IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-897
L.T. CASE NO. 4D09-5; 2004CA0111452XX

DK ARENA, INC.,

Petitioner,

v.

EB ACQUISITIONS, I, LLC,

Respondent.
_____/

RESPONDENT'S JURISDICTIONAL BRIEF

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INTRODUCTION

This is an appeal of a final judgment following a non-jury trial. Petitioner DK Arena, Inc. ("DK Arena") claimed Respondent EB Acquisitions I, LLP ("EB") breached a contract for the purchase and sale of a real property for $23 million. DK sought EB's $1,000,000 escrow deposit posted pursuant to the contract. EB asserted various defenses and counterclaims, including that DK Arena breached the contract. Following trial, the court ruled in favor of EB, specifically finding that the parties had orally agreed to an extension of the due diligence period, and that EB was entitled to the return of its $1,000,000 deposit. Although Petitioner acknowledged consent to verbally modify the due diligence period, it appealed the judgment arguing that the statute of frauds prevented enforcement of that agreement. The Fourth District Court of Appeals affirmed that portion of the final judgment, ruling that EB was entitled to the return of its escrow deposit, and rejected DK Arena's Statute of Frauds argument.

DK Arena seeks discretionary review by this Court claiming that the Fourth District's decision, which applied the doctrine of equitable estoppel in rejecting DK Arena's contention that the parties' oral agreement to extend the due diligence period was barred by the Statute of Frauds, is in direct and express conflict with the Florida Supreme Court's decision in *Tanenbaum v. Biscayne Osteopathic Hosp., Inc.*, 190 So.2d 777 (Fla. 1966). *Tanenbaum* held that the doctrine of promissory estoppel (which was not asserted in the case below) may not be used to circumvent the Statute

of Frauds. For the reasons explained below, this Court should decline to exercise discretionary jurisdiction to review the Fourth District Court's decision.

SUMMARY OF THE ARGUMENT

The Fourth District Court's decision does not conflict with *Tanenbaum* for several reasons: (1) it applied the doctrine of "equitable estoppel," not promissory estoppel; (2) case law uniformly recognizes that "equitable estoppel" may be used to overcome a Statute of Frauds defense to enforce proven oral modifications; (3) Respondent never advanced nor asserted a theory of promissory estoppel in this case; and (4) the Fourth District Court's decision expressly stated that it was not applying the doctrine of promissory estoppel.

To the contrary, the Fourth District Court's decision is consistent with a long line of Florida appellate decisions permitting the doctrine of equitable estoppel to be used "defensively" to defeat claims that a party's reliance on an oral extension of time to perform a written real estate contract violated the Statute of Frauds.

ARGUMENT

POINT I

THE FOURTH DISTRICT'S DECISION CORRECTLY APPLIED THE DOCTRINE OF "EQUITABLE ESTOPPEL" IN REJECTING THE STATUTE OF FRAUDS AS A DEFENSE TO THE UNDISPUTED ORAL MODIFICATION OF THE DEADLINE FOR PERFORMANCE AND DOES NOT CONFLICT WITH *TANENBAUM*, WHICH FOCUSES ON THE DOCTRINE OF PROMISSORY ESTOPPEL

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The linchpin of Petitioner's jurisdictional argument is that the Fourth District Court's application of the doctrine of **equitable estoppel** to reject Petitioner's claim that the oral modification of the due diligence period is barred by the Florida Statute of Frauds is in express and direct conflict with the Supreme Court's decision in *Tanenbaum*. In *Tanenbaum*, the Supreme Court specifically declined to "adopt by judicial action the doctrine of promissory estoppel as sort of a counteraction to the legislatively created Statute of Frauds." 190 So.2d at 779.

A. The Fourth District Court Clearly Applied "Equitable Estoppel" Principles

The Fourth District Court's decision does not conflict with *Tanenbaum* because *Tanenbaum* is a promissory estoppel case, and here the court applied equitable estoppel in holding that the oral modification was not barred by the Statute of Frauds. Petitioner concedes that the Fourth District Court applied equitable estoppel, not promissory estoppel, in rejecting its Statute of Frauds argument. (Petitioner's Brief, p. 3 [acknowledging that "the Fourth District employed equitable estoppel"]). Indeed, the Fourth District explicitly stated that its decision did not turn on promissory estoppel principles. 31 So.3d at 313, 325 (Fla. 4th DCA 2010) ("This case [does not involve] an attempt to set up a new enforceable promise under the doctrine of promissory estoppel."). For this reason alone, the Fourth District Court's opinion cannot be in express and direct conflict

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with *Tanenbaum*, **which, on its face, is limited to promissory estoppel and does not even mention equitable estoppel**. *See Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980) ("The dictionary definitions of the term 'express' include: 'to represent in words; 'to give expression to.' 'Expressly' is defined: 'in an express manner.'"); *see also Paddock v. Chacko*, 553 So.2d 168, 168-69 (Fla.1989) ("the opinion itself must directly and expressly, on its face, conflict with another opinion.").

Petitioner's argument that this is a promissory estoppel case overlooks the fact that the Respondent never asserted a claim for promissory estoppel below; the issue was neither litigated nor briefed. This is fatal to Petitioner's invocation of jurisdiction since promissory estoppel is an affirmative cause of action which must be pled,[1] whereas equitable estoppel is a purely "defensive doctrine."[2] The Fourth District clearly applied the estoppel doctrine "defensively," as evidenced by, among other things, its explanation that "[i]t is not the enforcement of the oral agreement that is sought, but a legal excuse for noncompliance with the terms of the written contract that is claimed." 31 So.3d at 323 (quoting *Warren v. Dodge*, 83 N.H. 47, 138 A. 297, 299 (1927)). This statement demonstrates that the Fourth District was applying equitable estoppel, and <u>not</u> promissory estoppel.

[1] *See Romo v. Amedex Ins. Co.*, 930 So.2d 643, 650 (Fla. 3d DCA 2006).
[2] *Flagship Resort Development Corp. v. Interval Intern., Inc.*, 28 So.3d 915, 923 (Fla. 3d DCA 2010); *Meyer v. Meyer*, 25 So.3d 39, 43 (Fla. 2d DCA 2009).

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Moreover, the Fourth District did not "mischaracterize" promissory estoppel as equitable estoppel, as Petitioner now suggests. In holding that Petitioner was "estopped" from avoiding the extension to which it orally agreed, the Fourth District explained that an estoppel "prevent[s] a party from ignoring an oral modification to conditions of performance where to do so, in light of one party's reliance on the modifications, creates an **injustice**." 31 So.2d at 324-25 (emphasis added). This is the essence of an equitable estoppel. *See Major League Baseball v. Morsani*, 790 So.2d 1071, 1076 (Fla. 2001) ("Equitable estoppel is based on principles of fair play and essential **justice** and arises when one party lulls another party into a disadvantageous legal position.") (emphasis supplied).

The operative facts underlying the District Court's estoppel ruling also establish that the Court applied equitable estoppel, not promissory estoppel. The difference between promissory estoppel and equitable estoppel is that, as to the former, the representation is "promissory" rather than pertaining to an "existing" fact. *Crown Life Ins. Co. v. McBride*, 517 So.2d 660, 661-62 (Fla. 1987); *Sheraton Twin Towers v. Casas*, 397 So.2d 391, 393 (Fla. 1st DCA 1981). Here, the representation at issue was to an "**existing**" fact; specifically, that the due diligence period under the contract was extended. *See DK Arena, Inc.*, 31 So.3d at 319 ("On October 4, 2004, the day the due diligence period was to expire, King and Markey met at King's office. Each man had two lawyers with him. King and Markey

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agreed to hold the due diligence period 'in abeyance' until 'they could get the joint venture agreement memorialized.'").[3] While Petitioner attempts to characterize this representation as "a promise by DK to permit EB to terminate the Agreement at a future date, the Court's ruling makes clear that the oral representation at issue is the present extension of the due diligence period, and not the future right of EB to terminate. *Id.* at 322-24 (repeatedly referring to "an oral agreement to extend the due diligence period.").

Any suggestion by Petitioner that the Court "mislabeled" promissory estoppel as equitable estoppel is further belied by the opinion's quote of the following passage from Justice Cardozo's oft-cited opinion in *Imperator Realty Co. v. Tull*, 228 N.Y. 447, 127 N.E. 263 (1920):

> The principle [of estoppel] is "fundamental and unquestioned," with "roots in the yet larger principle that no one shall be permitted to found any claim based upon his own inequity or take advantage of his own wrong. The statute of frauds was not intended to offer an asylum of escape from that fundamental principle of justice."

31 So.2d at 324 (quoting *Imperator*, 127 N.E. at 266). The *Imperator* decision is frequently cited by courts applying the doctrine of equitable estoppel in rejecting a party's claim that an oral modification is barred by the Statute of Frauds. *See e.g.*, *Rose v. Spa Realty Assocs.*, 42 N.Y.2d 338, 344, 397 N.Y.S.2d 922, 927 (1977).

[3] King conceded a verbal extension of the due diligence period; only the length was disputed. *See* Petitioner's Initial Brief below at pp. 3, 7, and 15-18.

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The Fourth District's reliance on *Imperator* further evinces that it correctly applied equitable estoppel. These principles are long-established, uniformly observed, and not in conflict with any decisional authority found in the State of Florida.

B. Equitable Estoppel May Be Employed to Defeat the Statute of Frauds

In contrast to promissory estoppel, equitable estoppel may be used **defensively** to prevent a party from invoking the Statute of Frauds to contest the validity of an oral agreement. *See Gleason v. Leadership Housing, Inc.*, 327 So.2d 101, 104-05 (Fla. 4th DCA 1976) ("assuming for the purpose of our decision that the agreement was, in fact, in violation of the Statute of Frauds, we hold that appellee is estopped to contest the validity of the agreement under the doctrine of equitable estoppel."); *United of Omaha Life Ins. Co. v. Nob Hill Associates*, 450 So.2d 536, 539 (Fla. 3d DCA 1984) (employing equitable estoppel principles); *Affordable Homes, Inc. v. Devil's Run, Ltd.*, 408 So.2d 679, 680 (Fla. 1st DCA 1982) (same); *Young v. Pottinger,* 340 So.2d 518 (Fla. 2d DCA 1976) (same).

Florida courts have routinely applied the doctrine of equitable estoppel to reject claims that a party's reliance on an oral extension of the time to perform a written real estate contract violated the Statute of Frauds. For example, in *Young*, buyers exercised an option to purchase real property, but orally agreed to delay closing to allow the sellers, an elderly couple, to "continue residing on the property." 340 So.2d at 519. During the extension, another couple, the Pottingers,

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swooped in and convinced the elderly couple to convey the property to them. *Id.* The buyers sued the Pottingers for tortious interference with their contract with the elderly sellers. *Id.* The trial court granted the Pottingers' motion to dismiss for failure to state a cause of action. *Id.* The Second District reversed, holding that the buyers had "pled themselves around" the statute of frauds defense by demonstrating an estoppel on the face of their pleading; the complaint stated a cause of action for tortious interference with their contract to purchase. *Id.* at 520-21.

In *Affordable Homes*, the First District Court of Appeal, citing *Young*, held that a party to a real estate contract could rely on "estoppel or waiver" to avoid the statute of frauds defense to its breach of contract claim by pleading that "it detrimentally relied on an oral modification, such as an extension of time of performance agreed to by" the other party to the contract. 408 So.2d at 680.

In *United of Omaha*, the Third District Court of Appeal, following *Young* and *Affordable Homes*, recognized that where one party to a real estate contract took action in reliance upon an oral agreement to extend the time for performance, the other party is estopped from relying on the statute of frauds to claim "that it did not agree to a longer period of time for compliance." 450 So.2d at 539.

In its decision below, the Fourth District noted the parallels between each of these cases and this one since each involved oral extensions of time to perform real

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estate contracts. 31 So.3d at 324. The Fourth District ultimately concluded that *Young*, *Affordable Homes*, and *United of Omaha* supported the application of equitable estoppel in this case, characterizing the estoppel doctrine as "fundamental and unquestioned," with "roots in the yet larger principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." 31 So.3d at 324 (quoting *Imperator Realty Co. v. Tull*, 228 N.Y. 447, 127 N.E. 263, 266 (1920) (Cardozo, J., concurring) (citations omitted). As the foregoing demonstrates, the Fourth District Court's application of the doctrine of "equitable estoppel" is in accord with existing case law and is not in express and direct conflict with *Tanenbaum's* proscription against the use of promissory estoppel principles to circumvent the Statute of Frauds.

POINT II

CASE LAW FROM THE SAME DISTRICT COURT CANNOT PROPERLY SERVE AS THE BASIS OF AN "EXPRESS AND DIRECT CONFLICT"

Discretionary jurisdiction to resolve conflicts is limited to those cases in which the decision of the district court of appeal expressly and directly conflicts with a decision of this Court or of **another** district court of appeal. *See* Philip J. Padovano, *Florida Appellate Practice*, § 3.11, at p. 73 (2009 ed.). On pages 9 and 10 of its jurisdictional brief, Petitioner relies upon two Fourth District Court of Appeal decisions--*Wharfside at Boca Pointe, Inc. v. Superior Bank*, 741 So.2d 542

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(Fla. 4th DCA 1999); and *Shore Holdings, Inc. v. Seagate Beach Quarters*, 842 So.2d 1010 (Fla. 4th DCA 2003)--as being "in conflict" with the decision below. By its express terms, Art. V, § 3(b)(3), Fla. Const., does not allow this Court to resolve conflicts within the **same** district. As explained by Judge Padovano, such conflicts can only be addressed through the rehearing *en banc* procedure. *See* Padovano, *Florida Appellate Practice*, § 3.11, at p. 73. Therefore, neither *Wharfside* nor *Shore* may serve as a basis for exercising discretionary jurisdiction.[4]

The only other district court decision relied upon by Petitioner as the basis for a supposed "inter-district" conflict is *Bradley v. Sanchez*, 943 So.2d 218 (Fla. 3d DCA 2006). However, that case, just like the others cited by Petitioner in its jurisdictional brief, involved a party's attempt to utilize the doctrine of promissory estoppel to support a claimed oral modification. *Id.* at 222 (holding that "the statute of frauds prohibits the oral modification of a contract for the sale of land under the doctrine of promissory estoppel."). As such, it cannot be in conflict with the decision below, which applied the doctrine of equitable estoppel (and not promissory estoppel) to prevent the Petitioner from relying on the statute of frauds to invalidate its oral agreement to extend the due diligence period.

[4] In any event, the Fourth District's opinion in this case does not conflict with either of those prior decisions, as thoughtfully explained in the opinion. *See* 31 So.3d at 325.

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CERTIFICATE OF FONT COMPLIANCE

WE HEREBY CERTIFY that pursuant to Florida Rule of Appellate Procedure 9.210(a), this Petition for Writ of Certiorari has been printed in Times New Roman with 14-point font.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by regular United States mail this 25th day of June, 2010 to: ALVIN B. DAVIS, ESQ., Squire, Sanders & Dempsey L.L.P., Attorneys for Petitioner, 200 South Biscayne Boulevard, Suite 4000, Miami, Florida 33131-2398.

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