IN THE SUPREME COURT OF FLORIDA

CASE NO.:
Lower Tribunal No.: 4D09-5

DK ARENA, INC.,

Plaintiff-Appellant

v.

EB ACQUISITIONS, I, LLC,

Defendant-Appellee.

DK ARENA, INC.'S JURISDICTIONAL BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

TREATISES

STATEMENT OF THE CASE AND FACTS

On July 20, 2004, EB Acquisitions, I, LLC ("EB") contracted to purchase real property ("Agreement") from DK Arena, Inc. ("DK"), posting a $1 million deposit. The Agreement provided for a sixty-day Due Diligence Period, ending September 20. If EB did not terminate the Agreement prior to expiration of the Due Diligence Period, the deposit was to be released to DK.

The Agreement required modifications to be in writing. On September 13, a written amendment extended the Due Diligence Period to October 4. Around this time, EB proposed and DK considered an alternate joint venture to develop the property.

On October 4, DK orally agreed to extend the Due Diligence Period for one week, through October 11. On October 11, EB requested yet another extension, which was not possible at the time. DK advised EB to terminate the Agreement in order to avoid forfeiting the deposit, with negotiations to continue. EB failed to do so. Accordingly, DK demanded the deposit. EB refused to allow payment.

On December 8, DK sued 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 the deposit based on a different oral joint venture, not pled by EB, which

extended the Due Diligence Period indefinitely. EB was awarded damages based on DK's breach of that newly-minted oral joint venture.

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; and (2) the finding of an oral joint venture was error because it, too, was barred by the Statute of Frauds, and the parties never agreed on its terms.

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

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, EB did not terminate the Agreement. The Fourth

District characterized the estoppel as equitable estoppel. Equitable estoppel has no application here. Whatever the Fourth District's description, this is demonstrably a case of promissory estoppel.

Equitable estoppel requires a showing that a party misrepresented or concealed an existing fact. Promissory estoppel differs from equitable estoppel in that the representations that form the basis for one's assertion of the doctrine relate to a promise of a future act, as opposed to an existing fact. Thus, the representations at issue in promissory estoppel go to future intent, while equitable estoppel involves misrepresentations that go 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 extend the Due Diligence Period. Stated differently, 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 will effectively nullify the legislatively created Statute of Frauds. Although the Fourth District purported to apply equitable estoppel, in substance, it

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.[1]

ARGUMENT

I. The Decision in this Case Directly Conflicts with *Tanenbaum*.

According to the Fourth District, the key to this case is that "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 terminate the contract." Op. at 10-11. Based on EB's purported reliance on DK's promise, the Fourth District estopped DK 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. 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 had a five-year oral employment contract with Defendant. *Id*. at 778. In reliance on the contract, Plaintiff, a Pennsylvania resident, left his job, sold his home at a loss, moved to Florida, and bought a new home. *Id*. at 780. Plaintiff's employment was terminated just months later. *Id*. at 778. Notwithstanding the changes made by Plaintiff in reliance on the contract,

[1] 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.

this Court did not enforce it. Rather, 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 they did not apply…" *Id.* at 779.

Both *Tanenbaum* and this case have: (1) contracts subject to the Statute of Frauds; (2) oral promises relating to future intent; (3) parties seeking to avoid the Statute of Frauds claiming reliance on oral promises; and (4) nothing preventing the parties from memorializing the promises.[2] Accordingly, the decisions conflict.

The conflict was created by mischaracterizing promissory estoppel as equitable estoppel. If permitted to stand, this decision will allow promissory estoppel, under the guise of equitable estoppel, to trump the Statute of Frauds.

II. 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).

[2] DK expressly cautioned EB to terminate the Agreement and avoid what occurred here.

A "truthful 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."[3] *South Inv. Corp. v. Norton*, 57 So. 2d 1, 3 (Fla. 1952) (refusing to apply equitable estoppel to enforce land owner's promise to extend deadline under option contract).

The exception to the rule that equitable estoppel applies only to representations of present or past fact is promissory estoppel. 22 Fla. Jur. 2d § 46; *Southeastern Sales and Serv. Co. v. T. T. Watson, Inc.*, 172 So. 2d 239, 240 (Fla. 1965) (Promissory estoppel is "an exception to that doctrine, well-rooted in the sub-soil of Florida law, known as 'equitable' estoppel or estoppel 'in pais.'").

"'Promissory' estoppel differs from ordinary 'equitable' estoppel in that the representation is promissory rather than as to an existing fact."[4] *Southeastern*, 172 So. 2d at 240 ("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).

[3] *See also W.R. Grace and Co. v. Geodata Serv., Inc.*, 547 So. 2d 919, 924 (Fla. 1989); *Bergman v. DeIulio*, 826 So. 2d 500, 504 (Fla. 4th DCA 2002).
[4] A promise "as to the future will not support an estoppel…" 31 C.J.S. § 92.

This Court recognizes the distinction between equitable and promissory estoppel, and has corrected previous mischaracterizations by the Fourth District. In *Crown Life Ins. Co. v. McBride*, Plaintiff sought to enforce an oral contract for insurance. 517 So. 2d 660, 661 (Fla. 1987). The Fourth District certified this question: "May the theory of equitable estoppel be utilized to prevent an insurance company from denying coverage?" *Id*. This Court corrected the Fourth District, which should have asked if promissory estoppel could be used. *Id*. at 662. This Court answered the reframed certified question in the affirmative, finding "that the form of equitable estoppel known as promissory estoppel may be utilized to create insurance coverage." *Id*. The basis for this Court's decision was that "several of the district courts ha[d], in effect, found [promissory estoppel] applicable, albeit in the guise of equitable estoppel." *Id*. District Courts have frequently confused promissory and equitable estoppel, resulting in conflicting decisions.[5]

[5] In *Tanenbaum*, Plaintiff argued at trial court that the defendant was estopped from asserting the Statute of Frauds. *See Tanenbaum*, 173 So. 2d 492, 493 (Fla. 3d DCA 1965); *Tanenbaum*, 190 So. 2d at 778. Despite Plaintiff's use of equitable estoppel, both the Third District and this Court addressed Plaintiff's "estoppel" in terms of promissory estoppel because Plaintiff was seeking to enforce a promise of future intent – a five-year oral employment contract – as opposed to a representation of present fact. *Id*. Similarly, in *City of Orlando v. West Orange Country Club*, Plaintiff sought to enforce an unsigned contract to provide water for twenty years. 9 So. 3d 1268, 1269 (Fla. 5th DCA 2009). 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*.

In this case, DK's oral promise to extend the Due Diligence Period was made on October 4. The then-current extension to the Due Diligence Period was set to expire. Thus, the extension was to begin on October 5. Stated differently, the "oral agreement," for which no consideration was provided,[6] was a promise by DK to permit EB to terminate the Agreement at a future date.[7] DK's promise was a statement as to its present intention with regard to its future acts, as opposed to a misrepresentation or concealment of existing fact. Thus, only promissory estoppel is applicable here.

Nonetheless, the Fourth District enforced DK's promise as a form of equitable estoppel.[8] As a result, this decision misapplied and directly conflicts with: (1) *Tanenbaum*; (2) *South Inv. Corp.*; (3) *McBride*; and (4) *Southeastern.*

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[6] 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.

[7] Similarly, in *Coral Way v. Roses*, Plaintiff sought to enforce Defendant's "oral assurances that he would be able to continue to occupy the subleased space." 565 So. 2d 372 (Fla. 3rd DCA 1990). The court held that: (1) the case was controlled by *Tanenbaum*; and (2) promissory estoppel could not avoid the Statute of Frauds.

[8] The cases the Fourth District relied on also mischaracterized promissory estoppel as equitable estoppel. In *Young v. Pottinger,* the Second District, in following *Warren v. Dodge*, a 1927 New Hampshire case, stated in dicta that an estoppel could be used to plead around the Statute of Frauds where parties orally agree to extend a written option contract to purchase land. 340 So. 2d 518, 520 (Fla. 2d DCA 1977). Such an agreement goes to future intent. *See South Inv. Corp.*, 57 So. 2d at 3. *Young* was a promissory estoppel case. In *Affordable Homes, Inc. v. Devil's Run, Ltd.*, the First District stated in dicta that a "cause of action can be stated under [an estoppel] theory if the appellant pleads that it detrimentally relied on an oral modification…" 408 So. 2d 679, 680 (Fla. 1st DCA 1982). It is well-established that equitable estoppel is a defense, while promissory estoppel is an

III. The Decision in this Case Conflicts with District Court Precedent.

In *Wharfside at Boca Point, Inc. v. Superior Bank*, the parties attempted to orally modify the sales price and extend the closing date of a real estate contract. 741 So. 2d 542, 544 (Fla. 4th DCA 1999). 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.*, 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." 842 So. 2d 1010, 1012 (Fla. 4th DCA 2003). Plaintiff's claims did not survive the Statute of Frauds. *Id*. An oral modification of the real estate contract was prohibited. *Id*. In *Bradley v. Sanchez*, Plaintiff claimed its contract to purchase real property from Defendant was orally modified when Defendant granted an extension to apply for financing. 943 So. 2d 218, 221-22 (Fla. 3d DCA 2006). 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*.

The Fourth District attempted to distinguish *Wharfside* and *Shore* because the oral agreements not only extended the closing date, but altered the "sales price,

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affirmative claim for relief. 28 Am. Jur. 2d §35; *Bergman*, 826 So. 2d 500, 504. The First District's reference in *Affordable Homes* to equitable estoppel as a cause of action is another example of the failure of District Courts to properly differentiate between the doctrines. In *United of Omaha Life Ins. Co. v. Nob Hill Assoc.*, the Third District merely followed *Affordable Homes* and *Young*.

an essential term" as well. Op. at 13. Thus, the Fourth District minted a new rule, pursuant to which promissory estoppel,[9] disguised as equitable estoppel, does not counteract the Statute of Frauds where the oral modification both extends the contract and alters "an important term such as the sales price," but does counteract the Statute of Frauds if the oral modification only extends the contract.[10] *Id*.

Wharfside, *Shore*, 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*, and *Bradley*.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider this case on its merits.

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[9] In both *Bradley* and *Shore* the District Courts stated: the "statute of frauds prohibits the oral modification of a contract for the sale of land under the doctrine of promissory estoppel." *Bradley*, 943 So. 2d at 222; *Shore*, 842 So. 2d at 1012. Akin to DK's alleged oral promise to hold the Due Diligence Period in abeyance, *Bradley* and *Shore* involved oral promises extending a real estate contract. That the courts in *Bradley* and *Shore* addressed promissory estoppel in considering oral modifications that extended a real estate contract further supports the proposition that the Fourth District, in this case, misapplied equitable estoppel to a case of promissory estoppel.

[10] The Fourth District stated that the "estoppel cases do not condone oral changes" to an "important term. . . ." Op. at 13.

Dated: May 17, 2010

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 17th day of May, 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.

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