant to assert that a prior breach had occurred. Not only are the Court's rulings inconsistent, they are patently erroneous given the fact that the Court read the foregoing to the jury prior to deliberations. It is axiomatic that the "prior breach" Defendant claims occurred was precluded from being raised by the Defendant given the foregoing Stipulation. However, the Court alarmingly allowed the jury to hear the foregoing portion of the Stipulation but then denied Plaintiff's Motion in Limine which was ultimately prejudicial to the Plaintiff. The Court erred by: (a) reading the foregoing to the jury, (b) allowing the jury to hear the defense that Plaintiff committed a prior breach; and (c) denying Plaintiff's Motion in Limine to preclude such language pursuant to the foregoing. This sequence of events was not only an inconsistent ruling by the Court but was also in contravention of the Stipulation agreed to and executed by both parties. As such, Plaintiff is entitled to a new trial due to the foregoing.

d. The Charge Conference Regarding the Jury Instructions and Verdict Form and Entry of the Jury Instructions and Verdict Form

On or about June 15, 2023, at 8:19 a.m., Plaintiff received an email from the Defendant including Defendant's *proposed* jury instructions in the instant matter. A true and correct copy of the email from counsel for the Defendant is attached hereto as **Exhibit "I"** and by this reference incorporated herein. Likewise, a true and correct copy of the Defendant's *proposed* jury instructions and verdict form is attached hereto as **Composite Exhibit "J"** and by this reference incorporated herein. On June 15, Defendant was calling certain witnesses to testify in the instant matter, including, *inter alia*, its Expert Fire Investigator, Mike Hill and Expert Electrical Engineer, Ed Brill. After receiving Defendant's *proposed* jury instructions and verdict forms at 8:19 a.m., the Court inquired as to the status of the same. Plaintiff argued that, upon its cursory review of Defendant's proposed Jury Instructions and Verdict Forms, it had several objections that would need to be argued before the Court. Plaintiff also inquired if it could submit competing Jury Instructions and a competing Verdict Form. The Court articulated it wanted one (1) form and that the parties needed to discuss and come to an agreement before the end of the day. The Court also commented that Plaintiff has three (3) attorneys who could review the document during the direct and cross-examination of the Defendant's foregoing witnesses. Pursuant to the Court's directive, the parties did speak but were unable to reach an agreement and, on June 15, 2023, the Court held a charge conference regarding the jury instructions and verdict forms. Plaintiff made the following arguments during the charge conference: (i) the jury instructions for certain claims and terms including, without limitation, unjust enrichment, gross negligence and constructive eviction were not appropriate and that a special jury instruction would be needed. The Court entered the Defendant's version of the jury instructions but reserved on the issue of constructive eviction and unjust enrichment. The Court provided Defendant with an opportunity to draft another version to

provide to the Plaintiff, by Saturday, June 17, 2023. Given the inaccuracies in the Defendant's version, Plaintiff took extra time to ensure that the instructions for each of the foregoing were accurate and provided a copy to the Defendant on June 18, 2023. *See* **Exhibit "K".** Ultimately, after argument, the Court utilized the Defendant's proposed version, over the objection of the Plaintiff.

The proposed jury instructions submitted by the Defendant are defective in a multitude of ways, however, for purposes of this Motion, the infirmities are limited to the following issues: (i) definition of "Gross Negligence"; (ii) unjust enrichment; and (iii) constructive eviction. Plaintiff asserts that the definition of "Gross Negligence", as proffered by the Defendant is inaccurate and misplaced. The proper definition, for purposes of the instant matter, is what Plaintiff proposed in its version of the jury instructions. Additionally, the instructions for unjust enrichment and constructive eviction, as proffered by the Defendant, are simply incorrect. There is no standard jury instruction for either of the foregoing and the Plaintiff's version cited to case law in support thereof. The instructions provided by the Court, using Defendant's version, were inaccurate and confusing for the jury.

Plaintiff felt "rushed" to finalize the jury instructions and the Court unfortunately did not allow Plaintiff to articulate its arguments regarding the jury instructions. Instead, in what the Plaintiff assumes was for the sake of efficiency, the Court accepted the Defendant's version of the jury instructions, with its facial inaccuracies and without paying deference to the Plaintiff's arguments to the contrary. The same issues arose when the Court hastily addressed the verdict form, to which the Plaintiff thoroughly objected to and stated on the record the Plaintiff did not have time to read due to trying to review the 60 plus pages of jury instructions pursuant to the Court's order.

A cursory review of the Defendant's proposed verdict form reveals its deficiencies in creating the following contradiction: if a jury finds a contract exists (for purposes of breach of contract) than there can be no damages for Plaintiff's cause of action for Unjust Enrichment.[2] Throughout the entirety of the litigation in the instant matter, Plaintiff has asserted that its claim for Unjust Enrichment falls outside of the subject Lease agreement and that Defendant was unjustly enriched by virtue of the fact that it received an insurance payment after the fire which included, *inter alia*, payment for "lost rent" and also obtained an order on rent determination requiring the Plaintiff to pay a certain sum ($131,000) in back rent. This issue – specifically numbers thirteen (13) and fourteen (14) therein – are the infirmity which Defendant is now calling "inconsistent". Moreover, while the Plaintiff tried to rectify this issue prior to the Court accepting the Verdict Form, the jury also had questions as to those *very same issues*. Defendant cannot simply now claim that *its own verdict form* is internally inconsistent after Plaintiff attempted to rectify the issue. The jury's intent was clear – to award a sum of money to the Plaintiff for breach of contract, unjust enrichment and constructive eviction. The jury utilized its knowledge of the facts and its understanding of the Court's directions, given Defendant's Verdict Form, to formulate its award for the Plaintiff. It is well settled that a new trial *must always* be granted but when the jury misunderstand the law as instructed. *See Brown v. Estate of Stucky*, 749 So. 2d 490 (Fla. 1990) (a trial judge should always grant a motion for new trial when the jury … misunderstood the law as "instructed").

Moreover, the Court, over Plaintiff's objections, included *Fabre* Defendants that were not specifically pled in its affirmative defenses. The Florida Supreme Court has very clearly ruled on this issue in *Nash v. Wells Fargo Guard Servs.*, 678 So. 2d 1262, 1264 (Fla. 1996), holding

[2] Even more telling of the Defendant's intentions—there was never even an issue of whether a contract existed, the parties stipulated to this fact and, as such, it should have never been included on the verdict form.

specifically that "in order to include a nonparty on the verdict form pursuant to Fabre, the defendant must plead as an affirmative defense the negligence of the nonparty and specifically identify the nonparty." Yet, in its Answer and Affirmative Defenses to Amended Complaint, Defendant only pled "the owner and/or manufacturer of the RV and/or the owner/manufacturer of any components of the RV" in its *Fabre* affirmative defense, which fails to state any third party with specificity. Despite this, the Court improperly allowed "EDISON POWERS CONSTRUCTORS, INC.", "FLORIDA POWER & LIGHT COMPANY", and the very vague "owner and/or manufacturer of the RV and/or the owner/manufacturer of any components of the RV" to be included in the jury instructions and verdict form.

Ultimately, **this Court admitted on the record that it was wrong** for utilizing Defendant's Verdict Form. It would be fundamentally unjust to let the Defendant's intentionally misleading verdict form and jury instructions prevent the Plaintiff from receiving the verdict the jury clearly intended to award her. Fundamental errors are those which affect the validity of the trial to the extent that the verdict would not have been the same if errors had not occurred. *See Franco v. State*, 901 So. 2d 901 (Fla. 4th DCA 2005) and *Garzon v. State*, 939 So. 2d 278 (Fla. 4th DCA 2005). Here, the damage was done when the Court read the wrong instruction to the jury and then subsequently told the jury to follow the instructions and verdict form when the jury submitted its question to the Court. Although the Plaintiff properly preserved her objections to the foregoing issues, the issues surpass the ordinary standard and amount to fundamental error, as such, a new trial must therefore be granted.

e. The Court erred in considering argument as to whether Constructive Eviction is the same as Breach of Contract, as it was never raised by the Defendant.

After the jury's verdict was received and read by the Court, Defendant renewed its previous Motions for Directed Verdict and, also, moved for a new trial based on inconsistent verdict (only

pertaining to the unjust enrichment and breach of contract counts). The parties appeared before this Court on June 20, 2023 to discuss the verdict form issues and the Defendant's Motion for New Trial. Plaintiff was prepared to argue the very narrow verdict form issue (limited to the claims of breach of contract and unjust enrichment) and Defendant's Motion for New Trial when the Court *sua sponte* articulated its concern regarding the substance of the Breach of Contract, Unjust Enrichment, and Constructive Eviction claims. Plaintiff was wholly unprepared to argue the merits of the Court's concern and Defendant simply agreed with the Court, stating that the foregoing was its position "the whole time". Instead of arguing the issues surrounding the infirmities of the verdict form and Defendant's Motion for New Trial based on the inconsistency therein, the argument surrounded whether Unjust Enrichment, Constructive Eviction, and Breach of Contract are one and the same action.

First, **Plaintiff's Constructive Eviction claim had no "inconsistencies" affecting the jury's verdict** and the only "inconsistencies" of any concern regarded the cause of action for Unjust Enrichment and Breach of Contract. Notwithstanding the fact that the Court erroneously and *sua sponte* issued what is tantamount to **an advisory opinion as to the viability of Plaintiff's Constructive Eviction claim**, the Defendant's Motions for Directed Verdict did not raise this issue, and as such, the entry of a directed verdict and/or JNOV was wholly inappropriate and prejudicial to the Plaintiff. It is well settled that a "party cannot seek judgment in accordance with a previously-made motion for directed verdict unless that party has actually asserted the grounds raised in the motion for directed verdict made at the conclusion of evidence in the case." *TLO South Farms, Inc.*, 282 So. 3d 145 (Fla. 2d DCA 2019).

The instant case is strikingly similar to the matter of *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891 (11th Cir. 2004). In *Doe*, after the verdict and entry of judgment for the plaintiff, the district court *sua sponte* raised an entirely new issue regarding which of the four defendants

employed the subject crew member and whether that employer was a common carrier. Thereafter, the district court granted a Rule 50(b) judgment as a matter of law to all defendants, concluding that the plaintiff failed to prove any single defendant was both a common carrier and the employer of the subject crew member. Upon review, the United States Court of Appeal reversed the Rule 50(b) entry of judgment for the defendants because the district court lacked the authority to enter judgement under Rule 50(b) **on a *new ground not raised by any party prior to submission of the case to the jury***. The United States Court of Appeals also **reinstated and affirmed the jury's verdict** for the plaintiff." This is precisely the type of post-verdict "trap" that Rule 50(b) is designed to avoid." *Id.* at 904.

As in *Doe*, the Defendant in the instant matter never raised in any of its various Motions for Directed Verdict the fact that constructive eviction is an identical cause of action to breach of contract. Defendant did renew all of the arguments it raised in its summary judgment motions, which are also devoid of the foregoing. As in *Doe*, Defendant here also sought a re-submission of its claims and defenses after the jury announced its verdict based on an 'inconsistent verdict' – specifically regarding the Unjust Enrichment claim averred by the Plaintiff.

It has long been the law in Florida that any renewal of a motion for judgment as matter of law must be based upon the same grounds as the original request for judgment as a matter of law made at the close of the evidence and prior to the case being submitted to the jury. *See discussion supra*; *see also Shannon v. Bellsouth Telecomms., Inc.*, 292 F.3d 712, 717 n. 3 (11th Cir. 2002); *Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1245 (11th Cir. 2001). "Given the purpose and renewal nature of a Rule 50(b) motion, this Court also has instructed that a district court does not have the authority under Rule 50(b) to rule *sua sponte* on issues not raised by the parties. Further, it is well settled that "[t]he trial court's role is to *adjudicate* the case by ruling on the issues

raised by the parties, not to *litigate* the case by raising issues *for* parties." *Marocco v. Brabec*, 299 So. 3d 416 (Fla. 1st DCA 2019) (emphasis added).

Here, the record reflects that by discussing the issue regarding Breach of Contract v. Constructive Eviction *sua sponte*, at a conference where the only issues to be discussed were the verdict form inconsistency issues, the Court raised an issue *for* the Defendant upon which Defendant relied. However, Defendant had never raised that issue in any of its prior Motions for Directed Verdict or Motions for Summary Judgment. "If it is improper for a trial court to reweigh the evidence presented to the jury when ruling on a post-trial motion for JNOV – and it is, *see New Jerusalem Church of God, Inc. v. Sneads Community Church, Inc.*, 147 So. 3d 25 (Fla. 1st DCA 2013), it is equally, if not more, inappropriate for the court to grant a JNOV *sua sponte* based on information [not raised by any party in prior Motions for Directed Verdict]". *Id.* at 421.

Finally, a jury verdict should only be vacated when the finding is inconsistent (in this case, that would only apply to breach of contract or unjust enrichment). In *Reality Land Investment, Ltd. v. Sayar Enterprises, Inc.*, 2011 WL 7710033 (Fla. Cir. Ct.) (Trial Order) the court vacated the jury verdict in a breach of contract claim when a jury found that both the Plaintiff and Defendant breached a common contract. The Court held that the verdict was hopelessly internally inconsistent and the jury found that the plaintiff's principal fraudulently induced the defendant to enter into the contract and that defendant's breached the contract. The situation we are presented with in the instant matter is starkly different. There was and is no 'inconsistency' with the verdict as to constructive eviction, nor has either party ever alleged an inconsistency as to the constructive eviction verdict. As such, a JNOV or directed verdict should have never been entered by the Court on the same as it was clearly going beyond the scope of issues presented to it. Accordingly, the verdict as entered by the jury should be reinstated.

f. The Court erred in finding Constructive Eviction and Breach of Contract are the same causes of action as a matter of law.

Notwithstanding the erroneous *sua sponte* entry of directed verdict and/or JNOV by this Court, it is *abundantly clear* in Florida that Constructive Eviction and Breach of Contract are two (2) separate and distinct causes of action. The landmark Supreme Court Case, *Hankins v. Smith*, 103 Fla. 892 (Fla. 1931), along with its progeny, provides that "[a] 'constructive eviction' is an act which, although not amounting to an actual eviction, is done with the express or implied intention, and has the effect, of essentially interfering with the tenant's beneficial enjoyment of the lease premises." (*citing* 36 C.J. 256 § 980). The *Hankins* court also articulated that a constructive eviction may be found "if the landlord does any wrongful act or is guilty of any default or neglect whereby the leased premises are rendered unsafe, unfit, or unsuitable for occupancy in the whole, *or in substantial part*, for the purposes for which they were leased". Citing *Hankins*, the Court in *Sentry Water Systems vs. ADCA Corp.*, 355 So. 2d 1255 (Fla. 2d DCA 1978) held that "underlying or implicit in all of the decisions is the act of the landlord constituting the constructive eviction be wrongful, unwarranted or unlawful.".

Further, it is well settled that there is a difference between the causes of action for Breach of the Covenant of Quiet Enjoyment and Constructive Eviction, and that while constructive eviction always constitutes a breach of the covenant of quiet enjoyment, not all breaches of the covenant of quiet enjoyment are tantamount to a constructive eviction. *See, e.g., Coral Wood Page, Inc. v. GRE Coral Wood, LP*, 71 So. 3d 251 (Fla. 2d DCA 2011) (finding that a tenant may claim damages based upon a breach of the implied covenant off quiet enjoyment even where the landlord's action did not rise to the level of eviction); *G&G In-Between Bridge Club Corp. v. Palm Plaza Associates, Ltd.*, 356 So. 3d 292 (Fla. 2d DCA 2023) ("if a landlord authorizes acts to be done which cause substantial injury to the tenant in the peaceful enjoyment of the demised

premises, and such a result of is the natural and probably consequence of the acts so authorized there landlord is liable therefor [for the breach of quiet enjoyment] even when [the] landlord's conduct does not rise to the level of a constructive eviction."); *Katz Deli of Aventura v. Waterways Plaza, LLC*, 183 So. 3d 374 (Fla. 3d DCA 2013) ("where an action included causes for both constructive eviction and breach of contract, the Court held that while "[i]n an action for breach of contract, the goal is to place the injured party in the position it would have been in had the other party not breached the contract so as to give the aggrieved party the benefit of its bargain … where a business continues after suffering from an act of negligence … the only remedy to sufficiently restore [the plaintiff] is an award of lost profits"); *Blum v. Kohlmeyer & Co.*, 363 So. 2d 1129 (Fla. 3d DCA 1978) (upholding a trial judge's award of a money judgement to appellees for ***both constructive eviction and breach of quiet enjoyment***).

In Florida, it is well settled that for a court to find that a breach of the covenant of quiet enjoyment has occurred, proof of *actual interference* with the tenancy is required. Whereas, in order for constructive eviction to occur the premises must be found to be unsafe, unfit or unsuitable for occupancy for the purposes for which they were leased. *See Griffin Industries, LLC v. Dixie Southland Corp.*, 162 So. 3d 1062, 1067 (Fla. 4th DCA 2015); *Bass v. Wollitz*, 384 so. 2d 704, 708 (Fla. 1st DCA 1980) ("a party cannot rely upon a termination provision in a lease to dispense with the jury's verdicts on constructive eviction ***and*** breach of the covenant of quiet enjoyment")[3]; *Brevard County Fair Ass'n, Inc. v. Cocoa Expo. Inc.*, 832 So. 2d 147, 150, 153-53 (Fla. 5th DCA 2002) (finding that constructive eviction is not waived by a reasonable effort to mitigate damages, and a tenant may also be entitled to damages having nothing to do with the loss of the benefit for which it contracted, *i.e.*, the quiet enjoyment of the leased premises); *Avatar Development Corp.*

[3] Given that the Court specifically articulated the **conjunctive, "and"** it is axiomatic that Constructive Eviction and Breach of the Covenant of Quiet Enjoyment are separate and distinct causes of action that can be brought in the same lawsuit.

v. DePani Construction, Inc., 883 So. 2d 344, 346 (Fla. 4th DCA 2004) ("[t]he Court explained that claims are separate and distinct when they could support an independent action and are not simply alternative theories of liability for the same wrong.")

Given the foregoing, it is axiomatic that the causes of action for constructive eviction and a breach of the covenant of quiet enjoyment are not "one and the same" and, are, in fact, separate and distinct causes of action. Further, there was no inconsistency with respect to constructive eviction and therefore this Court must vacate the JNOV it entered on the Plaintiff's cause of action for constructive eviction and reinstate the verdict as rendered by the jury.

g. The Court Erred in Entering a JNOV for Plaintiff's Unjust Enrichment Count

As discussed *supra*, after the jury's verdict was received and read by the Court, Defendant renewed its previous Motions for Directed Verdict and, also, moved for a new trial based on inconsistent verdict (only pertaining to the unjust enrichment and breach of contract counts). The parties appeared before this Court on June 20, 2023 to discuss the verdict form issues and the Defendant's Motion for New Trial, and Plaintiff was prepared to argue the very narrow verdict form issue (limited to the claims of breach of contract and unjust enrichment) and Defendant's Motion for New Trial. It was at this juncture that the Court *sua sponte* entered a JNOV for both the Plaintiff's Constructive Eviction and Unjust Enrichment claims. Defendant argued that a part cannot maintain a constructive eviction claim simultaneously with a Breach of Contract action. However, it is well settled in Florida that the claims can be brought alternatively. Notwithstanding the foregoing, Plaintiff argued, both during litigation as well as at trial, that the unjust enrichment claim stems from the Defendant's failure to remit any monies to the Plaintiff when it: (1) obtained money from Scottsdale Insurance Company for "lost rent" after the fire while simultaneously obtaining an Order of Rent Determination against the Plaintiff for $131,000; (2) obtained money from Scottsdale Insurance Company for the reimbursement of the flood insurance premium on the

property while it is undisputed that the Plaintiff paid this premium, and (3) for collecting money from truckers using the subject property as a truck stop / transition location for trucks while Plaintiff still had legal rights thereto pursuant to the subject lease. In the instant matter, the *clear intent of the jury* was to award to Plaintiff a sum of money as damages for the Plaintiff's knowing acceptance of a benefit to which it should not be entitled given the factual evidence presented before it.

Additionally, the jury instructions, which the Court accepted, were the instructions as drafted solely by the Defendant. As discussed above, the jury instruction for Plaintiff's unjust enrichment cause of action were erroneous (*see* **Exhibit "J"**). The instructions provided and accepted by the Court regarded a Contract Implied at Law and, while similar, is still different from an instruction for *unjust enrichment*. Plaintiff took extra time to ensure that the instructions for the foregoing were accurate and provided a copy to the Defendant on June 18, 2023. However, the Court again accepted only the Defendant's original proposed version, over Plaintiff's objection. As such, it is axiomatic that the jury was read incorrect instructions as to the Plaintiff's unjust enrichment count and a new trial must be granted. It would be fundamentally unjust to let the Defendant's intentionally misleading verdict form and jury instructions prevent the Plaintiff from receiving the verdict the jury clearly intended to award her. Fundamental errors are those which affect the validity of the trial to the extent that the verdict would not have been the same if errors had not occurred. *See Franco v. State*, 901 So. 2d 901 (Fla. 4th DCA 2005) and *Garzon v. State*, 939 So. 2d 278 (Fla. 4th DCA 2005). Here, the damage was done when the Court read the wrong instruction to the jury and then subsequently told the jury to follow the instructions and verdict form when the jury submitted its question to the Court. The foregoing amounts to fundamental error and a new trial must therefore be granted.

WHEREFORE, the Plaintiff, RV SALES OF BROWARD, INC. respectfully requests that this honorable Court enter an Order granting Plaintiff's Motion for New Trial along with any and all further relief this Court deems just and proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a correct copy hereof has been furnished via the Florida Court's E-Filing Portal to: Stuart A. Teller, Esq. (Attorney for Defendant) 7320 Griffin Road, Suite 216, Davie, FL 33314 (stuart@tellerlawoffice.com; pleadings@tellerlawoffice.com); Benjamin L. Bedard, Esq., Jeffrey W. Hurcomb, Esq., Roberts, Reynolds, Bedard & Tuzzio, PLLC (Attorneys for Defendant) 470 Columbia Drive, Bldg. C101, West Palm Beach, FL 33408; (service_BLB@rrbpa.com) on this 5th day of July, 2023.

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