IN THE SUPREME COURT OF FLORIDA

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

DK ARENA, INC.,

Petitioner,

v.

EB ACQUISITIONS, I, LLC,

Respondent.

DK ARENA, INC.'S REPLY BRIEF

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INTRODUCTION

There is one alleged representation upon which this entire case is based—DK Arena, Inc.'s ("DK") promise to hold the Due Diligence Period in abeyance. This representation was promissory. The Fourth District, nonetheless, 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.

EB Acquisitions, I, LLC ("EB") urges this Court to affirm the trial court's and the Fourth District's holding that DK "waived" certain provisions in the parties' contract (the "Agreement"). There was no finding of waiver below. EB's assertions to the contrary are patent misrepresentations.

EB contends that its failure to comply with the Statute of Frauds should be excused under the "doctrine of waiver and estoppel." Waiver, equitable estoppel and promissory estoppel are distinct doctrines. EB's conflated doctrine does not exist, and neither waiver nor equitable estoppel pertains here. EB's hybrid doctrine, therefore, inevitably fails.

EB failed to terminate the Agreement despite DK's explicit warning to do so. The Agreement expired by its own terms. DK is entitled to the deposit.

ARGUMENT

I. Partial Performance is Not Applicable and Was Never Raised Below.

EB first claims that *Yates v. Ball*, 132 Fla. 132 (Fla. 1937) stands for the proposition that the Statute of Frauds must be construed to prevent lawsuits from

having "fraudulent outcomes," and second, claims that DK's alleged promise to hold the Due Diligence Period open should be removed from the Statute under the doctrine of part performance. (EB Answer Brief at 15-19). EB is incorrect.

Contrary to EB's interpretation, which advocates an "outcome" driven and, therefore, inconsistent application of the Statute of Frauds, this Court stated in *Yates* that the Statute is to be strictly construed and that "courts should be reluctant to take cases from its protection." *Yates*, 132 Fla. at 138. EB omitted this key phrase and misread the case. Illustrating this point, in *Shore Holdings, Inc. v. Seagate Beach Quarters, Inc.*, 842 So. 2d 1010, 1012 (Fla. 4th DCA 2003), a correct reading of *Yates* and other Supreme Court opinions was stated as follows:

> In *Tanenbaum*, the Florida Supreme Court specifically declined to "adopt by judicial action the doctrine of promissory estoppel as a sort of counteraction to the legislatively created *Statute of Frauds*." 190 So. 2d at 779. The Florida Supreme Court cited with approval its holding in *Yates* . . . that the *Statute of Frauds* should be strictly construed, and that great caution should be exercised "in the consideration of the advisability of ingrafting onto the law of this State a provision which may have the effect of nullifying the legislative will of the State as expressed by the enactment of the *Statute of Frauds*." *Tanenbaum*, 190 So. 2d at 778. Additionally, the Florida Supreme Court in *W.R. Grace & Co. v. Geodata Services, Inc.*, 547 So. 2d 919 (Fla. 1989) expressed concern that the *Statute of Frauds* would be substantially changed if it approved the application of promissory estoppel under the facts of that case, stating that "it would . . . become extremely difficult for parties to fully understand or be advised of their rights and obligations under written contracts."

Id. Based on the foregoing, it is clear that EB's reliance on *Yates* is misplaced.

EB also incorrectly relies on *Carson v. Tanner*, 101 So. 2d 811 (Fla. 1958) and *Cottages, Miami Beach v. Wegman*, 57 So. 2d 439 (Fla. 1951) in arguing that part performance removes DK's alleged promise from the Statute of Frauds.

In *Carson*, this Court found that an oral agreement for ingress and egress could be specifically enforced because the plaintiffs had "performed their contract" by exercising the right for four years and paying the purchase price, and the defendant performed the contract by delivering the deed. 101 So. 2d at 813. The plaintiffs were awarded specific performance under the part performance doctrine.

Wegman involved an oral contract where the plaintiff was to receive land if she moved to Miami and operated a business on the land. 57 So. 2d at 440. She "took possession of the property and operated it for approximately three years" and, thus, "fully performed her part of the oral contract." *Id*. Specific performance was granted because "[t]his Court has held that the taking of possession and, in addition, the payment of some part or all of the consideration is such part performance as will take an oral contract out of the Statute of Frauds." *Id*. at 441.

EB never raised part performance below, nor is it applicable. EB did not perform, it did not take possession of the land. Further, this is a suit for money damages, and "part performance to excuse a failure to comply with the statute of frauds is not available in Florida to actions solely for money damages." *Wharfside*

at Boca Point, Inc. v. Superior Bank, 741 So. 2d 542, 544 (Fla. 4th DCA 1999). The doctrine of part performance merits no consideration in this case.

II. Neither Waiver nor Equitable Estoppel Applies and EB's "Doctrine of Waiver *and* Estoppel" Does Not Exist; DK's Alleged Promise is Governed by Promissory Estoppel and Barred by the Statute of Frauds.

EB invents a new theory in its Answer Brief—one never before promulgated, applied or otherwise mentioned by the Florida Supreme Court—the "doctrine of waiver and estoppel." (EB Answer Brief at 12-14, 22, 25-27, 31-33). EB's "hybrid" doctrine purports to have three elements: (i) a contract; (ii) waiver; and (iii) estoppel. (*Id*. at 12, 26, 33). Waiver, equitable estoppel and promissory estoppel are, of course, separate doctrines, each defined by distinct characteristics and elements. There is no doctrine of waiver *and* estoppel.

It is certain that there is one key representation at issue—DK's promise to hold the Due Diligence Period open. EB claims that this representation establishes waiver and equitable estoppel, and therefore, its "doctrine of waiver and estoppel" as well. There is no legal or factual basis for EB's naked assertions. Neither waiver nor equitable estoppel applies. Thus, overlooking the fact that it does not exist, EB's self-serving doctrine fails. This is a case of promissory estoppel.

A. Waiver has no Application to this Case.

There are two key contract provisions relevant to EB's newly-minted waiver theory. The first is the Due Diligence Period, originally set to expire on September

20, then extended in a writing signed by both parties through October 4. (App. 3 at ¶ 7; App. 5). The second allowed EB to terminate the Agreement before the Due Diligence Period's expiration and retain the deposit. (App. 4 at ¶ 10). If EB did not terminate, the deposit was to be released to DK, and the deed, in a form acceptable to EB, delivered pending closing. (*Id*).

EB is inconsistent and unclear with respect to the provision it claims was waived. At times, EB asserts that DK waived the Due Diligence Period provision. At others, EB asserts that DK waived the deposit provision. DK waived neither.

1. Waiver was Never Addressed by the Courts Below.

As a threshold matter, EB's waiver argument as to the Due Diligence Period provision is premised on a demonstrably, intentionally false characterization of the proceedings below. EB claims that the "trial court found that DK Arena had waived the due diligence deadline," and that the Fourth District "affirmed . . . specifically holding that DK Arena waived the due diligence deadline." (EB Answer Brief at 12). EB then urges this Court to affirm these mythical findings.

The word "waiver" does not appear anywhere in the trial court's ten-page final judgment. There is, of course, good reason for its absence—the trial court **did not** find that DK waived any part of the Agreement. Rather, the trial court found that the Due Diligence Period was verbally extended on October 4 in connection with an oral joint venture to "deal[] in good faith to conclude modified

partnership documents." (App. 13 at 8). The trial court then attempted to finesse the Statute of Frauds obstacle by reasoning that the oral joint venture "was not for the purpose of taking title to the property," rather, "it was contemplated that modified documents would be prepared for the purpose of taking title . . . ." (*Id*. at n. 6). The Fourth District entirely rejected these findings.

The Fourth District could not affirm what the trial court never found. Waiver was not an issue in either court. The Fourth District held that the "doctrine of estoppel prevents DK Arena from relying on the statute of frauds." (App. 1 at 10). It **did not** hold that DK had "specifically waived" a provision in the Agreement. EB's unfortunate and wholly false assertion to the contrary is yet another deliberate misrepresentation. (EB Answer Brief at 12).

There was no discussion—let alone a finding—regarding waiver because waiver never occurred. Waiver is the relinquishment of a known right. *Winans v. Weber*, 979 So. 2d 269, 274 (Fla. 2nd DCA 2007). The essential elements are (1) the existence at the time of the waiver of a right; (2) knowledge of the benefit, right or advantage; and (3) the intention to relinquish the benefit, right or advantage. *Id*.

DK's alleged promise to indefinitely hold the Due Diligence Period open does not remotely fit the definition of waiver. Nor does the evidence establish that DK intended to relinquish the provision. More importantly, one can only waive a contract provision for whose benefit it is inserted. *Am. Ideal Mgmt., Inc. v.*

Gauvreau, 567 So. 2d 497, 501 (Fla. 4th DCA 1990) (reversing summary judgment because contract provision allegedly waived protected both parties). The Due Diligence Period provided EB the ability to evaluate the project before committing to purchase the property. DK could not, as a matter of law, waive a provision that inured to EB's benefit. *Id*. Further, DK, on October 4, could not waive its right to assert that the Due Diligence Period expired because as of that date, the period was still open. *Winans*, 979 So. 2d at 274 (right must be in existence at time of waiver); *Choctawhatchee Elec. Cooperative, Inc. v. Gulf Power Co.*, 265 So. 2d 417, 421 (Fla. 1st DCA 1972) (provision cannot be waived at time when one is "powerless to assert or enforce" it).

2. Waiver of the Deposit Provision was Never Addressed by the Courts Below.

Inconsistently, EB also argues that DK waived the deposit provision. (EB Answer Brief at 33-34). There was no finding of waiver by either of the Courts below. Additionally, EB overlooks a key component of the doctrine—waiver is the relinquishment of a known benefit, right or advantage that is in existence at the time of the alleged waiver. *Winans*, 979 So. 2d at 274. EB's claimed waiver is DK's promise to hold the Due Diligence Period in abeyance. That alleged promise was made on October 4, when the Due Diligence Period was still open. Thus, at the time of the alleged waiver, DK had no right to demand the deposit. In other words, there was no benefit, right or advantage in existence on October 4 that

could have been waived by DK. *Id.* 28 Am. Jur. 2d § 201 ("a person cannot waive a right before he or she is in a position to assert it"); *Gulf Power*, 265 So. 2d at 421 (provision can't be waived at time when one is "powerless to assert or enforce" it).

Further, there is no evidence that DK represented to EB that it was choosing to not demand the deposit after EB failed to timely terminate. In fact, the opposite is true. On October 11, DK advised EB that it would demand the deposit if EB did not terminate the Agreement. (App. 2 at 169-73; App. 10 at 7-11). This evidence was unrefuted at trial. DK did not waive the deposit provision.

B. Equitable Estoppel has no Application to this Case.

The essential elements of equitable estoppel are: (1) a representation about a past or present fact; (2) reliance on that representation; and (3) a detrimental change in position. *Winans*, 979 So. 2d at 275; 28 Am. Jur. 2d § 40; 22 Fla. Jur. 2d § 44 ("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.").

DK's purported representation—a promise to hold the Due Diligence Period open for an indefinite period of time continuing into the future—does not provide the basis for an equitable estoppel because it "relate[d] to a future act of the promisor [DK]." *Southeastern Sales and Serv. Co. v. T. T. Watson, Inc.*, 172 So. 2d 239, 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."); *Crown Life Ins. Co. v. McBride*, 517 So. 2d 660, 661 (Fla. 1987) (correcting Fourth District's mischaracterization of promissory estoppel as equitable estoppel).

C. Promissory Estoppel is the Sole Applicable Doctrine.

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." 28 Am. Jur. 2d § 50; *Southeastern*, 172 So. 2d at 240. The elements are: (1) a promise as to future intent; (2) reliance on the representation in the form of action or forbearance; and (3) a detrimental change in position. 28 Am. Jur. 2d § 55; 22 Fla. Jur. 2d § 46.

As stated by EB itself, the representation at issue here is DK's "promise to hold the due diligence period under the contract in abeyance." (EB Answer Brief at 1-2, 41) (EB also refers to it as a "promise regarding extension of the due diligence period" and a "promise to suspend the due diligence period") (emphasis added). EB claims that it "relied upon this promise through forbearance of its right to terminate the contract." (*Id*. at 1) (emphasis added).

Promissory estoppel applies where there is a promise as to future intent and detrimental reliance through action or forbearance. 22 Fla. Jur. 2d § 46. EB's own characterization of the key representation in this case is, by definition, promissory

estoppel. Indeed, EB claims that DK made a "promise to hold the due diligence period under the contract in abeyance," and that EB detrimentally "relied on this promise" as to DK's future intent "through forbearance of its right to terminate the contract." (EB Answer Brief at 1-2, 41). This is a case of promissory estoppel.

D. EB's Doctrine of Waiver *and* Estoppel Fails.

In attempting to establish its "doctrine of waiver *and* estoppel," EB argues that the same representation—DK's alleged promise to hold the Due Diligence Period open—resulted in: (i) either a waiver of the Due Diligence Period or the deposit provision; and (ii) an estoppel. Waiver, equitable estoppel and promissory are distinct doctrines. EB's awkward attempt to fuse waiver and estoppel into a single doctrine does not change Florida law. Even if the doctrine did exist, neither waiver nor equitable estoppel applies. DK's alleged promise, as a matter of law, is governed by promissory estoppel. Thus, EB's combination of two doctrines entirely inapplicable to this case inevitably fails.

EB's "waiver and estoppel cases" do not support a contrary result. (EB Answer Brief at 19-25). For example, in EB's first case, *Gilman v. Butzloff*, 22 So. 2d 263 (Fla. 1945), the plaintiff purchased a hotel, and after taking possession, sued the defendant arguing that there had been an unenforceable modification because the property was delivered at a later date than provided in the contract. *Id.* at 264. The Court affirmed judgment in favor of the defendant because even if

there had been an unenforceable modification, there was a "waiver of the terms of the executory contract and a consummation and satisfaction of the contract as affected by the waiver." *Id*. (emphasis added). The Court held that the "statute of frauds cannot be invoked where non-performance of the original terms has been occasioned by the oral modification **and a contract as modified has been fully performed**." *Id*. Coincidently, EB recites this quote, but omits the bold language. (EB Answer Brief at 19). *Gilman* provides no relief to EB. Rather, once again, EB has misguidedly relied on a case where the contract was performed.

EB's next case is *Forbes v. Babel*, 70 So. 2d 371 (Fla. 1953). There, due to the defendant's own conduct, the closing on a real estate contract did not take place on the date set therein. *Id*. Plaintiff sued and the Court specifically enforced the contract for the plaintiff. *Id*. The narrow holding in *Forbes*, akin to the doctrine of part performance, is that where a plaintiff proves that she was, at all times, ready, willing and able to close on real property pursuant to a written and enforceable contract, but was unable to close due to the defendant seller's conduct, the plaintiff is entitled to specific performance. *Id*. *See also Harrison v. Baker*, 402 So. 2d 1270, 1273 (Fla. 3d DCA 1981) (granting specific performance where the contract was "in writing and duly witnessed and acknowledged" and holding that "to obtain specific performance of a land contract, the 'purchaser must either pay the contract sum; tender it; establish that he is ready, willing and able to do so; or establish that

he has been excused from so doing.'"); *Gevas v. Fernandez*, 905 So. 2d 149 (Fla. 3d DCA 2004). This is not a suit for specific performance. Even if it was, EB was never ready and able to perform—it never secured financing. *Forbes* is irrelevant.

EB's next three "waiver and estoppel" cases, *Young*, *Affordable Homes*, and *Nob Hill*, are equally unavailing. In *Young*, the plaintiffs exercised a written option to purchase a home, at which point the sellers, an elderly couple, asked to stay a bit longer; the plaintiffs agreed. 340 So. 2d 519. When the defendants slyly procured the deed from the sellers, the plaintiffs sued seeking imposition of a trust. *Id*. The complaint was dismissed. *Id*. On appeal, the defendants argued that the plaintiffs were relying on an oral extension in violation of the Statute of Frauds. *Id*. The appeals court reversed the dismissal and held that because the defendants were not a party to the option contract, they did not have standing to raise the Statute. *Id*. The appeals court stated that the "[Statute of Frauds] is **irrelevant** to this suit." *Id*. (emphasis added). Nonetheless, the appeals court embarked on a superfluous, inconsequential and inaccurate discussion on whether the Statute of Frauds would have been violated *if* it was relevant. *Id*. This dicta in *Young* does not serve as precedent for Florida's lower courts, much less this Court.

Notwithstanding the foregoing, *Young*—a suit in equity—relies on *Warren v. Dodge*, 83 N.H. 47 (1927) and *Gilman*, both of which involve specific performance and full or part performance. To reiterate, EB quoted *Gilman*, but

omitted the key language: "the statute of frauds cannot be invoked where non-performance of the original terms has been occasioned by the oral modification **and a contract as modified has been fully performed**." *Gilman*, 22 So. 2d at 265 (contract performed because plaintiff buyer paid consideration, accepted the deed and took possession of land). To be clear, performance under Florida law requires possession and payment, and is not available to actions for money damages. *Id.* *See also Wegman*, 57 So. 2d at 441 (possession and payment necessary for oral contract to be removed from Statute of Frauds under part performance doctrine); *Wharfside*, 741 So. 2d at 544 (doctrine of part performance not available in actions solely for money damages). EB is not seeking specific performance, did not take possession, was never willing, able, and ready to do so, and never raised performance below. *Id*. EB's reliance on *Young* is unavailing.

EB's next case, *Affordable Homes*, again involves specific performance where the plaintiff pled that it was "ready, willing and able to close" on the subject property. 408 So. 2d at 680. The appeals court reversed the trial court's dismissal with prejudice, and relying on *Young*, stated that the plaintiff could plead a "cause of action under [equitable estoppel or waiver]." *Id*. Authority is not necessary to point out that neither equitable estoppel nor waiver are "causes of action." Only promissory estoppel is. *Affordable Homes* does not lend support to EB's position.

EB's final case, *Nob Hill*, followed the faulty dicta of *Young* and *Affordable Homes*, and, therefore, is not persuasive. 450 So. 2d 539.

III. This Case Conflicts With Florida Law.

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. This decision conflicts directly with Supreme Court and District Court precedent holding that: (i) promissory estoppel cannot be used to counteract the Statute of Frauds; (ii) promissory estoppel differs from equitable estoppel in that the representation is promissory rather than as to an existing fact; and (iii) oral modifications to contracts subject to the Statute of Frauds are unenforceable.[1]

IV. DK is Entitled to the Deposit.

In a last-ditch effort, EB claims the trial court found there was an "independent breach compelling the release of the deposit back to EB," and that the "appellate court left undisturbed these findings," which DK did not challenge on appeal. (EB Answer Brief at 37). EB misrepresents the proceedings below.

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[1] *See, e.g., Tanenbaum*, 190 So. 2d 777; *Southeastern*, 172 So. 2d 239; *McBride*, 517 So. 2d 660; *South Inv. Corp. v. Norton*, 57 So. 2d 1 (Fla. 1952); *W.R. Grace and Co. v. Geodata Serv., Inc.*, 547 So. 2d 919 (Fla. 1989); *Wharfside*, 741 So. 2d 542; *Shore Holdings*, 842 So. 2d 1010; *Bradley v. Sanchez*, 943 So. 2d 218 (Fla. 3d DCA 2006); *Orlando v. West Orange Country Club*, 9 So. 3d 1268 (Fla. 5th DCA 2009); *Coral Way Prop. v. Roses*, 565 So. 2d 372 (Fla. 3d DCA 1990); *Eclipse Med. Inc. v. Am. Hydro-Surgical Inst., Inc.*, 262 F. Supp. 2d 1334 (S.D. Fla. 1999).

The trial court's purported breaches were DK's failure to attend the October 26 meeting and its dealing with a purchaser on or about October 27. (App. 13 at 6). These breaches were premised on the trial court's finding that an oral joint venture indefinitely extended the Due Diligence Period—and DK's contractual obligations—beyond October 4. There is not a shred of evidence that DK's purported breaches occurred on or before October 4. As demonstrated above, DK's alleged promise is barred by the Statute of Frauds. The Agreement expired by its own terms on October 4. DK's alleged breaches occurred after expiration.

Notwithstanding the foregoing, the Fourth District entirely rejected the trial court's opinion, and only affirmed to the extent that EB was entitled to the deposit. Indeed, the Fourth District's basis for awarding EB the deposit was equitable estoppel. Estoppel was not mentioned in the trial court's opinion. Thus, the Fourth District **did not** affirm the trial court's findings of breach. Rather, it found that EB was entitled to the deposit on different grounds.

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: February 7, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 7th day of February, 2011, served a true and correct copy of the foregoing upon the following counsel of record by U.S. Mail and E-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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