IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC-10-897
Lower Tribunal No.: 4D09-5

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DK ARENA, INC.,

Petitioner,

v.

EB ACQUISITIONS, I, LLC,

Respondent.

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# DK ARENA, INC.'S INITIAL BRIEF

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## STATEMENT OF THE CASE AND FACTS

On July 20, 2004, EB Acquisitions, I, LLC ("EB") contracted to purchase real property from DK Arena, Inc. ("DK"), posting a $1 million deposit (the "Agreement"). (App. 3 at ¶ 2). The Agreement provided for a sixty-day Due Diligence Period, ending September 20, 2004. (App. 3 at ¶ 7). If EB did not terminate the Agreement prior to expiration of the Due Diligence Period, the deposit was to be released to DK. (App. 4 at ¶ 10; App. 2 at 166:1-8, 167:3-6).[1]

Modifications to the Agreement were required to be in writing. (App. 3 at ¶ 15). On September 13, a written amendment extended the Due Diligence Period to October 4. (App. 5). Around this time, EB, which was having difficulty obtaining its financing, proposed converting the project to a joint venture to develop the property. (App. 2 at 23-24; App. 7; App. 8; App. 9; App. 12). DK was willing to consider the proposal. (*Id*).

On October 4, DK orally agreed to extend the Due Diligence Period for one additional week, through October 11, while the structure and terms of a possible joint venture were addressed. (App. 2 at 27:12-13, 178-79; App. 7; App. 8; App. 9; App. 12). On October 11, EB requested yet another extension. (App. 2 at 169-73; App. 10 at 7:12-15, 7:19-25, 8:1-4, 9:25-10:23, 11:9-19). DK's chief executive

[1] "At the end of the Due Diligence Period, assuming that [EB] has not given notice to [DK] that it intends to terminate the Contract, the parties shall take the following actions: (a) The Deposit shall be released to [DK]." (App. 4 at ¶ 10).

was unavailable at that time and no one else within DK was authorized to grant the extension. (*Id*). Accordingly, no further extension was possible at the time. (*Id*). DK advised EB of that fact and further advised EB to terminate the Agreement in order to avoid forfeiting the deposit. (*Id*). EB was assured that joint venture negotiations would continue following such a termination. (*Id*). For commercial reasons of its own, EB declined to terminate the Agreement. (App. 2 at 171-72). Therefore, in accordance with the express terms of the Agreement, DK demanded the deposit. (App. 2 at 21, 35; App. 6; App. 10 at 28:4-9). EB refused to allow payment. (App. 2 at 36:24-25; App. 10 at 28:4-9).

On December 8, DK was forced to sue to obtain the deposit. EB counterclaimed, alleging a purported oral joint venture agreement that, among other things, extended the Due Diligence Period indefinitely.

Following a one-day, non-jury trial, the trial court held that EB was entitled to a return of the deposit. (App. 13 at 4-5, 8). That ruling was predicated on a completely new and different oral joint venture, one never pled by EB or addressed at trial by either party, which purportedly extended the Due Diligence Period indefinitely. (App. 13 at 8). EB was awarded damages based on DK's breach of that newly-minted oral joint venture. (App. 13 at 9-10).

DK appealed, asserting that: (1) the indefinite extension of the Due Diligence Period was error because an oral modification of a land sales contract is

barred by the Statute of Frauds; (2) the finding of an oral joint venture was error because it, too, was barred by the Statute of Frauds and the parties had never agreed on its terms; and (3) the evidence supporting the damage award was insufficient as a matter of law.

The Fourth District: (1) enforced an oral agreement to extend indefinitely the Due Diligence Period and awarded EB the deposit; (2) reversed the finding that an oral joint venture was formed; and (3) rejected the damage award. (App. 1).

## SUMMARY OF ARGUMENT

This Court has held that promissory estoppel cannot be used to counteract the Statute of Frauds and cautioned that to do so would engraft into the law a doctrine that would effectively nullify the legislative will of this State. District Courts have similarly refused to apply the doctrine of promissory estoppel to circumvent the Statute of Frauds, and therefore, have found oral modifications to contracts subject to the Statute of Frauds unenforceable.

The Fourth District held that DK was estopped from asserting the Statute of Frauds because, in reliance on DK's alleged promise to hold the Due Diligence Period in abeyance indefinitely into the future, EB did not terminate the Agreement. The Fourth District characterized the estoppel that it applied as equitable estoppel. Equitable estoppel has no application here. Whatever the Fourth District's description, the facts here establish that this is demonstrably a

case of promissory estoppel. Promissory estoppel cannot trump the Statute of Frauds.

Equitable estoppel requires a showing that a party misrepresented or concealed an existing fact. Promissory estoppel differs from equitable estoppel in that the representation that forms the basis for one's assertion of that doctrine relates to a promise of a future act, as opposed to the statement of an existing fact. Thus, the representation at issue in promissory estoppel goes to future intent, while equitable estoppel involves a misrepresentation that goes to past or present fact.

This Court recognizes this distinction between equitable estoppel and promissory estoppel. However, District Courts not infrequently confuse and mischaracterize the doctrines, as did the Fourth District here.

The Fourth District found that DK promised to hold the Due Diligence Period in abeyance for an indefinite period of time extending into the future. Stated more precisely for purposes of the necessary analysis, according to the Fourth District, DK promised EB that it would be able to terminate the Agreement at a future date. This representation was promissory. DK did not conceal or misrepresent an existing fact. Thus, the Fourth District employed equitable estoppel where only promissory estoppel applied, and in doing so, enforced an oral modification to a contract subject to the Statute of Frauds. Its holding effectively nullified the legislatively created Statute of Frauds. Although the Fourth District

chose to characterize the actions here as equitable estoppel, what was at issue in substance was promissory estoppel. Correctly construed, this decision conflicts directly with Supreme Court precedent holding that promissory estoppel cannot be used to counteract the Statute of Frauds.[2]

## ARGUMENT

### I. Standard of Review.

The Fourth District found that DK was estopped from relying on the Statute of Frauds because EB relied, to its detriment, on DK's promise to hold the Due Diligence Period in abeyance for an indefinite period of time.

The issue is whether the Fourth District erroneously employed equitable estoppel where only promissory estoppel applied. This is a pure question of law. Thus, the standard of review is *de novo* and no deference is given to the judgment of the lower courts. *D'Angelo v. Fitzmaurice,* 863 So. 2d 311, 314 (Fla. 2003).

### II. The Decision in this Case Directly Conflicts with this Court's Decision in *Tanenbaum*.

According to the Fourth District, the Statute of Frauds is not applicable to this case because "EB changed its position in reliance on the oral agreement to extend the due diligence period—it did not give notice . . . that it intended to

[2] The decision in this case also conflicts with Supreme Court and District Court decisions holding that: (1) promissory estoppel differs from equitable estoppel in that the representation is promissory rather than as to an existing fact; and (2) oral modifications to contracts subject to the Statute of Frauds are unenforceable.

terminate the contract." (App. 1 at 10-11). Based on EB's purported reliance on DK's promise, the Fourth District ruled that DK was estopped from asserting the Statute of Frauds and found that the trial court "properly enforced the oral extension of the due diligence period." (*Id*. at 9).[3] This result is irreconcilable with this Court's decision in *Tanenbaum v. Biscayne Osteopathic Hosp., Inc.*, 190 So. 2d 777 (Fla. 1966).

In *Tanenbaum*, Plaintiff, a physician, had a five-year oral employment contract with Defendant, a hospital, to work as an osteopathic radiologist. *Id*. at 778. The contract was "terminable only after the expiration of that period and then only upon 90 days written notice by either party." *Id.*

In reliance on the contract, Plaintiff, a Pennsylvania resident, left his job, sold his home at a loss, moved to Florida with his family, took the necessary licensing examinations, and bought a new home. *Id*. at 780; *Tanenbaum v. Biscayne Osteopathic Hosp., Inc.*, 173 So. 2d 492, 493-94 (Fla. 3d DCA 1965). He began his practice and was accepted "in all outward manifestations" as a member of the hospital staff. *Tanenbaum*, 173 So. 2d at 493-94. Plaintiff's employment was terminated just months later "upon purely personal grounds without relation to any question of his competency." *Id*. at 495. Accordingly,

[3] In fact, the trial court did not enforce an oral extension of the Due Diligence Period, but enforced a new, judicially-created oral joint venture distinct from the Agreement or any extension of provisions of that Agreement. (App. 13 at 8).

Plaintiff filed an action for damages. The Statute of Frauds was the "principal defense" asserted. *Tanenbaum*, 190 So. 2d at 778. As here, Plaintiff argued that Defendant was estopped from asserting the Statute. *Id*. *See also Tanenbaum*, 173 So. 2d at 495.

Notwithstanding the significant career and personal changes Plaintiff made in reliance on the oral contract, this Court determined that it was unenforceable. More to the point here, this Court rejected "promissory estoppel as a sort of counteraction to the legislatively created Statute of Frauds," reasoning that Plaintiff "had but to follow the provisions of the Statute of Frauds to secure his rights under the [contract]" instead of claiming "rather tardily that [the Statute of Frauds] did not apply . . . ." *Tanenbaum*, 190 So. 2d at 779.

*Tanenbaum* and this case are identical in several material ways. Both have (1) contracts subject to the Statute of Frauds; (2) an oral promise relating to future intent; (3) parties seeking to avoid the Statute of Frauds by claiming detrimental reliance on an oral promise; and (4) nothing preventing the parties from having memorialized the promise in writing. In fact, here, DK expressly urged EB to terminate the Agreement to avoid what occurred in this case.[4] In *Tanenbaum*, conversely, Plaintiff repeatedly sought to have the agreement reduced to writing, although that was never accomplished. *Tanenbaum*, 190 So. 2d at 778.

[4] (App. 2 at 169-73; App. 10 at 7:12-15, 7:19-25, 8:1-4, 9:25-10:23, 11:9-19).

*Tanenbaum* and the result in the instant case clearly conflict. Nevertheless, the Fourth District essentially rejected *Tanenbaum*, concluding that promissory estoppel was not applicable because the parties had not attempted to set up a new enforceable promise. (App. 1 at 13).[5]

Instead, the Fourth District latched onto several cases, including one New York case from the late 1800's and a New Hampshire case from 1927, that misapplied the doctrine of equitable estoppel—where promissory estoppel governed—to enforce oral modifications of real estate contracts as a means of circumventing the Statute. (App. 1 at 10-13).

This patchwork of cases finds no support in Florida jurisprudence. They directly conflict with this Court's holding in *Tanenbaum*, as well as later Florida cases that have properly held that promissory estoppel cannot be used to circumvent the Statute of Frauds. If permitted to stand, the Fourth District's decision will allow promissory estoppel, mischaracterized as equitable estoppel, to vitiate the Statute of Frauds.

[5] The Fourth District also found that promissory estoppel was not applicable because the parties did not "attempt to modify the financial terms of a written real estate contract . . . ." (App. 1 at 13). There is no basis for the Fourth District's determination that promissory estoppel applies if a financial term of a real estate contract is altered, but not if the duration of a real estate contract is altered.

**III.** Only Promissory Estoppel is Applicable Here**.**

Equitable estoppel applies to "conduct which amounts to a false representation or concealment of material facts . . . ." 28 Am. Jur. 2d § 40. "It is a well-settled general rule that in order to furnish the basis of an estoppel, a representation . . . must relate to some present or past fact . . . as distinguished from mere promises or expressions of opinion as to the future." 22 Fla. Jur. 2d § 44; *Dep't of Revenue v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981).

In contrast, "'[p]romissory' estoppel differs from ordinary 'equitable' estoppel in that the representation is promissory rather than as to an existing fact." *Southeastern Sales and Serv. Co. v. T. T. Watson, Inc.*, 172 So. 2d 239, 240 (Fla. 1965). It is axiomatic that a promise "as to the future will not support an estoppel." 31 C.J.S. § 92; *see also Southeastern Sales*, 172 So. 2d at 240 (Fla. 1965) ("Since the offer or promise in our case relates to a future act of the promisor, as opposed to some representation of a present fact by him which he later tried to deny, equitable estoppel has no application.") (emphasis added); 28 Am. Jur. 2d § 50 (A "claim is more appropriately analyzed under the doctrine of promissory estoppel, not equitable estoppel, where representations . . . are more akin to statements of future intent than past or present fact.") (emphasis added).

Here, EB has argued that DK "orally agreed" that it "would hold in abeyance all due diligence deadlines." (App. 14 at ¶ 17). Again, at trial, EB's

chief executive asserted that DK agreed that it "would hold the due diligence in abeyance until we could get the agreement done because we were so close." (App. 2 at 139:24-25, 140:1-2). Similarly, the Fourth District stated that DK "agreed to hold the due diligence period 'in abeyance' until they 'could get the joint venture agreement memorialized.'" (App. 1 at 5). The aforementioned language demonstrates that both EB and the Fourth District itself expressly recognized that DK's purported representation—a promise that it would hold the Due Diligence Period open for an indefinite period of time continuing into the future—was promissory in nature because it "relate[d] to a future act of the promisor [DK]." *Southeastern Sales*, 172 So. 2d at 240. Indeed, there can be no doubt that a continuing obligation that extends into the indefinite future can only provide a basis for promissory estoppel, and not equitable estoppel.

This Court has previously recognized the distinction between equitable and promissory estoppel, having corrected prior mischaracterizations, such as this one, by the Fourth District.[6]

For example, in *Crown Life Ins. Co. v. McBride*, 517 So. 2d 660, 661 (Fla. 1987), Plaintiff sought to enforce an oral contract for insurance. The Fourth District certified the following question to the Florida Supreme Court: "May the

[6] It seems that these distinct doctrines are often confused because both have detrimental reliance as a key element.

theory of equitable estoppel be utilized to prevent an insurance company from denying coverage?" *Id*. This Court corrected the Fourth District's certified question, finding that it should have inquired if promissory estoppel could be used. *Id*. at 662. This Court then answered the reframed certified question in the affirmative, finding that "promissory estoppel may be utilized to create insurance coverage." *Id*. The basis for this Court's restatement of the question was that, as here, "several of the district courts ha[d], in effect, found [promissory estoppel] applicable, albeit in the guise of equitable estoppel." *Id*. (emphasis added).

This misapplication of equitable estoppel is not limited to *McBride*. District Courts have not infrequently confused promissory and equitable estoppel, resulting in conflicting decisions. For example, even in *Tanenbaum*, Plaintiff argued at trial that Defendant was estopped from asserting the Statute of Frauds. *See Tanenbaum*, 173 So. 2d at 493; *Tanenbaum*, 190 So. 2d at 778. Despite Plaintiff's attempted use of equitable estoppel, this Court addressed Plaintiff's "estoppel" in terms of promissory estoppel because Plaintiff was seeking to enforce a promise of future intent—an oral employment contract that continued into the future for five years—as opposed to a representation of past fact. *Tanenbaum*, 190 So. 2d at 778.

Similarly, in *City of Orlando v. West Orange Country Club*, 9 So. 3d 1268, 1269 (Fla. 5th DCA 2009), Plaintiff sought to enforce an unsigned contract to provide water for twenty years. Defendants raised the Statute of Frauds, but the

trial court found they were estopped from denying the contract and enforced it. *Id*. The Fifth District corrected the trial court's misapplication of equitable estoppel, and ruled that promissory estoppel could not be used to circumvent the Statute of Frauds. *Id*.

Additionally, the line of cases, described below, upon which the Fourth District relied here, similarly mischaracterized promissory estoppel as equitable estoppel. For example, in *Young v. Pottinger,* 340 So. 2d 518, 520 (Fla. 2d DCA 1977), having found no support in Florida jurisprudence, the Second District found comfort in *Warren v. Dodge,* a 1927 New Hampshire case,[7] in holding that equitable estoppel could be used to circumvent the Statute of Frauds. *Warren* stated in dicta that an estoppel could be used to plead around the Statute of Frauds where, as here, the parties orally agree to extend a written option contract to purchase land. That, of course, constitutes promissory estoppel since such an agreement clearly goes to future intent. *See South Inv. Corp. v. Norton*, 57 So. 2d 1, 3 (Fla. 1952). Notwithstanding the Second District's scrambling of the estoppel doctrines, *Young* was a promissory estoppel case.

In *Affordable Homes, Inc. v. Devil's Run, Ltd.,* 408 So. 2d 679, 680 (Fla. 1st DCA 1982), another of the Fourth District's foundation stones, the First District, relying on *Young*, stated in dicta that a "cause of action can be stated under [an

[7] *Warren v. Dodge*, 138 A. 297, 299 (N.H. 1927).

estoppel] theory if the appellant pleads that it detrimentally relied on an oral modification . . . ." The First District's reference in *Affordable Homes* to equitable estoppel as a cause of action is yet another example of the failure of District Courts to properly differentiate between the doctrines. It is well-established that equitable estoppel is a defense, while promissory estoppel is an affirmative claim for relief. 28 Am. Jur. 2d § 35; *Bergman v. DeIulio*, 826 So. 2d 500, 504 (Fla. 4th DCA 2002).

Finally, in *United of Omaha Life Ins. Co. v. Nob Hill Assoc.*, 450 So. 2d 536 (Fla. 3d DCA 1984), the Third District merely followed *Affordable Homes* and *Young* in holding that equitable estoppel trumps the Statute of Frauds. It did not conduct any meaningful analysis of the facts in that case or of either doctrine.

In the instant case, the Fourth District also failed to analyze the doctrines or explain why equitable estoppel and not promissory estoppel applied. Rather, it simply followed this line of improperly decided cases, reasoning that the key to this case was detrimental reliance. (App. 1 at 10-11). The Fourth District prematurely stopped the analysis there. It is fundamental that detrimental reliance is a key element of both equitable estoppel and promissory estoppel. Accordingly, further analysis was required to determine the true nature of the representation upon which EB supposedly relied. This is so because this Court, in *Tanenbaum*, *South Inv. Corp.*, *McBride* and *Southeastern Sales*, unequivocally rejected

detrimental reliance as a basis for avoiding the Statute of Frauds where the reliance is based on a representation of future intent—as was the case here.

Indeed, "[i]n Florida, it is a clearly established rule of law that [parties] cannot avail themselves of the doctrine of promissory estoppel as a means to circumvent or defeat the Statute of Frauds." *Eclipse Medical Inc. v. American Hydro-Surgical Instruments, Inc.*, 262 F. Supp. 2d 1334, 1352 (S.D. Fla. 1999) (citing *Tanenbaum*, 190 So. 2d at 779). Further, the "[Supreme Court of Florida] recognized the 'havoc' that would be wrought if a party (and the judiciary) could eviscerate statutory requirements based on oral statements – all under the doctrine of promissory estoppel . . . ." *Id*. (citing *W.R. Grace and Co. v. Geodata Serv., Inc.*, 547 So. 2d 919, 925 (Fla. 1989)).[8]

In *Eclipse Medical*, the Southern District of Florida, relying on precedent set by this Court, found that Plaintiffs' "effort to extend the two-year duration of the parties' Agreement by alleged oral promises runs afoul of the statute [of frauds], and [is] therefore barred." *Id*. at 1352. The Southern District properly

[8] In *W.R. Grace*, this Court explained: "The law of written contracts, including the statute of frauds, would be substantially changed if we approved the application of promissory estoppel under the facts of this case. It would also become extremely difficult for parties to fully understand or be advised of their rights and obligations under written contracts." *W.R. Grace and Co. v. Geodata Serv., Inc.*, 547 So. 2d 919, 925 (Fla. 1989); *see also Coral Way Properties, Ltd. v. Roses*, 565 So. 2d 372, 373 (Fla. 3d DCA 1990) (holding that the statutory requirement that certain contracts be in writing cannot be circumvented by relabeling a claim for enforcement of an oral contract as a claim for "promissory estoppel").

characterized Plaintiffs' representations, which regarded the "future rights of parties to a contract," in terms of promissory estoppel. *Id*. at 1351 (citing *W.R. Grace and Co.*). Similarly, in *W.R. Grace and Co.*, this Court refused to enforce alleged oral promises by Defendant that Plaintiff's work would continue beyond the contract's specified duration term because promissory estoppel cannot be used to circumvent the Statute of Frauds. *W.R. Grace and Co.*, 547 So. 2d at 921, 925. In *Coral Way v. Roses*, 565 So. 2d 372 (Fla. 3d DCA 1990), a case in which Plaintiff sought to enforce Defendant's "oral assurances that he would be able to continue to occupy the subleased space," the court held that (1) the case was controlled by *Tanenbaum*; and (2) promissory estoppel could not be used to avoid the Statute of Frauds.

*Eclipse Medical*, *W.R. Grace and Co.* and *Coral Way* are in accord with *Tanenbaum*—each correctly found that oral promises extending the duration of a contract fall within the purview of promissory estoppel—as opposed to equitable estoppel—because such representations regard the future rights of the parties.

Here, EB claims that DK promised that it "would hold the due diligence [period] in abeyance until [the parties] could get the [joint venture] agreement done . . . ." (App. 2 at 139:23-25, 140:1-2). This oral promise purportedly extended the duration of the Agreement and directly impacted the future rights of the parties. To be clear, no joint venture existed at the time of the alleged oral extension of the

Due Diligence Period. Any negotiations and documentation needed to create this proposed joint venture would logically have had to occur in the future. Thus, DK's alleged representation not only regarded its own actions in the future, but was contingent upon events that had not yet occurred. Only promissory estoppel is applicable here. *See, e.g., Tanenbaum*, 190 So. 2d at 779; *Eclipse Medical*, 262 F. Supp. at 1352; *W.R. Grace and Co.*, 547 So. 2d at 921, 925; *Coral Way v. Roses*, 565 So. 2d at 372.

Further, in improperly applying equitable estoppel to a clear case of promissory estoppel, the Fourth District reasoned that "EB changed its position in reliance upon the oral agreement to extend the due diligence period—it did not give notice under paragraph 10 of the addendum that it intended to terminate the contract." (App. 1 at 10-11). Thus, the "oral agreement," for which no consideration was provided,[9] was a promise by DK to permit EB to terminate the Agreement at a <u>future</u> date should the parties fail to reach a joint venture agreement. Indeed, the Fourth District specifically stated that "the doctrine of estoppel prevents DK Arena from relying on the statute to invalidate its agreement to extend the due diligence period. EB could therefore <u>terminate the contract</u>

[9] Because promissory estoppel comes into play where the formal requisites of a contract are not met, EB's lack of consideration is yet another factor tending to prove that only promissory, and not equitable, estoppel is applicable here. 28 Am. Jur. 2d § 57.

during the extended due diligence period and obtain a return of the deposit." (App. 1 at 10) (emphasis added).

DK's promise was a statement as to its intention with regard to its future acts. Promissory estoppel is the only possible doctrine that applies here. Accordingly, under *Tanenbaum*, the Statute of Frauds prohibits any purported oral modification of the parties' Agreement.

In contrast, equitable estoppel applies only to a misrepresentation or concealment of existing fact. By way of illustration, had DK represented to EB that development permits had already been obtained, when in fact they hadn't, equitable estoppel may have applied, as DK's representation would have been related to a past fact, rather than the future rights of the parties. However, that was not the case here. Rather, DK's alleged promise was unequivocally related to its actions in the future, and as this Court has previously recognized, a "statement as to the present intention of a party with regard to his future act is not the foundation upon which an estoppel may be built." *South Inv. Corp.*, 57 So. 2d at 3 (refusing to enforce land owner's promise to extend deadline under option contract); *see also W.R. Grace*, 547 So. 2d at 924 (Fla. 1989); *Bergman*, 826 So. 2d at 504.

Nonetheless, the Fourth District enforced DK's promise by recasting it as equitable estoppel in order to circumvent the Statute of Frauds. The Fourth

District's decision runs afoul of the Statute and directly conflicts with: (1) *Tanenbaum*; (2) *South Inv. Corp.*; (3) *McBride*; and (4) *Southeastern Sales.*

**IV.** The Decision in this Case Conflicts with District Court Precedent.

The Fourth District's opinion is similarly at odds with multiple District Court decisions holding that contracts subject to the Statute of Frauds cannot be orally modified. In *Wharfside at Boca Point, Inc. v. Superior Bank*, 741 So. 2d 542, 544 (Fla. 4th DCA 1999), the parties attempted to orally modify the sales price and extend the closing date of a real estate contract. The Fourth District rejected the oral modifications because "an agreement required to be in writing by the statute of frauds cannot be orally modified." *Id*. at 545.

In *Shore Holdings, Inc. v. Seagate Beach Quarters, Inc.*, 842 So. 2d 1010, 1012 (Fla. 4th DCA 2003), Plaintiff sued "based upon oral representations" by the seller that he would accept "changes in the financial terms of [a real estate] transaction as well as the timing of the closure." Plaintiff's claims did not survive the Statute of Frauds. *Id*. An oral modification of the real estate contract was prohibited. *Id*.

Finally, in *Bradley v. Sanchez*, 943 So. 2d 218, 221-22 (Fla. 3d DCA 2006), Plaintiff claimed its contract to purchase real property from Defendant was orally modified when Defendant granted an extension to apply for financing. The Third

District stated "the contract could not be orally modified because it was required by the statute of frauds to be in writing." *Id*.

Akin to DK's alleged oral promise to hold the Due Diligence Period in abeyance, *Bradley* and *Shore Holdings* addressed promissory estoppel—not equitable estoppel—in considering oral modifications that extended the duration of a real estate contract, further supporting the proposition that the Fourth District, in this case, misapplied equitable estoppel to a case of promissory estoppel.[10]

Recognizing that its decision here could not be squared with the unequivocal holdings in *Wharfside*, *Shore Holdings* and *Bradley*, the Fourth District created its own unprecedented variation on the clearly defined estoppel doctrines discussed above. According to the Fourth District, because the oral agreements in those cases not only extended the closing date but also altered the "sales price, an essential term," as well, the Statute of Frauds still governed and the oral promise could not be enforced.[11] Under this theory, applied for the first and only time in the instant case, the significance of the oral modification determines whether the Statute of Frauds still applies. Thus, as here, an indefinite extension of a due

[10] In both *Bradley* and *Shore Holdings*, the District Courts stated that the "statute of frauds prohibits oral modification of a contract for the sale of land under the doctrine of promissory estoppel." *Bradley*, 943 So. 2d at 222; *Shore Holdings*, 842 So. 2d at 1012 (emphasis added).

[11] The Fourth District stated that the "estoppel cases do not condone oral changes" to an "important term. . . ." (App. 1 at 13).

diligence period is apparently not important enough to be barred by the Statute of Frauds, while a change in the sales price would be so barred. This unique and wholly subjective distinction is not found in either *Wharfside*, *Shore Holdings* or *Bradley*, or any other case addressing these estoppel issues. It is illogical, unprecedented and unworkable.

Thus, under the Fourth District's rationale, if a party detrimentally relies on the oral modification of an important, material term, equitable estoppel does not defeat the Statute of Frauds. However, if a party detrimentally relies on the oral modification of an unimportant, immaterial term, equitable estoppel can be used to circumvent the Statute of Frauds. Notably, the Fourth District failed to expound on the basis for its assertion that pricing is a material term but duration is not.

The Fourth District's new rule finds no support in the jurisprudence of any jurisdiction. *Wharfside, Shore Holdings* and *Bradley* hold, unequivocally, that a contract subject to the Statute of Frauds cannot be orally modified. These decisions do not provide for an exception where the modifications are to "unimportant" or "immaterial" terms. By reading into the law this caveat to the Statute of Frauds, the Fourth District disregarded *Wharfside, Shore Holdings* and *Bradley* and effectively eviscerated the Statute of Frauds.

## CONCLUSION

DK respectfully requests that this Court reverse the Fourth District's holding that DK is estopped from asserting the Statute of Frauds and find that DK is entitled to the deposit as well as attorneys' fees through all appeals.

Dated: November 30, 2010

Respectfully submitted.

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## CERTIFICATE OF SERVICE

I hereby certify that I have, on this 30th day of November, 2010, served a true and correct copy of the foregoing upon the following counsel of record by U.S. Mail, addressed as follows:

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure. This Brief is submitted in Times New Roman 14-point font.

Alvin B. Davis

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