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IN THE DISTRICT COURT OF APPEAL
SIXTH DISTRICT OF FLORIDA
Case No. 6D24-0034
On Appeal from the Ninth Judicial Circuit Court
in and for Orange County, Florida
L.T. CASE NO: 2021-CA-004752-O

1ST ORIENTAL MARKET, LLC,

Appellant,

v.

ENSON MARKET, INC.
and XINSEN NI,

Appellees.

APPELLEES' ANSWER BRIEF

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2. Whether the Appellant through its actions and statements waived a right to require arbitration for which rehearing was sought.

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ISSUES ON APPEAL

1. Whether there are any disputed issues of fact or any issues of law which support a conclusion that the trial court abused its discretion by entering partial summary judgment requiring specific performance of the contract at issue.

2. Whether the Appellant through its actions and statements waived any right to require arbitration for which rehearing was sought.

STATEMENT OF APPELLATE JURISDICTION

This case is not an appeal of a final judgment as Appellant, 1st Oriental Market, LLC contends on page 1 of its Initial Brief. There are issues remaining in the lower court, as described below. *See* Statement of the Case and Facts *infra* at 5.

This appeal is of the July 6, 2023, Order Granting Plaintiff Xinsen Ni's Motion for Partial Summary Judgment (R. 490-499), a non-final order requiring specific performance of a contract and determining the immediate right to property, i.e. membership interests in 1st Oriental Market Real Estate, a Florida limited liability company, and is appealable under *Fla. R. App. P.* 9.130(a)(3)(C)(ii). *See, e.g., Hollinger v. Hollinger*, 292 So. 3d 537, 541 (Fla. 5th DCA 2020). *See also Ruckdeschel v. People's Trust Ins. Co.*,327 So. 3d 311, 312 (Fla. 4th DCA 2021) (*per curiam,* equating injunctive relief and specific performance).

PRELIMINARY STATEMENT

A. Designation of the Parties and Non-Party

Appellant, 1st Oriental Market, LLC, defendant below, will be referred to, as appropriate, as "Appellant," "1st Oriental Market" or "Defendant." Appellees, Enson Market, Inc. and Xinsen Ni, a/k/a Xinsen "Ni" Zheng, plaintiffs below, will be referred to, respectively, as Enson or Mr. Ni, and collectively as "Appellees, or "Plaintiffs." 1st Oriental Market Real Estate, LLC, whose membership interests are at issue in this appeal, will be referred to as "1st Oriental Real Estate."

B. References to the Record

The record on appeal will be referred to by "R.," followed by the number of the page(s) in the record, and, as appropriate, by the paragraph ("¶") or the section ("§") number on the page(s) to which the Appellees refer. Even though some documents may appear several times in the Record on Appeal, a document will be referred to only at one of its record locations.

The following documents will be referred to as indicated:

1. "'Second Amended Complaint" – The amended complaint (R.211-245) filed on January 24, 2022;

2. "Sales Agreement" – the September 23, 2020, Agreement for Sale of Limited Liability Company Interests of 1st Oriental Market Real Estate, LLC (R. 219-226) attached to the Second Amended Complaint as Exhibit "A;"

3. “Purchase Agreement” – the Supermarket Asset Purchase Agreement (R. 227-242) attached as Exhibit B to the Second Amended Complaint for the purchase of the business assets of 1st Oriental Market;

4. “Affirmative Defenses” or “Aff. Def.” – as appropriate, the Affirmative Defenses at R, 272-277 in the Answer and Affirmative Defenses and Demand for Trial by Jury on All Issues So Triable (R.270-306);

5. “Summary Judgment Motion”– Plaintiff’s Motion for Partial Summary Judgment (R.354-364);

6. “Ni’s First Affidavit” or “Ni 1st Aff.” – Affidavit of Xinsen "Ni" Zheng (R.365-367);

7. “Ni’s Second Affidavit” or “Ni 2d Aff.” – Second Affidavit of Xinsen "Ni" Zheng (R.368-369);

8. “Pugh Affidavit” - Affidavit of Jason Pugh, Esq. (R.370-394);

9. “George Affidavit” - Affidavit of Dennis George Esquire (R.414-447);

10. “Opposition to Summary Judgment’ - 1st Oriental Market, LLC'S Response in Opposition to Plaintiff Xinsen Ni's Motion for Partial Summary Judgment (R. 448-486);

11. “July 6, 2023, Order” or “Order” – the July 6, 2023, Order Granting Plaintiff Xinsen Ni’s Motion for Partial Summary Judgment (R. 490-499) and requiring Appellant to specifically perform the Sales Agreement (R. 219-226);

12. "Motion for Rehearing" – the Motion for Rehearing filed by Appellant (R.505-506) on July 20, 2023;

13. "Notice of Appeal" – the Notice of Appeal (R. 519 – 531) filed by Appellant on December 29, 2023, and

14. "Amended Notice of Appeal" – the Amended Notice of Appeal (R, 532-533) filed by the Appellant on January 24, 2024.

ISSUES ON APPEAL

1. Whether there are any disputed issues of fact or any issues of law which support a conclusion that the trial court abused its discretion by entering partial summary judgment requiring specific performance of the contract at issue.

2. Whether the Appellant through its actions and statements waived any right to require arbitration for which rehearing was sought.

STATEMENT OF THE CASE AND FACTS

On September 23, 2020, Appellant and Mr. Ni entered into the Sales Agreement (R. 219-226). In that Sales Agreement, Appellant represented that it owned sixty percent (60%) of the limited liability company interests of 1st Oriental Real Estate, and Mr. Ni agreed to purchase forty-nine percent (49%) of the membership interests in 1st Oriental Real Estate for One Million Five Hundred Sixty-Eight Thousand and 00/100 Dollars ($1,568,000.00). *See* Sales Agreement at §1.2 and Article II (R. 219-220) and Schedule "A" (R. 226). Under paragraph 3.3

of the Sales Agreement (R. 221), the Sales Agreement (R219-226). and the Purchase Agreement (R. 228-242) under which Enson was to purchase the assets of 1st Oriental Market were to close on the same day, but no later than 60 days after September 23, 2020.

Other than the requirement of simultaneous closing, there is no reference in either agreement to the other. The word option is only used in each agreement as a representation by the Appellant that there were no options that would affect either closing. *See* Paragraph 1.8 (R 220) of the Sale Agreement and paragraph 4.01.C. (R. 231) of the Purchase Agreement.

The Complaint (R. 13-24) was filed by the Appellees on May 6, 2021. The Second Amended Complaint (R.211-245) was filed on January 25, 2022. *See* R. 246. In Count 1 (R. 212-213) in which Mr. Ni sues Appellant for breach of the Sales Agreement (R. 219-226), Mr. Ni asks for both specific performance and damages. In Count 2 (R. 213-214), Mr. Ni sues Appellant for negligent misrepresentation. In Count 3 (R. 215-216), Enson sues Appellant for fraud in the inducement for damages. In Count 4 (R. 216), Mr. Ni sues Appellant for negligent misrepresentation for promissory estoppel. Appellees' causes of action for damages are still pending in the lower court.

As a consequence of the Order on Plaintiff Enson Market, Inc.'s Motion to Strike Affirmative Defenses (R. 345-346) entered on March 10, 2023, the following

Affirmative Defenses of Appellant (R. 272-277) filed on August 24, 2022, remain in the case: (a) failure to have all members of 1st Oriental Real Estate sign the Sales Agreement (R. 219-226) or agree to it in writing, a condition precedent (Aff. Def. at ¶¶ 59-51), (b) failure to submit the matter to arbitration and mediation, a condition precedent (Aff. Def. at ¶ 52), (c) breach of the Sales Agreement (R. 219-226) by Mr. Ni (Aff. Def. at ¶¶ 53-54), (d) that an unspecified Appellee is not entitled to an award of damages (Aff. Def. at ¶ 55), (e) impossibility of performance (Aff. Def. at ¶ 56), (f) Mr. Ni's lack of standing (Aff. Def. at ¶ 57), (g) Mr. Ni's failure to state a cause of action for negligent misrepresentation (Aff. Def. at ¶¶58-60), (h) failure to state a cause of action due to allegation of an immaterial statement of fact (Aff. Def. at ¶61), (i) estoppel, bar by contract as a result of non-reliance clauses in contracts (Aff. Def. at ¶¶62-63), (j) violation of the Statute of Frauds (Aff. Def. at ¶¶64-65), (k) failure to state a cause of action as to promissory estoppel (Aff. Def. at ¶¶66-69), (l) ratification and/or waiver (Aff. Def. at ¶70), (m) set off (Aff. Def. at ¶71), (n) comparative negligence (Aff. Def. at ¶72) and (n) plaintiffs tort causes of action are barred by Florida's Independent Tort Doctrine (Aff. Def. at ¶74).

In addition to filing its Answer and Affirmative Defenses (R. 270-306) on August 24, 2022, the Appellant actively participated in this case by (a) filing its Objection to Referral to Arbitration and Response to Motion to Stay and/or Compel Arbitration (R.28-42) and its Answer and Affirmative Defenses (R. 43-61), both on

May 28, 2021; (b) filing its Motion To Dismiss Amended Complaint (R. 247-257) on April 24, 2022; (c) attending a hearing on its Motion To Dismiss Amended Complaint on July 20, 2022 (*see* Court Minutes at R. 268); (d) attending a hearing on October 17, 2022 (*see* Court Minutes at R. 319); (e) filing its Certification for Mediation Pursuant To *Fla. R. Civ. P*. 1.720 (R. 323) on November 22, 2022; (f) attending mediation on November 28, 2022 (*see*. R. 325-326); (g) filing its Response to Plaintiff's Motion to Strike Affirmative Defenses (R. 330-339) on March 22, 2023; (h) attending a hearing on April 11, 2023 (*see* Court Minutes at R. 398): (i) filing 1st Oriental Market, LLC's Notice of Objection to Plaintiffs' Request for Sanctions (R. 399-410) on April 17, 2023; (j) attending a hearing on April 24, 2023 (*see* Court Minutes at R. 411); (k) filing the affidavit of Dennis George, Esquire (R. 414-447) on May 22, 2023; (l) filing its Opposition to Summary Judgment (R. 448-486) on May 31, 2023: (m) attending a hearing on June 19, 2023 (*see* Court Minutes at R. 487); (n) filing a Motion for Rehearing (R. 505-506) on July 20, 2023; (o) attending a hearing on October 18, 2023 (*see* Court Minutes at R. 523-514); (p) filing its Notice of Appeal (R. 519-531) on December 29, 2023 and (q) filing its Amended Notice of Appeal (R, 532-533) on January 24, 2024.

On March 22, 2023, Appellee, Mr. Ni, filed the Summary Judgment Motion (R. 354-364), Ni's First Affidavit (R.365-367), Ni's Second Affidavit (R.368-369) and the Pugh Affidavit (R.370-394). In his affidavits, Mr. Ni testified that (a) "[t]he

Seller listed in the Sales Agreement is 1st Oriental Market, LLC" ((Ni 1st Aff. at ¶6), (b) he witnessed the Sales Agreement being signed for Appellant by Mr. Wai K Pang, who Mr. Ni had known "both personally and professionally for many years" (Ni 1st Aff. at ¶¶7-9), (c) "[o]n October 1, 2020, $300,000[, which "included within it the $160,000 deposit" required by the Sales Agreement",] was transferred to Arangio & George, LLP for the benefit of 1st Oriental Market, LLC," attaching a Payment Detail Report (Ni 1st Aff. at ¶¶10-11), (d) "1st Oriental Market, LLC accepted the funds" (Ni 1st Aff. at ¶12) and stating that he "was ready, willing, and able to close the transaction within 60 days of the execution of the Sales Agreement." (Ni 1st Aff. at ¶13).

In Ni's Second Affidavit, he testified that (a) the Sales Agreement was signed by both him and by Mr. Pang for the Appellant and "is not an agreement to convey an interest in real property," but "[r]ather, the agreement was for the transfer of membership interests" (Ni 2d Aff. at ¶¶4, 16), (b) "[t]he Operating Agreement for [1st Oriental Real Estate], which is attached to 1st Oriental's Answer and Affirmative Defenses, establishes two positions of new members when existing members transfer their interests" (Ni 2d Aff at ¶5), (c) that the only precondition for the Sales Agreement entered into on September 23, 2020, was under "Section 3.1 of the Sales Agreement [that he] pay a deposit of $160,000," which he did (Ni 2d Aff at ¶¶6-9), (d) Section 3.3 of the Sales Agreement required 1st Oriental Market, the Appellant,

to complete the sale no later than 60 days after September 23, 2020, but Appellant "did not complete the sale" (Ni 2d Aff at ¶¶10-11) and (e) "[t]here are no provisions in the Sales Agreement that require that non-parties to the Sales Agreement execute the Sales Agreement for it to be valid," but Appellant "informed [him] that all members of [1st Oriental Real Estate] had already agreed" to the transfer of 49% of its membership interests to him (Ni 2d Aff. at ¶¶14, 15; *see* also Sales Agreement (R.219-226) at last Whereas clause (R. 219)).

The Pugh Affidavit (R.370-394) had attached to it, beginning at R. 372, numerous e-mails informing Appellees' counsel that Appellant would not arbitrate. *See* R.370-394.

The George Affidavit (R.414-447) filed in opposition to the Summary Judgment Motion is the only "evidence' filed in opposition. That affidavit does not contradict the affidavits filed in support of the motion. It does not identify the Sales Agreement as such, instead calling it an "Option," which, as pointed out above, the Sales Agreement is not. His affidavit does not state that Mr. Ni did not pay the $160,000 deposit as required by Section 3.1 of the Sales Agreement. His affidavit also does not state the source of the money used for the Purchase Agreement. The George Affidavit does, however, state that Mr. George "was directed to apply all deposits[, apparently including deposits made by Mr. Ni for the Sales Agreement,] towards [Enson's] purchase of the Supermarket Asset Agreement" (see R. 416 at

¶11) to which Enson was a signatory as the buyer, not Mr. Ni, individually. Moreover, there is nowhere in the Sales Agreement, Exhibit "D" to the George Affidavit (R. 439-447), under which anyone was to "purchase sixty percent (60%) of the membership interest" in 1st Oriental Real Estate as Mr. Georger testified in paragraph 8 of his affidavit. *See also* Schedule "A" (R. 447) to the Sales Agreement attached to the George Affidavit showing that after closing, Mr. Ni would own 49% not 60%.

Appellant filed its Opposition to Summary Judgment (R.448-486) on May 31, 2023. In it, Appellant also misidentifies the Sales Agreement as an option and misstates that the Sales Agreement was for the purchase of sixty percent (60%), not forty-nine percent (49%) of the membership in 1st Oriental Real Estate, *See* R. 450 at ¶14. Appellant does not argue that Mr. Ni did not pay $160,000 as a deposit under the Sales Agreement. Appellant also does not argue that ambiguity in the Sales Agreement requires any evidence outside the body of that agreement; ambiguity is not raised as an issue in the Opposition to Summary Judgment (R. 448–486).

1. On July 6, 2023, the lower court entered the Order (R. 490-499) granting the Summary Judgment Motion (R. 354-364) and requiring Appellant to specifically perform under the Sales Agreement (R. 219-226). Paragraph 2 of the July 6, 2023, Order ordered and adjudged at R. 498, in pertinent part, as follows:

> a. Defendant, 1st Oriental Market, LLC, shall specifically perform the Sales Agreement [(R. 219-226)] attached as Exhibit to the Amended

> Complaint in this case by closing on the sale to Plaintiff, Xinsen Ni, and transferring to him FORTY-NINE PERCENT (49%) of the total membership interests in [1st Oriental Real Estate], a Florida limited liability company;
>
> b. The closing shall occur within 45 days of the date of this Order unless Plaintiff, Xinsen Ni, and Defendant, 1st Oriental Market, LLC, agree in writing to a different closing date; and
>
> c. At the closing, as required by the Sales Agreement [(R. 219-226)] attached as Exhibit to the Amended Complaint in this case, the balance of ONE MILLION FOUR HUNDRED EIGHT THOUSAND and 00/100 Dollars ($1,408,000.00) shall be paid to Defendant, 1st Oriental Market, LLC, as stated in section 3.2 of the Sales Agreement [(R. 219-226)].

The closing of the Sales Agreement (R.219-226) has still not happened. *See* Exhibit "A" to the Motion of Appellees Enson and Ni to Dismiss Appeal, Motion to Extend Time for Filing Answer Brief and Incorporated Memorandum of Law filed in this court on December 12, 2024, the Affidavit of Appellee, Xinsen "Ni" Zheng, at ¶5.

In the course of rendering the decision in the Order, the lower court concluded at paragraph 9 (R. 492-494) of the Order (R. 415-447) discussing the George Affidavit, the following:

> The sworn affidavit of Dennis George, Esq., however, does not, support the position of Defendant that the Sales Agreement [(*see, e.g*., R. 219-226)] which is attached to the Amended Complaint as Exhibit "A" under which Mr. Ni is to obtain 49% of Company should not be specifically performed as requested in the Motion or sufficiently raise a material disputed issue of fact to be considered under the current summary judgment standard for the following reasons:
>
> (a) the affidavit includes errors of fact, including errors of basic

math,[1]

(b) the affidavit fails to provide predicates for and is hearsay as to matters for which the affiant claims personal knowledge,[2]

(c) the affidavit appears to make argument about an agreement for which summary judgment is not sought and as to the other plaintiff, [Enson], and appears to attempt to inject parol evidence contrary to the unambiguous language of the written Sales Agreement (Exhibit "A" to the Amended Complain) under which the Defendant agreed to sell a 49% interest in [1st Oriental Real Estate] ("Company"), by making assertions applicable to the other plaintiff, Enson, and as to an agreement to which Mr. Ni, individually, is not a party,[3]

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[1] $2,650,000-$500,000-$2,090,000=$60,000; not $150,000.

[2] Affiant claims to have personal knowledge that the other plaintiff Enson Market Inc. ("Enson") "lacked the funds to close on the purchase of the assets and the underlying real estate [,]" and "lacked funds to purchase the Option," without providing a foundation for how he would have knowledge of Enson's finances. More importantly, the Motion does not ask this Court to consider any summary judgment as to, or to provide any relief to, Enson, and the Sales Agreement is not an "Option;" it is an outright sale.

[3] The Sales Agreement for which specific performance is sought, Exhibit "A" to the Amended Complaint, is an agreement between 1st Oriental and Mr. Ni for him to purchase 49% of the ownership interest in Company, but Paragraphs 8-9 of Mr. George's affidavit discuss facts immaterial to the Motion. Paragraph 8 of the affidavit states, "In connection with this transaction, Enson[, not Plaintiff Ni,] had the option to purchase sixty percent (60%) of the membership interest in lst Oriental Market Real Estate, LLC, which was the owner of the Property (the "Option")," which, even if accurate—and there is no evidence that it is—is separate from the Sales Agreement attached to the Amended Complaint as Exhibit "A." Paragraph 9 of the affidavit, again referring to an option not a part of the Motion, states, "The Option provided for a purchase price of One Million Five Hundred Sixty-Eight Thousand and 00/100 Dollars ($1,568,000.00) (*see* Exhibit D, appended hereto)." Further, paragraph 10 of the affidavit references a "real estate closing scheduled for no later than December 23, 2020." The sale for which partial summary judgment is sought does not deal with a "real estate closing" at all; it concerns the closing of the

(d) the affidavit provides evidence corroborating the affidavits supporting Mr. Ni's Motion[4] and

(e) the affidavit does not even address the movant, Mr. Ni, instead discussing only the non-moving plaintiff, Enson. The Court finds that the affidavit of Dennis George, Esq., does not "set out facts that would be admissible in evidence" as required by *Fla, R. Civ P.* 1.510(c)(4), and it fails to raise any genuine dispute of material fact.

Speaking to the affidavit of Mr. George (R. 415-447), the lower court determined that it was inadmissible, because it was based on hearsay and violated the parol evidence rule. As the lower court held in paragraph 7 of the July 6, 2023, Order (R. 490-499) respecting hearsay at R.492,

> The law requires that the affidavits generally may not be based upon hearsay or require consideration of parol evidence. *See, e.g., Custom Design Expo, Inc. v. Synergy Rents, Inc.*, 327 So. 3d 427, 431 (Fla. 2d DCA 2021)(holding that "hearsay cannot form the basis in an affidavit for establishing a genuine issue of material fact that would preclude summary judgment," inasmuch as "[t]he personal knowledge requirement found in rule 1.510(e)[, now *Fla. R. Civ. P.* 1.510(c)(4),] is meant to prevent the trial court from relying on hearsay when deciding a motion for summary judgment"); *Polk v. Crittenden*, 537 So. 2d 156 , 159 (Fla. 5th DCA 1989)(holding that parol evidence "should not be permitted to contradict unambiguous terms of written instruments"); *E. A. Turner Constr. Co. v. Demetree Builders, Inc.*, 141

sale of an interest in Company. Even if the Court were to make such assumptions as to what "real estate closing" the affiant was referencing, and ignoring the clear parol evidence violation—none of which this Court will do—at best, paragraph 10 of the affidavit is further evidence that the closing was not timely set.

[4] The affidavit attaches a copy of a ledger showing receipt of the $300,000 transfer, which as sworn to in Mr. Ni's affidavit, included payment of Mr. Ni's deposit.

So. 2d 312 (Fla. 1st DCA 1962).

The lower court held in paragraph 10 (R. 494) of the July 6, 2023, Order that the "Defendant's affidavit fails to properly support its position and its assertions of fact and fails to properly address Mr. Ni's assertions of fact as required by *Fla. R. Civ. P.* 1.510(c)." In paragraphs 11 - 16 (R. 494-495), the lower court clearly finds, based on the evidence, that (a) the Sales Agreement was between two parties, Mr. Ni and Appellant, for Mr. Ni to purchase 49% of the ownership interest in 1st Oriental Real Estate, (b) on or about October 1, 2020, Mr. Ni paid the required $160,000 deposit and "[t]hus, pursuant to the contract, Mr. Ni did all, or substantially all, of the essential things which the contract required him to do in order to require [1st Oriental Market} to perform," (c) 1st Oriental Market "did not close the sale[, an essential requirement of the contract,] with Mr. Ni as required" by the Sales Agreement (R. 219-226),, thereby breaching the Sales Agreement, and (d) "[p]aragraph 9.3 of the Sales Agreement specifically permits Plaintiff, Ni, to seek its specific performance."

The lower court then addressed each of the Appellant's affirmative defenses in paragraphs 17- 25 (R. 495-497) of the Order and stated in pertinent part as follows:

> 17. None of Defendant's Affirmative Defenses ("AD" or "ADs," as appropriate) avoid its liability for its breach of contract. The affidavit of Mr. George does not raise issues of material fact in opposition to the Motion or in support of the ADs.
>
> 18. Defendant's ADs at paragraphs 55, 57-60, 62-63, 66-72 and 74

do not apply to Count 1 and are immaterial to determination of Mr. Ni's Motion.

19. Defendant's condition-precedent defense at paragraphs 50-51 of its ADs fails because 1st Oriental []Market] did not identify evidence showing that Mr. Ni and 1st Oriental [Market] separately agreed to a condition precedent of requiring all members sign the contract before it became valid, which purported condition precedent would be in contravention of the terms of the Sales Agreement.

20. Defendant's condition-precedent defense at paragraph 52 of its ADs fails because defendant refused to participate in the arbitration, and actively participated in the litigation, which waived its right to require arbitration,[Citation omitted] and 1st Oriental [Market] did not identify evidence to the contrary.

21. Defendant's AD of a breach-by-plaintiff at paragraphs 53-54 fails because 1st Oriental did not identify evidence showing that Mr. Ni breached the Sales Agreement.

22. [Citations omitted] Defendant's impossibility defense at paragraph 56 of its ADs fails because Defendant stated in paragraph 1.7 of the Sales Agreement that the non-party members of Company agreed to terms of the Sales Agreement, and Defendant presented no evidence which contradicts that they so agreed. Under *Fla. R. Civ. P.* 1.130(b), the Sales Agreement, Exhibit "A" to the Amended Complaint "must be considered a part thereof for all purposes." Further, defendant identified no evidence showing that refusal of the non-parties was so extraordinary and unprecedented that human foresight could not foresee or guard against it. Thus, the allegations in this AD of impossibility by the alleged refusal of the non-parties to go through with the Sales Agreement do not raise a material dispute.

23. Defendant's failure-to-state-a-claim defense at paragraph 61 of its ADs fails because Mr. Ni pled a cause of action for breach of contract.

24. Defendant's Statute-of-Frauds defense at paragraphs 64-65 of its ADs fails because *Fla. Stat.* § 725.01 does not apply. The Sales Agreement is in writing, is not an agreement to convey an interest in

real property, and was entered into on September 23, 2020, and intended to be closed no later than 60 days after September 23, 2020.

25. Defendant's failure-to-investigate defense at paragraph 73 of its ADs fails because the defense does not apply to Plaintiff Ni's breach of contract allegations. [It was also stricken in the Order on Plaintiff Enson Market, Inc.'s Motion to Strike Affirmative Defenses (R. 345-346)].

Appellant's Motion for Rehearing (R. 505-506) only sought rehearing of Appellant's argument that the case should have been arbitrated. Appellant's Notice of Appeal (R. 519- 531) filed on December 29, 2023, and Appellant's Amended Notice of Appeal (R. 532-533) filed on January 24, 2024, only seek appeal of the July 6, 2023, Order (R. 490-499).

SUMMARY OF ARGUMENT

There are no disputed issues of fact or any issues of law which support a conclusion that the trial court abused its discretion by entering partial summary judgment requiring specific performance of the Sales Agreement (R. 219-226). The lower court properly interpreted the Sales Agreement and properly considered the evidence in support of and in opposition to the Summary Judgment Motion (R.354-364).

Additionally, the Appellant through its actions and statements waived any right to require arbitration for which rehearing was sought.

ARGUMENT

A. Standard of Review

Appellate courts apply a mixed standard of review in cases involving summary judgment, contract interpretation and specific performance. They

> review de novo an order granting summary judgment. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). "A trial court's interpretation of a contract is [also] reviewed de novo." *Inlet Colony, LLC v. Martindale*, 340 So. 3d 492, 494 (Fla. 4th DCA 2022) (citation omitted). However, "[t]he decision whether to grant or withhold a judgment for specific performance is a matter within the sound discretion of the trial court[,] which will not be disturbed on appeal unless clearly erroneous." *Muniz v. Crystal Lake Project, LLC*, 947 So. 2d 464, 469 (Fla. 3d DCA 2006).

See, e.g., N. Fla. Mango, LP v. LLS Holdings, LLP, 375 So. 3d 906, 910-911 (Fla. 4th DCA 2023) (cited in Appellant's Initial Brief at 12 and 14). "A trial court's findings of fact shall not be disturbed unless they are clearly erroneous." *D & E Real Estate, LLC v. Vitto*, 260 So. 3d 429, 433 (Fla. 3d DCA 2018) (citing *Emaminejad v. Ocwen Loan Servicing, LLC,* 156 So. 3d 534, 535 (Fla. 3d DCA 2015)).

"An order on a motion for rehearing is [normally] reviewed for abuse of discretion." *See, e.g. Orfanos v. 45 Ocean Condo. Ass'n,* 368 So. 3d 995, 996 (Fla. 4th DCA 2023) (citing *Dalrymple v. Franzese,* 944 So. 2d 1240, 1242 (Fla. 4th DCA 2006).

B. Summary Judgment Standard

As the court knows, effective May 1, 2021, *Fla. R. Civ. P.* 1.510, was amended. *See In re Amendments to Fla. Rule of Civ. Procedure 1.510,* 317 So. 3d

72 (Fla. 2021). As with the old standard, the moving party must show no genuine dispute of material fact exists to preclude summary judgment. *Del Carpio v. W. Beef of Fla., LLC,* 384 So. 3d 192, 193 (Fla. 4th DCA 2024) (citing *Thayer v. Hawthorn*, 363 So. 3d 170, 172 (Fla. 4th DCA 2023)). Mr. Ni has met the new summary judgment standard. There are three summary judgment principles that apply here.

First, *In re Amendments to Fla. Rule of Civ. Procedure 1.510,* 317 So. 3d at 75, (Emphasis added) made clear that "[i]n the broadest sense," Florida courts are to adhere to the *Celotex* trilogy[5] which standa for the proposition that "[s]ummary judgment procedure is *properly regarded not as a disfavored procedural shortcut*, but rather as an integral part" of rules aimed at "the just, speedy and inexpensive determination of every action" and "embracing the *Celotex* trilogy means abandoning certain features of Florida jurisprudence that have unduly hindered the use of summary judgment in" Florida. (Emphasis added). As a consequence of the amendment to *Fla. R. Civ. P.* 1.510, prior holdings, such as in *Nationstar Mortg. Co. v. Levine*, 216 So. 3d 711, 714 (Fla. 4th DCA 2017) (cited at page 12 of the Initial Brief), that "[i]f the record reflects even the possibility of a material issue of fact …, the doubt must be resolved against the moving party" is no longer good law in Florida.

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[5] The Celotex trilogy consists of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

> Second, those applying new rule 1.510 must recognize that a moving party that does not bear the burden of persuasion at trial can obtain summary judgment without disproving the nonmovant's case. Under *Celotex* and therefore the new rule, such a movant can satisfy its initial burden of production in either of two ways: "[I]f the nonmoving party must prove X to prevail [at trial], the moving party at summary judgment can either produce evidence that X is not so or point out that the nonmoving party lacks the evidence to prove X." {Citation omitted]. "A movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial." {Citation omitted].

Id, Appellant provided no evidence supporting its affirmative defenses, and Mr, Ni was not obligated to do so. Even so, the lower court dealt fully and appropriately with those affirmative defenses. *See* Statement of the Case and Facts, *supra* at 14-17.

> And third, those applying new rule 1.510 must recognize that the correct test for the existence of a genuine factual dispute is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." {Citation omitted]. Under our new rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." [Citation omitted]. In Florida it will no longer be plausible to maintain that "the existence of *any* competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised {Citation omitted]

In re Amendments to Fla. Rule of Civ. Procedure 1.510, 317 So. 3d at 75-76.

Mr. Ni submitted three affidavits (R.365-394) requiring the conclusion that the Sales Agreement (R. 219-226) be specifically performed. Appellant, however,

submitted no admissible affidavit to contravene the relief requested in the Summary Judgment Motion (R.354-364). *See* Statement of the Case and Facts, *supra* at 11-14 and *infra* at 24-26.

C. There are no disputed issues of fact or any issues of law which support the conclusion that the trial court abused its discretion by requiring specific performance of the Sale Agreement.

"In order for a court to grant specific performance, the parties must have entered into an agreement that is definite, certain, and complete in all of its essential terms." *See, e.g., Muniz*, 947 So. 2d at 469. While "[w]hat is an essential term of a contract 'will vary widely according to the nature and complexity of each transaction and will be evaluated on a case by case basis.,'" s*ee, e.g., King v. Bray,* 867 So. 2d 1224, 1228 (Fla. 5th DCA 2004) (citing, *inter alia*, *Socarras v. Claughton Hotels, Inc.*, 374 So. 2d 1057, 1060 (Fla. 3d DCA 1979), *cert. denied*, 385 So. 2d 760 (Fla. 1980)), Appellant made no argument in the lower court that the Sales Agreement (R. 219-226) does not contain all essential elements, and has, therefore, waived any such argument. *See, e.g., Adkison v. Morey*, 239 So. 3d 205, 207 (Fla. 1st DCA 2018) (citing *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005))

Even so, the Sales Agreement (R. 219-226) unambiguously shows a "'meeting of the minds,' on all the essential terms" of the Sales Agreement (R. 219-226). *See, e.g., Sam Rodgers Props. v. Chmura*, 61 So. 3d 432, 437 (Fla. 2d DCA 2011) (citing

Leopold v. Kimball Hill Homes Fla., Inc., 842 So. 2d 133, 138 (Fla. 2d DCA 2003)). The first rule of contract construction is that "[t]he words in a contract must be given their plain and ordinary meaning." *See, e.g., 295 Collins, LLC v. PSB Collins, LLC*, 296 So. 3d 943, 947 (Fla. 3d DCA 2019). The Sales Agreement describes the subject matter of the transaction, the sale by Appellant to Mr. Ni of forty-nine percent (49%) of the membership interest in 1st Oriental Real Estate. *See* Sales Agreement at §1.2 and Article II (R. 219-220) and Schedule "A" (R. 226). It states the sale price, One Million Five Hundred Sixty-Eight Thousand and 00/100 Dollars ($1,568,000.00). *Id.* at Article II (R. 220) Paragraph 3.3 of the Sales Agreement (R. 221) states the closing date; the Sales Agreement (R 219-226). and the Purchase Agreement (R. 228-242) were to close on the same day no later than sixty (60) days after the execution of the Sales Agreement. Paragraph 3.1 (R. 221) of the Sales Agreement states the amount of deposit, One Hundred Sixty Thousand and 00/100 Dollars ($160,000.00), and paragraph 3.2 (R. 221) states the amount that Mr. Ni was to bring to closing, i.e. the balance of the purchase price in the amount of One Million Four Hundred Eight Thousand and 00/100 Dollars ($1,408,000.00),

Even though not an essential element of the Sales Agreement (R. 219-226), the Sales Agreement also contains the Appellant's representation that it owned sixty percent (60%) of the interests of 1st Oriental Real Estate. *See* Sales Agreement at §1.2 (R. 219)

Because the Sales Agreement (R. 219-226) contains unambiguous essential terms to which the Appellant and Mr. Ni agreed, it is not appropriate to allow parol evidence, particularly parol evidence contained in the George Affidavit (R.414-447) which contains so much hearsay, as determined by the lower court (*see* Statement of the Case and Facts *supra* at 11-14), to be considered to vary the unambiguous terms of the Sales Agreement (R. 219-226). "If a contract provision is clear and unambiguous, a court may not consider extrinsic or parol evidence to change the plain meaning set forth in the contract." *See, e.g., Spring Lake NC, LLC v. Figueroa,* 104 So. 3d 1211, 1214 (Fla. 2d DCA 2012) (citing *SCG Harbourwood, LLC v. Hanyan*, 93 So. 3d 1197, 1200 (Fla. 2d DCA 2012)) (in turn citing *Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 52 (Fla. 1st DCA 2005)).

> As the court explained in *Emergency Associates of Tampa, P.A. v. Sassano*, 664 So. 2d 1000, 1003 (Fla. 2d DCA 1995):
>
> > [W]hen the terms of a voluntary contract are clear and unambiguous, as here, the contracting parties are bound by those terms, and a court is powerless to rewrite the contract to make it more reasonable or advantageous for one of the contracting parties.
>
> (Citing *Medical Ctr. Health Plan v. Brick*, 572 So. 2d 548 (Fla. 1st DCA 1990)); *see also Neisner Bros., [Inc. v. Palm Corp.*, 394 So. 2d 1106, 1107 (Fla. 3d DCA 1981)].

Jenkins, 913 So. 2d at 52.

An exception to the parol evidence rule is if the contract contains a latent ambiguity, which Appellant did not argue in the lower court, and which the Sales

Agreement (R. 219-226) here does not contain. *See, e.g., Juster v. Montgomery Ward Dev. Corp*., 496 So. 2d 851, 853 (Fla. 2d DCA 1986) (holding that "[b]ecause there is no latent ambiguity, the trial court should not have allowed the introduction of parol testimony to further explain the intent of the parties").

"[A] latent ambiguity occurs 'where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings.'" *See, e.g., RX Solutions, Inc. v. Express Pharm. Servs., Inc.,* 746 So. 2d 475, 477 (Fla. 2d DCA 1999) (citing *Ace Elec. Supply Co. v. Terra Nova Elec., Inc.,* 288 So. 2d 544, 547 (Fla. 1st DCA 1973) and holding "that the trial court improperly relied on parol evidence" to interpret unambiguous terms in the contract in that case). *See also Morris v. MGZ Props, LLC*, 251 So. 3d 929, 930-931 (Fla. 4th DCA 2018) (holding that "[w]hen the terms of a contract are clear and unambiguous, [courts] are required to apply the plain and ordinary meaning of the words and apply them as they are written" and, quoting *Beans v. Chohonis*, 740 So. 2d 65, 67 (Fla. 3d DCA 1999), looking "'to the dictionary for the plain and ordinary meaning' of the word 'sale'" to reverse the lower court's consideration of parol evidence to determine what the parties intended by that word). As in *RX Solutions* and *Morris*, there is no extrinsic fact or evidence that creates any necessity for interpretation or a choice among two or more possible meanings in this case. *See*

also Statement of the Case and Facts *supra* at 11-13.

In addition, the George Affidavit (R.414-447), Appellant's only attempt at providing evidence in opposition to the Summary Judgment Motion (R.354-364), was so riddled with facts that blatantly contradict the record that it, too, is a basis for entry of the July 6, 2023, Order (R. 490-499) granting the relief requested in the Summary Judgment Motion (R.354-364). The George Affidavit (R.414-447) not only made incorrect mathematical calculations (*see* Statement of the Case and Facts *supra* at 492, n.1), but Mr. George also testified in paragraph 8 (R. 415) that "Enson had the option to purchase sixty percent (60%) of the membership interest in 1st Oriental Market Real Estate, LLC," when the Sales Agreement was with Mr. Ni, not Enson, and it was for the purchase of forty-nine percent (49%), not sixty percent (60%), of the membership interest in 1st Oriental Real Estate. *See* Statement of the Case and Facts *supra* at 4, 9-12 and n.3 and 14. . *See also* Sales Agreement at §1.2 and Article II (R. 219-220) and Schedule "A" (R. 226). Even David Pederson, Appellant's counsel, recognized that Enson was not a party to the Sales Agreement. *See* the June 1, 2021, e-mail (R. 383) attached to the Pugh Affidavit (R. 370-394). Mr. George also testified in paragraph 13 of his affidavit at R. 416-417, that "[a]t closing, however, Enson lacked funds to purchase the Option" and "[b]etween the date of closing on October 28, 2020 to the date of this affidavit, Enson has neither paid for nor deposited monies to purchase the membership interest in the limited

liability company which owns the Property," when under the Sales Agreement LLC (R. 218-226) , to which Enson was not a party, Enson had no such obligations.

Even though a lower court is not to judge the credibility of a witness in rendering summary judgment (*see, e.g., Anderson.*, 477 U.S. at 255), where, as here, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record[, as is Appellant's story,] so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *In re Amendments to Fla. Rule of Civ. Procedure 1.510,* 317 So. 3d at 75-76 (citing *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

And then there is the hearsay in the George Affidavit (R.414-447).

> Generally, "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." *Fla. R. Civ. P.* 1.510(c)(4). When a supporting [or opposing] summary judgment affidavit fails to establish its basis in the affiant's personal knowledge, the affidavit should be found legally insufficient to support[or overcome] the entry of summary judgment in favor of the moving party. *See, e.g., Huertas v. Avatar Prop. & Cas. Ins. Co.,* 333 So. 3d 767, 771 (Fla. 4th DCA 2022); *Everett v. Avatar Prop. & Cas. Ins. Co.*, 310 So. 3d 536, 539 (Fla. 2d DCA 2021); *Rodriguez v. Avatar Prop. & Cas. Ins. Co.,* 290 So. 3d 560, 563 (Fla. 2d DCA 2020). The justification for this standard is hardly mysterious; "[t]he personal knowledge requirement . . . is meant to prevent the trial court from relying on hearsay when deciding a motion for summary judgment." *Johns v. Dannels*, 186 So. 3d 620, 622 (Fla. 5th DCA 2016).
>
> …
>
> "[T]o prevent the trial court from relying on hearsay when deciding a

> motion for summary judgment," any affidavit used to support such a ruling must be predicated on the personal knowledge of the affiant. *Johns*, 186 So. 3d at 622; *see also Huertas,* 333 So. 3d at 770-71; *Everett*, 310 So. 3d at 539; *Rodriguez,* 290 So. 3d at 563.

See, e.g., Gromann v. Avatar Prop. & Cas. Ins. Co., 345 So. 3d 298, 300-301 (Fla. 4th DCA 2022). *See also Custom Design Expo Inc.*, 327 So. 3d at 431. The George Affidavit (R.414-447) testifies in violation of *Fla. Stat.* §90.802, for instance, (a) in paragraph 11 (R. 416) about conversations Mr. George apparently had with third persons in which he "was directed to apply all deposits towards [Enson's] purchase of the Supermarket Asset Agreement" and (b) in paragraph 6 (R. 416) about business records without setting a proper business records predicate as required by *Fla. Stat.* §90.803(b). *See also* July 6, 2023, Order at ¶¶7 and 9.b. (R. 492-493).

Mr. Ni has proven, as a matter of law, that there are no disputed issues of fact and that the lower court did not abuse its discretion in requiring that Appellant perform as required by the Sales Agreement (R. 219-226).

D. The Appellant through its actions and statements waived any right to require arbitration, for which rehearing was sought

Appellant filed its Motion for Rehearing (R.505-506) on July 20, 2023. That motion, filed after the July 6, 2023, Order (R. 490-499) granting the Summary Judgment Motion (R. 354-364), asked the court for rehearing on a so-called right to have this case arbitrated. Appellant did not call its Motion for Rehearing on for hearing before it filed its Notice of Appeal (R. 519-531) on December 29, 2023, or

before it filed its Amended Notice of Appeal (R, 532-533) on January 24, 2024. As a consequence, by filing the first Notice of Appeal and certainly by filing the Amended Notice of Appeal one month later, the lower court's jurisdiction to hear the matters requested by the Motion for Rehearing passed to this court (*see, e.g., Spencer v. DiGiacomo,* 56 So. 3d 92, 93-94 (Fla. 4th DCA 2011)), and Appellant waived any right it might have had to have the arbitration matters identified in its Motion for Rehearing (R.505-506) determined by the lower court. *See Sanders v. McCaughey,*192 So. 2d 774, 774 (Fla. 2d DCA 1966).

Even if the arbitration of this case--the only matter addressed in the Motion for Rehearing--is considered by this court, Appellant would net succeed, because it waived any right to require arbitration through its actions in the lower court and its statements to counsel. As the Florida Second District Court of Appeal held in *Green Tree Servicing, LLC v. McLeod,* 15 So. 3d 682, 686-687 (Fla. 2d DCA 2009),

> "In determining whether a dispute is subject to arbitration, courts consider at least three issues: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." [Citations omitted].
> .
>
> "Generally, whether a party has waived the right to arbitrate is a question of fact, reviewed on appeal for competent, substantial evidence to support the lower court's findings." [Citations omitted].
>
> "Waiver" has been defined "as the voluntary and intentional relinquishment of a known right or conduct which implies the voluntary and intentional relinquishment of a known right." [Citation omitted]. The general definition of waiver is applicable to the right to arbitrate. [Citation omitted]. Concerning the issue of waiver in the context of an

arbitration agreement, the Supreme Court of Florida has quoted with approval Judge Mikva's opinion in *National Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774, 261 U.S. App. D.C. 284 (D.C. Cir. 1987). [*Raymond James Fin. Servs., Inc. v. Saldukas (Saldukas II)*, 896 So. 2d 707, 711 (Fla. 2005)] Judge Mikva addressed the issue as follows:

> The right to arbitration, like any contract right, can be waived. [Citation omitted].. The Supreme Court has made clear that the "strong federal policy in favor of enforcing arbitration agreements" is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism. [Citation omitted].. Thus, the question of whether there has been waiver in the arbitration agreement context should be analyzed in much the same way as in any other contractual context. The essential question is whether, under the totality of the circumstances, the defaulting party has acted inconsistently with the arbitration right. [Citation omitted]..

Nat'l Found. for Cancer Research, 821 F.2d at 774. For these reasons, "there is no requirement for proof of prejudice in order for there to be an effective waiver of the right to arbitrate." *Id*. Thus "an arbitration right must be safeguarded by a party who seeks to rely upon that right and the party must not act inconsistently with the right." *Id*.

A party's active participation in a lawsuit is inconsistent with arbitration. Thus "[t]he prosecution or defense of a lawsuit on issues subject to arbitration may constitute a waiver." [Citation omitted].. It follows that a party may waive his or her right to arbitration … by filing an answer to a pleading seeking affirmative relief without raising the right to arbitration [Citations omitted].. A party who timely asserts the right to arbitration may still waive the right by later conduct that is inconsistent with the arbitration request. [Citation omitted].. Furthermore, once a party has waived the right to arbitration by active participation in a lawsuit, the party may not reclaim the arbitration right without the consent of his or her adversary. [Citations omitted]..

In this case, Appellant waived the right to arbitrate by actively participating in the case below (*see* Statement of the Case and Facts *supra* at 6-7), by filing its

Objection to Referral to Arbitration and Response to Motion to Stay and/or Compel Arbitration (R.28-42) and by making it clear to Jason Pugh, Mr. Ni's counsel, on several occasions in e-mail communications that Appellant did not intend to and would not arbitrate. *See* Statement of the Case and Facts *supra* at 9 and the attachments (R. 372-394) to the Pugh Affidavit (R. 370-394), particularly the June 1 and 7, 2021, and January 19, 2022, e-mails (R. 374, 383, 388) and by not responding to the January 25, 2023, e-mail at R. 372. In his June 21, 2021, e-mail (R. 377), which was copied to Appellant's counsel, David Pederson, Mr. Ni's counsel noted that Appellant's counsel took the "position that arbitration is not required."

CONCLUSION

The July 6, 2023, Order Granting Plaintiff Xinsen Ni's Motion for Partial Summary Judgment (R. 490-499) requiring Appellant to specifically perform the Sales Agreement [(R. 219-226) should be affirmed, and this cause should be remanded so that the lower court can enforce that order and complete the remaining matters pending before it.

CERTIFICATE OF SERVICE ON THE FOLLOWING PAGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 19, 2024, I electronically filed the foregoing with the Florida Courts E-Filing Portal and was furnished via electronic mail delivery to: Mark S. Reisinger, Esquire, attorney for Appellant, Reisinger Law, PLLC, 941 W. Morse Boulevard, Suite 100, Email: mark@reisingerlawpllc.com.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Answer Brief complies with the word, page and font requirements (Times New Roman 14-Point) contained in Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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