Filing # 203892815 E-Filed 08/01/2024 08:58:52 PM

IN THE
DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 3D24-1106
Lower Tribunal Case No. 2024-004307-CA-01

ARIA RESERVE 5005 LLC,
and ARIA RESERVE 5601 LLC,

Appellants/Plaintiffs,

v.

SOUTH PARK TOWER, LLC,

Appellee/Defendant.

On Appeal From a Non-Final Order of the
Circuit Court of the Eleventh Judicial Circuit
in and for Dade County, Florida

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 3

- I. Plaintiffs Purchase Two Condominium Units from Defendant and Expressly Agree Not to Rely on Oral Representations or Amendments. 3
- II. Plaintiffs Allegedly Obtain an Oral Modification of the Payment Schedules... 4
- III. Plaintiffs File Suit to Enforce the Alleged Oral Modification and Seek a Temporary Injunction. 5
- IV. The Trial Court Denies Plaintiffs' Request for a Temporary Injunction Because Plaintiffs Did Not Establish a Substantial Likelihood of Success on the Merits... 7

STANDARD OF REVIEW 9

SUMMARY OF ARGUMENT 9

ARGUMENT 12

- I. The Trial Court Did Not Abuse Its Discretion in Denying Plaintiffs' Request for a Temporary Injunction......................... 12
  - A. Plaintiffs Failed to Demonstrate a Substantial Likelihood of Success on the Merits. 14
  - B. The Purchase Agreements Expressly Precluded Oral Modifications. 14
  - C. "Plaintiffs Failed to Plead and Prove That They Provided Additional Consideration" to Support Oral Modification of the Purchase Agreements. 17
  - D. The Trial Court Did Not "Overlook" Arguments that Plaintiffs Failed to Make in Their Motion for a Temporary Injunction. 23
- II. The Trial Court Did Not Abuse Its Discretion In Denying Plaintiffs' Motion Without an "Evidentiary Hearing." 25

III. Plaintiffs Also Failed to Carry Their Burden of Establishing the Remaining Factors for Injunctive Relief. 28

CONCLUSION 31

CERTIFICATE OF SERVICE 32

CERTIFICATE OF COMPLIANCE 32

TABLE OF AUTHORITIES

Page(s)

Cases

Alonso-Llamazares v. Int'l Dermatology Research, Inc.,
339 So. 3d 385 (Fla. 3d DCA 2022) 1, 9

Avisena, Inc. v. Santalo,
65 So. 3d 14 (Fla. 3d DCA 2011) 13

Briceño v. Bryden Invs., Ltd.,
973 So. 2d 614 (Fla. 3d DCA 2008) 9

Brickell Townhouse, Inc. v. Hirschfield,
404 So. 2d 153 (Fla. 3d DCA 1981) 23

Chris Thompson, P.A. v. GEICO Indem. Co.,
349 So. 3d 447 (Fla. 4th DCA 2022) 25

CMR Distributors, Inc. v. Resol. Tr. Corp.,
593 So. 2d 593 (Fla. 3d DCA 1992) 8

Cohen Fin., LP v. KMC/EC II, LLC,
967 So. 2d 224 (Fla. 3d DCA 2007) 9

Coral Reef Drive Land Dev., LLC v. Duke Realty Ltd. P'ship,
45 So. 3d 897 (Fla. 3d DCA 2010) 2, 11, 18, 21

First Fid. Tr. Servs., Inc. v. Shelter Cove Condo. Assn, Inc.,
329 So. 3d 222 (Fla. 1st DCA 2021)... 28

India Am. Trading, Co. v. White,
896 So. 2d 859 (Fla. 3d DCA 2005) 22

Kedac, Inc. v. Export Dev. Corp.,
685 So.2d 97 (Fla. 4th DCA 1997) 26

Lopez v. Paredes,
653 So. 2d 472 (Fla. 3d DCA 1995) 26

Northwestern Nat'l Ins. Co. v. Greenspun,
330 So.2d 561 (Fla. 3d DCA 1976) 27

Okeechobee Resorts, LLC v. E Z Cash Pawn, Inc.,
145 So. 3d 989 (Fla. 4th DCA 2014) .... *passim*

Pan Am. Eng'g Co. v. Poncho's Constr. Co.,
387 So. 2d 1052 (Fla. 5th DCA 1980) 19, 20

Peebles v. Puig,
223 So.3d 1065 (Fla. 3d DCA 2017) 23

Perry & Co. v. First Sec. Ins. Underwriters, Inc.,
654 So. 2d 671 (Fla. 3d DCA 1995) 1, 9, 18

Pro. Ins. Corp. v. Cahill,
90 So.2d 916 (Fla. 1956) 16, 19

Quirch Foods LLC v. Broce,
314 So. 3d 327 (Fla. 3d DCA 2020) 30

Robertson v. State,
829 So. 2d 901 (Fla. 2002) 29

Sammie Invs., LLC v. Strategica Cap. Assocs.,
247 So. 3d 596 (Fla. 3d DCA 2018) 1, 9, 12

Shir Law Group, P.A. v. Carnevale,
317 So.3d 211 (Fla. 3d DCA 2021) 27

St. Brendan High Sch., Inc. v. Neff,
275 So. 3d 220 (Fla. 3d DCA 2019) 13, 28

St. Joe Corp. v. McIver,
875 So. 2d 375 (Fla. 2004) 19

Stav Software, LLC v. Lederman Investments, LLC,
No. 3D23-0361, 2024 WL 2743707 (Fla. 3d DCA May 29,
2024) 19

United Auto. Ins. Co. v. Pro. Med. Grp., Inc.,
318 So. 3d 1261 (Fla. 3d DCA 2021) 26

USA Prescription, Inc. v. Celestial Grp., Inc.,
817 So. 2d 1005 (Fla. 4th DCA 2002) 27

Vitra-Spray of Fla., Inc. v. Gumenick,
144 So. 2d 533 (Fla. 3d DCA 1962) 20

VME Grp. Int'l, LLC v. Grand Condo. Ass'n, Inc.,
305 So. 3d 30 (Fla. 3d DCA 2019) 13, 28

Wilson v. Woodward,
602 So. 2d 547 (Fla. 2d DCA 1992) 19

Statutes

Fla. Stat. § 725.01 22

Other Authorities

Ephram "Sammy" 3

Fla. R. App. P. 9.045(b) 32

Fla. R. App. P. 9.210(a)(2)(B) 32

Florida Rule of Appellate Procedure 9.130(a)(3)(B) 8

Rule 1.610 26

INTRODUCTION

As this Court has consistently emphasized, an appellant challenging the grant or denial of a temporary injunction bears a "heavy burden." *See, e.g.*, *Alonso-Llamazares v. Int'l Dermatology Research, Inc.*, 339 So. 3d 385, 392 (Fla. 3d DCA 2022); *Perry & Co. v. First Sec. Ins. Underwriters, Inc.*, 654 So. 2d 671, 671 (Fla. 3d DCA 1995). "A trial court has wide discretion to grant or deny a temporary injunction[,] and an appellate court will not interfere with the exercise of such discretion unless the party challenging the grant or denial clearly shows an abuse of that discretion." *Perry*, 654 So. 2d at 671. Plaintiffs cannot show a clear abuse of discretion in this case, because they failed to demonstrate an entitlement to relief in the trial court.

The clearest evidence that the trial court did not abuse its discretion can be found in Plaintiffs' own motion for a temporary injunction. It is well-established that, as the moving party, Plaintiffs bore the burden of demonstrating, *inter alia*, "a substantial likelihood of success on the merits." *Sammie Invs., LLC v. Strategica Cap. Assocs.*, 247 So. 3d 596, 599 (Fla. 3d DCA 2018). Yet Plaintiffs' discussion of the merits consisted of a single, conclusory paragraph, which merely recounted their factual allegations regarding the claims at issue. (*See* A.142.) Plaintiffs' motion did not address the legal standards that apply to its claims, nor did it present any legal

argumentation explaining why Plaintiffs were likely to succeed on those claims. (*Id.*) Faced with such a barebones motion, the trial court did not abuse its discretion in concluding that Plaintiffs had failed to carry their burden of demonstrating a substantial likelihood of success on the merits. (*See* A.175.)

The inadequacy of Plaintiffs' motion for a temporary injunction becomes even clearer in light of the type of claims at issue. The crux of Plaintiffs' claims is that the parties orally agreed to extend the payment deadlines specified in written contracts for the purchase of two condominium units. But those purchase agreements contained provisions—which Plaintiffs neglected to mention in their motion— requiring any amendments to the purchase agreements to be <u>in writing</u> and prohibiting the parties from relying on "oral representations." Florida law generally disfavors oral modification of a written contract in such circumstances, and permits such modification only when the party seeking to enforce the modification provided "additional consideration." *See Coral Reef Drive Land Dev., LLC v. Duke Realty Ltd. P'ship*, 45 So. 3d 897, 901-02 (Fla. 3d DCA 2010); *Okeechobee Resorts, LLC v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 992-95 (Fla. 4th DCA 2014).

Plaintiffs' motion did not address the "no-oral-modification" clauses in the purchase agreements or the "additional consideration" requirement. Plaintiffs' motion also did not mention—let alone demonstrate a substantial likelihood of success on—the alternative theories of relief asserted in their Opening Brief, such as their fraud claims or their "separate contract" theory. Given these obvious deficiencies in Plaintiffs' discussion of the merits of their claims, the trial court acted well within its discretion in denying Plaintiffs' request for a temporary injunction.

STATEMENT OF THE CASE AND FACTS[1]

I. Plaintiffs Purchase Two Condominium Units from Defendant and Expressly Agree <u>Not</u> to Rely on Oral Representations or Amendments.

Defendant South Park Tower, LLC ("South Park" or "Defendant") is the developer of a 792-unit luxury condominium building in Miami known as Aria Reserve South (the "Condominium"). (A.154.) Plaintiffs Aria Reserve 5005 LLC and Aria Reserve 5601 LLC (collectively, "Plaintiffs") agreed to purchase two units in the building from South Park on August 23, 2022. (A.64, 121.) Plaintiffs' authorized representative, Ephram "Sammy" Yeashoua, signed the Purchase Agreements for both units. (*Id.*)

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[1] In this Answer Brief, all citations of "A." shall refer to the Appendix submitted by Appellants on July 2, 2024 (A.1-203) and the Appendix submitted by Appellee on August 1, 2024 (A.204-219.)

The Purchase Agreements required Plaintiffs to make incremental payments according to a particular schedule—with payments due at execution of the Agreement, 90 and 180 days thereafter, when construction reached the 20th floor, top-off of the building, and at closing. (A.70, 127.) The Agreements stated that South Park may, "but is not obligated to," "accept [a deposit] on a later date" than what the schedules provided. (A.25, 82.)

The first clause in the Purchase Agreements stated, in bold and all capital letters:

> **ORAL REPRESENTATIONS CANNOT BE RELIED UPON AS CORRECTLY STATING THE REPRESENTATIONS OF THE DEVELOPER. FOR CORRECT REPRESENTATIONS, REFERENCE SHOULD BE MADE TO THIS CONTRACT**.

(A.23, 80.) The Purchase Agreements also included an integration clause, which expressly required any amendment to the Agreements—including any amendment to the payment schedules—to be in "<u>a written instrument signed by both Buyer and Seller</u> which specifically states that it is amending this Agreement." (A.63, 120 (emphasis added).)

II. Plaintiffs Allegedly Obtain an Oral Modification of the Payment Schedules.

Defendant reached the 20th floor of construction in August 2023, triggering one of the incremental payment dates under the payment

schedules. (*See* A.70, 127.) Plaintiffs sought to extend that deposit due date, and requested a meeting with Defendants' alleged representative, Nicholas Barbara. (A.139.)

According to the allegations in Plaintiffs' motion (which South Park accepted as true for purposes of this motion), Mr. Yeashoua and Mr. Barbara met in person on November 15, 2023. (*Id.*) At that meeting, Plaintiffs allege that Mr. Barbara orally granted Mr. Yeashoua's request to extend the payment deadline to December 29, 2023. (A.138.) No signed writing memorialized this conversation.

Approximately two weeks later, South Park sent Plaintiffs notices of default after they failed to make the scheduled payments by the deadline set forth in the Purchase Agreements. Then, on December 11, 2023, South Park notified Plaintiffs that it was terminating the contracts as provided in the Purchase Agreements. (A.38, 95, 13839.)

III. Plaintiffs File Suit to Enforce the Alleged Oral Modification and Seek a Temporary Injunction.

Plaintiffs filed suit against South Park on March 8, 2024, asserting claims for breach of contract, fraud, and declaratory and injunctive relief. (A.4–21.) The crux of Plaintiffs' claims was that South Park, through Mr. Barbara, orally agreed to extend the payment deadlines at the November

15th meeting, but then reneged on that promise when it sent the default notices to Plaintiffs shortly thereafter. (*Id.*)

Defendant moved to dismiss the complaint, arguing that the contractual provisions described above expressly precluded any claims based on oral modification of the written Purchase Agreements.[2] (A.209–11.) That motion remains pending in the trial court.

Soon after filing their complaint, Plaintiffs moved to temporarily enjoin South Park "from entering into any contracts with other potential non-party buyers and/or transferring or otherwise disposing of, encumbering, marketing and/or attempting to sell the two subject units." (A.141.) As described further below, Plaintiffs' motion relied almost exclusively on the factual allegations contained in the Complaint regarding Mr. Yeshoua's alleged conversation with Mr. Barbara, and the alleged oral modification of the payment schedules. (*See* A.136–44.) The motion did not mention the contractual provisions expressly prohibiting reliance on oral modifications to the Purchase Agreement, nor did it address the legal standards that apply to such claims. (*Id.*)

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[2] In its motion to dismiss, Defendant also disputes whether Plaintiffs could reasonably rely on the alleged statements made by Mr. Barbara, an independent real estate broker. (A.208, 210.) Plaintiffs have not demonstrated that Mr. Barbara had the authority to bind Defendant.

South Park opposed Plaintiffs' motion, arguing that the facts alleged by Plaintiffs, even if accepted as true for purposes of the motion, failed to establish a substantial likelihood that Plaintiffs would prevail on the merits of their claims. (A.160–61.) South Park pointed, in particular, to the express language of the Purchase Agreements that prohibited oral modifications to the Purchase Agreements. (*Id.*) South Park also took issue with the paucity of Plaintiffs' showing on the remaining temporary injunction factors, noting that the only "irreparable harm" alleged in Plaintiffs' motion was purely monetary—and therefore not a proper basis for a temporary injunction. (A.157–58.)

IV. The Trial Court Denies Plaintiffs' Request for a Temporary Injunction Because Plaintiffs Did Not Establish a Substantial Likelihood of Success on the Merits.

The trial court ultimately agreed with South Park, denying Plaintiffs' motion for a temporary injunction. (*See* A.178–81.) After noting that a temporary injunction is an "extraordinary and drastic remedy," the trial court held that Plaintiffs failed to carry their burden of establishing the necessary requirements to obtain injunctive relief. (A.178.)

The trial court focused on Plaintiffs' failure to grapple with the "relevant law." (A.179–80.) Plaintiffs "dedicate[d] less than a page to … their argument that post-written contract oral agreements and course of dealings

trump the amendment-only-by-written-agreement provision of the parties' written purchase agreement." (A.179.) As the court explained, Florida law permits oral modification in such circumstances only when the party seeking to enforce the modification provided "additional consideration"—and Plaintiffs' motion failed to address that requirement, let alone demonstrate that they provided additional consideration in this case. (A.180.)

Given Plaintiffs' failure to address the legal standards applicable to their claims, the trial court concluded Plaintiffs had not demonstrated a substantial likelihood of success on the merits. (*Id.*) The trial court denied Plaintiffs' motion on that basis, without reaching the remaining requirements for injunctive relief. (*Id.*)

Plaintiffs moved for reconsideration, attempting to raise new arguments that they had not presented in their original motion. (*See* A.182, 187–90.) South Park opposed reconsideration (*see* A.211), and Plaintiffs filed their notice of appeal before the trial court ruled on their motion for reconsideration. This Court has jurisdiction over the trial court's order denying a temporary injunction pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(B). *See CMR Distributors, Inc. v. Resol. Tr. Corp.*, 593 So. 2d 593, 594 (Fla. 3d DCA 1992).

STANDARD OF REVIEW

"An appellant who challenges the denial of a temporary injunction has a heavy burden." *Perry & Co. v. First Sec. Ins. Underwriters, Inc.*, 654 So. 2d 671, 671 (Fla. 3d DCA 1995). "A trial court has wide discretion to grant or deny a temporary injunction and an appellate court will not interfere with the exercise of such discretion unless the party challenging the grant or denial clearly shows an abuse of that discretion." *Id.*; *see also Briceño v. Bryden Invs., Ltd.*, 973 So.2d 614, 616 (Fla. 3d DCA 2008) (same). Accordingly, "[i]n reviewing a trial court's ruling on a request for a temporary injunction, [this Court] must affirm unless the appellant establishes that the trial court committed a clear abuse of discretion." *Cohen Fin., LP v. KMC/EC II, LLC*, 967 So. 2d 224, 226 (Fla. 3d DCA 2007); *see also Alonso-Llamazarenes*, 339 So. 3d at 392 ("the trial court's ruling is presumed to be correct and can only be reversed where it is clear the court abused its discretion" (quotation omitted)).

SUMMARY OF ARGUMENT

To obtain the "extraordinary remedy" of a preliminary injunction, Plaintiffs bore the burden of establishing, among other things, a "substantial likelihood of success on the merits." *Sammie Invs., LLC v. Strategica Cap. Assocs., Inc.*, 247 So. 3d 596, 599 (Fla. 3d DCA 2018). Plaintiffs attempted

to satisfy that burden in a single, conclusory paragraph, which merely repeated Plaintiffs' factual allegations regarding the alleged oral modification of the payment schedule. (*See* A.142.) As the trial court correctly recognized, that recitation fell far short of demonstrating that Plaintiffs were substantially likely to succeed on the merits of their claims, for several reasons.

First, Plaintiffs' motion contained no discussion of the relevant legal standards or the contractual provisions at issue. The Purchase Agreements expressly provided that the parties could not rely on "oral representations," and required any modifications to the Agreements to be in "a written instrument signed by" both parties. (A.23, 63, 80, 120.) Plaintiffs' motion failed to mention those contractual provisions or articulate any legal argumentation to support an oral modification of a contract with a "no-oral-modifications" clause. Where, as here, "a contract plainly provides that any modification must be in writing, all claims—however labeled—founded upon an alleged oral modification should generally be disposed of as a matter of law." *Okeechobee Resorts, LLC v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 993 (Fla. 4th DCA 2014).

Second, in those rare circumstances where a court will permit oral modification of a written contract containing a "no-oral-modifications" clause,

the party seeking to enforce the alleged modification must provide "additional consideration." *See Okechobee Resorts*, 145 So. 3d at 995; *Coral Reef Drive Land Dev., LLC v. Duke Realty Ltd. P'ship*, 45 So. 3d 897, 901-02 (Fla. 3d DCA 2010). But as the trial court explained, Plaintiffs' motion failed to address this "additional consideration" requirement, let alone demonstrate that Plaintiffs had provided "additional consideration" to Defendant for the modification alleged in this case. (A.176.) Given these obvious deficiencies in Plaintiffs' motion, the trial court did not abuse its discretion in denying Plaintiffs' request because they failed to demonstrate a substantial likelihood of success on the merits.

There is similarly no merit to Plaintiffs' claims that the trial court "overlooked" its arguments, or that the trial court was required to conduct an "evidentiary hearing" before denying Plaintiffs' motion. The lone paragraph in Plaintiffs' motion addressing the likelihood of success on the merits did not mention "fraud," nor did Plaintiffs address the legal elements of such a claim. That paragraph also neglected to raise Plaintiffs' new "separate contract" theory or argue that Plaintiffs were likely to prevail on the merits as to one unit, but not the other. The trial court therefore could not have "overlooked" arguments that Plaintiffs failed to present in their motion. Similarly, the trial court denied Plaintiffs' motion because it was legally deficient, not because

it resolved any factual disputes in Defendant's favor. In the absence of any factual dispute, the trial court was not required to hold an "evidentiary hearing" before denying Plaintiffs' motion.

Finally, to obtain a temporary injunction, Plaintiffs also bore the burden of demonstrating a likelihood of irreparable harm, the unavailability of an adequate remedy at law, that the balance of harms tipped in their favor, and that granting the injunction would not disserve the public interest. *See Sammie Invs.*, 247 So. 3d at 599. The trial court did not reach these issues, given its holding that Plaintiffs failed to satisfy the first factor (substantial likelihood of success on the merits). But this Court may affirm on any ground supported by the record, and as described below, Plaintiffs' showing on these remaining factors was similarly deficient.

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion in Denying Plaintiffs' Request for a Temporary Injunction.

A temporary injunction "is an extraordinary remedy that requires a clear legal right, free from reasonable doubt." *Sammie Invs.*, 247 So. 3d at 599 (citation omitted). Courts grant such relief "sparingly and only after the moving party has alleged and proved facts entitling it to relief." *Id.* at 600 (citation omitted). In seeking such an "extraordinary" remedy, <u>the burden lies squarely on the movant</u> to establish that it is entitled to relief. *Id.* at 599.

To obtain a temporary injunction, the movant bears the burden of establishing five elements: (1) a substantial likelihood of success on the merits, (2) a likelihood of irreparable harm, (3) the unavailability of an adequate remedy at law, (4) the threatened injury outweighs the possible harm of granting injunctive relief, and (5) the issuance of the temporary injunction will not disserve the public interest. *VME Grp. Int'l, LLC v. Grand Condo. Ass'n, Inc.*, 305 So. 3d 30, 31 (Fla. 3d DCA 2019). Each "requirement" is independently necessary; the moving party's "fail[ure] to meet any" one dooms the motion. *St. Brendan High Sch., Inc. v. Neff*, 275 So. 3d 220, 222 (Fla. 3d DCA 2019). This Court will affirm the denial of a temporary injunction when the movant fails to carry its "critical burden of establishing a substantial likelihood of success on the merits." *Avisena, Inc. v. Santalo*, 65 So. 3d 14, 16 (Fla. 3d DCA 2011).

As explained below, Plaintiffs failed to satisfy their heavy burden in this case. Plaintiffs sought "extraordinary" relief in a barebones motion that failed to mention—let alone analyze—the legal standards that applied to its claims. The trial court addressed the sole legal theory that Plaintiffs advanced (*i.e.*, that the parties orally amended the payment schedules in their written purchase agreements), but correctly recognized that Plaintiffs failed to demonstrate a substantial likelihood of success on that claim. Given the

obvious deficiencies with the motion before it, the trial court did not abuse its discretion in denying Plaintiffs' request for a temporary injunction.

A. Plaintiffs Failed to Demonstrate a Substantial Likelihood of Success on the Merits.

Despite bearing the burden of demonstrating a substantial likelihood of success on the merits, Plaintiffs' motion dedicated a single, conclusory paragraph to the merits of its claims. (*See* A.142.) That paragraph merely recounted the factual allegations contained in the complaint, asserting the parties orally agreed to modify the payment deadline. (*Id.*) That paragraph did not address the legal standards that apply to oral modifications of a written contract, and disregarded the express contractual provisions in the Purchase Agreement requiring any modification to be in writing. (*Id.*) Given Plaintiffs' failure to discuss the "relevant law," the trial court correctly held that Plaintiffs failed to carry their burden of demonstrating that "they are *substantially* likely to succeed on the merits of their claims." (A.175.)

B. The Purchase Agreements Expressly Precluded Oral Modifications.

The first and most obvious deficiency with Plaintiffs' motion for a temporary injunction was its failure to address provisions in the Purchase Agreements squarely precluding the parties from orally modifying their agreement. The crux of Plaintiffs' claims was that a representative of the

Defendant orally agreed to extend the written deadline to make scheduled payments under the Purchase Agreements from November 15, 2023 to December 29, 2023. (A.142.) According to Plaintiffs, it was consistent with their course of dealings with Defendant to "send [payment] deposits beyond the strict timeliness set forth in the contracts based on conversations with Seller's representatives." (A.137.)

Plaintiffs neglected to mention, however, that the Purchase Agreements themselves contained provisions expressly prohibiting reliance on oral modifications. The very first term in the Agreements provided (in boldface and all capital letters, no less) that: "**ORAL REPRESENTATIONS CANNOT BE RELIED UPON AS CORRECTLY STATING THE REPRESENTATIONS OF THE DEVELOPER. FOR CORRECT REPRESENTATIONS, REFERENCE SHOULD BE MADE TO THIS CONTRACT**." (A.23, 80.) The Agreements also contained an integration clause, which expressly provided: "This Agreement is the entire agreement for sale and purchase of the Unit and . . . <u>can only be amended by a written instrument signed by both Buyer and Seller</u> . . . ." (A.63, 120 (emphasis added).)

Florida law disfavors oral amendments to written contracts—particularly when, as here, a written contract contains a "no oral modification"

clause. *See Okeechobee Resorts, LLC v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 992-95 (Fla. 4th DCA 2014). As the Fourth District explained:

> Contracts are voluntary undertakings, and contracting parties are free to bargain for—and specify—the terms and conditions of their agreement. That freedom is indeed a constitutionally protected right. Contracting parties are at liberty to address any issue they see fit, including the question of whether their agreement may be modified at all, and, if so, how. When contracting parties elect to adopt a term or condition, including one addressing the question of modification, it is not the province of a court to second guess the wisdom of their bargain, or to relieve either party from the burden of that bargain by rewriting the document. Rather, it is a court's duty to enforce the contract as plainly written.

Id. at 993 (citations omitted). Accordingly, "when a contract plainly provides that any modification must be in writing, all claims—however labeled—founded upon an alleged oral modification should generally be disposed of as a matter of law." *Id.*; *see also Pro. Ins. Corp. v. Cahill*, 90 So.2d 916, 917–18 (Fla. 1956) (the "general rule" is that a "parol agreement will not be permitted to abrogate or modify a written" agreement).

Plaintiffs' motion failed to mention the express contractual provisions prohibiting oral modification of the Purchase Agreements, nor did it explain why Plaintiffs were substantially likely to succeed on the merits of their claims given the "general rule" described above. In the absence of any argument that the Purchase Agreements did not mean what they said, the trial court

did not err in holding the parties "to the bargain as negotiated and memorialized in their written agreement." *Okeechobee Resorts*, 145 So. 3d at 995.

C. "Plaintiffs Failed to Plead and Prove That They Provided Additional Consideration" to Support Oral Modification of the Purchase Agreements.

Despite Plaintiffs' failure to address the "relevant law" in their motion for a temporary injunction, the trial court nonetheless considered whether their claims might fall under a narrow exception to the general rule prohibiting oral modification described above. (*See* A.175–76.) As the trial court explained, Florida courts—including this Court—may permit oral modification of a written contract when the party seeking to enforce the alleged modification (*i.e.*, Plaintiffs) provided "additional consideration" for the modification. (*Id.* (collecting cases).) Plaintiffs, however, failed to address this "additional consideration requirement" in their motion, nor did they allege they had provided additional consideration to Defendant in exchange for orally extending the payment deadline. (*Id.*) Accordingly, even if the express provision in the Purchase Agreements precluding oral modifications were not dispositive, Plaintiffs failed to demonstrate a substantial likelihood of success on their claims that the parties orally agreed to modify the payment schedules.

Plaintiffs attack the trial court's conclusion on two fronts, neither of which is persuasive. *First*, Plaintiffs dispute whether additional consideration is required to support oral modification of a written contract, citing a "lack of clarity" in the case law. (*See* Opening Br. at 13-15.) Contrary to Plaintiffs' assertions, the law is clear that additional consideration is required to orally modify a written agreement containing a no-oral-modifications clause.

This Court squarely addressed the issue in *Coral Reef Drive*, explaining that a no-oral-modifications clause "is no less entitled to be enforced than a promise to make a payment by a certain date. In Florida, oral modifications are permitted despite such provisions, however, when one party provides additional consideration for the modification accepted by the other party." *Coral Reef Drive Land Dev., LLC v. Duke Realty Ltd. P'ship*, 45 So. 3d 897, 901-02 (Fla. 3d DCA 2010) (emphasis added). As explained further below, this Court proceeded to hold that the written contract had not been orally modified in that case because the party failed to provide "additional consideration" for the alleged modification. *Id.* at 902.

Coral Reef Drive is consistent with the other cases relied upon by the trial court, which similarly hold that "a party seeking to enforce an oral modification in the face of a 'no oral modification' clause must show," among other things, that "the party seeking to enforce the modification provided—

and the resisting party accepted—additional consideration for the modification." *Okeechobee Resorts*, 145 So. 3d at 995 (discussing the standard set forth in *Prof'l Ins. Corp. v. Cahill*, 90 So. 2d 916, 918 (Fla. 1956)); *see also St. Joe Corp. v. McIver*, 875 So. 2d 375, 382 (Fla. 2004) ("a party cannot modify a contract unilaterally," but rather must support "the modification [with] proper consideration"). In light of this precedent, the trial court appropriately considered whether Plaintiffs addressed this "additional consideration" requirement in their motion—and correctly found that they had not.

The cases upon which Plaintiffs rely do not hold that a written contract with a no-oral-modifications provision can be orally modified absent additional consideration. Rather, those cases simply do not discuss the additional-consideration requirement at all. *See Stav Software, LLC v. Lederman Investments, LLC*, No. 3D23-0361, 2024 WL 2743707, at *2 (Fla. 3d DCA May 29, 2024) (holding written contract may be orally modified "under certain circumstances" and remanding because genuine issue of fact remained "as to whether an agreement to extend the closing had been reached"); *Wilson v. Woodward*, 602 So. 2d 547, 549-50 (Fla. 2d DCA 1992) (merely holding written contract can be modified by oral agreement "under certain circumstances"); *Pan Am. Eng'g Co. v. Poncho's Constr. Co.*, 387

So. 2d 1052, 1053 (Fla. 5th DCA 1980) (applying general principle that "written contracts can be modified by subsequent oral agreement of the parties," where plaintiff completed—and sought to be paid for—oral work orders under a construction contract); *Vitra-Spray of Fla., Inc. v. Gumenick*, 144 So. 2d 533, 534 (Fla. 3d DCA 1962) (same).

Indeed, the latter two decisions (*Pan Am. Eng'g* and *Vitra-Spray*) both fit squarely within the "additional consideration" requirement, even if they do not use that specific term. In both cases, plaintiffs completed oral work orders requested by the defendants, under contracts requiring all work orders to be in writing. The additional work completed by plaintiffs under the oral work orders plainly constituted "additional consideration" accepted by the defendants, for which plaintiffs sought compensation. Neither case supports Plaintiffs' assertion that a written contract with an express "no-oral-modifications" clause can be orally modified without additional consideration.

Second, Plaintiffs inaccurately assert that they provided additional consideration for the alleged oral modification in this case. Even if Plaintiffs had presented this argument in their motion for a temporary injunction (and they did not), their description of the "additional consideration" purportedly provided to Defendant reaffirms that they cannot establish a substantial likelihood of success on the merits.

As this Court explained in *Coral Reef Drive*, "additional consideration" means some benefit or obligation that was not "part of [the party's] original obligation." 45 So. 3d at 902. In other words, a plaintiff seeking to enforce an alleged oral modification must demonstrate "that due to plaintiff's performance under the contract as amended the defendant received and accepted a benefit that it otherwise was not entitled to under the original contract (*i.e.*, independent consideration)." *Okeechobee Resorts*, 145 So. 3d at 995 (emphasis added). "Absent such a showing, the parties will be held to the bargain as negotiated and memorialized in their written agreement." *Id.*

The laundry list of "additional consideration" (items (i) thru (v)) described in Plaintiffs' brief (at 16) fails this test, as each of the purported benefits identified by Plaintiffs was already part of the parties' original bargain. Under the Purchase Agreements, Defendant was already spared the burdens of "relisting the property" (i), conducting a "separate" sale of the property (ii), and identifying "another ready, willing and able buyer" (iv) because the entire point of the Agreement was to sell the Units to Plaintiffs (iii). The Purchase Agreements also required Plaintiffs to pay interest (v) if they "fail[ed] to pay any deposit on time." (A.25, 82.) In short, none of the "additional consideration" identified by Plaintiffs constituted a "benefit" to

which Defendant was not already "entitled … under the original contract." *Okeechobee Resorts*, 145 So. 3d at 995.

More broadly, Plaintiffs' discussion of these issues reflects a misunderstanding of the basis for the trial court's order. In ruling on Plaintiffs' motion for a temporary injunction, the trial court did not need to determine, once-and-for-all, whether this case falls within the "limited circumstances" under which a written contract with a no-oral-modifications clause can be orally modified by the parties. That merits question will appropriately be the subject of dispositive motions practice.

Rather, the sole question before the trial court was whether Plaintiffs had satisfied their burden of demonstrating a substantial likelihood of success on the merits. Given Plaintiffs' failure to grapple with the relevant legal standards, the trial court had little difficulty determining that Plaintiffs had not carried their burden. Plaintiffs' silence on the additional-consideration requirement was perhaps the most glaring example of the motion's deficiencies, but it was far from the only one. Plaintiffs also failed to explain, for example, how the alleged oral modification would comply with the Statute of Frauds, Fla. Stat. § 725.01, which generally prohibits an action "to enforce a contract for the sale of land unless the contract is in writing and signed by the part[ies]." *India Am. Trading, Co. v. White*, 896 So.2d 859,

860 (Fla. 3d DCA 2005) (citation omitted); *see also Brickell Townhouse, Inc. v. Hirschfield*, 404 So.2d 153, 154–55 (Fla. 3d DCA 1981). Plaintiffs' motion failed to address any of these issues, and thus fell far short of demonstrating that Plaintiffs were substantially likely to succeed on the merits.

D. The Trial Court Did Not "Overlook" Arguments that Plaintiffs Failed to Make in Their Motion for a Temporary Injunction.

Plaintiffs similarly miss the mark in asserting that the trial court erred by "overlook[ing]" arguments that Plaintiffs failed to present in their motion for a temporary injunction. (*See* Opening Br. at 2, 17-19.) Plaintiffs assert, for example, that the trial court failed to address their claims for fraud, which "are not contractual claims." (*Id.* at 18.) As with their contract claims, however, Plaintiffs' motion failed to address the legal standards that apply to such claims. The sole paragraph of Plaintiffs' motion dedicated to their likelihood of success on the merits does not so much as mention the word "fraud," let alone identify the legal elements for fraud claims and explain how those elements were satisfied here.

Plaintiffs' failure to address the relevant legal standards is again particularly notable, given the nature of the claims at issue. The rule is "well-settled" that "where alleged misrepresentations relate to matters already covered in a written contract, such representations are not actionable in fraud." *Peebles v. Puig*, 223 So.3d 1065, 1068 (Fla. 3d DCA 2017). Plaintiffs

advance a theory that Defendant falsely promised to extend the payment schedules in the Purchase Agreements. Yet Plaintiffs' motion does not even attempt to explain why those alleged misrepresentations would be actionable in fraud, even though they directly relate to the terms of the Purchase Agreement.

The same is also true of Plaintiffs' assertions that the trial court "overlooked" the fact that its claims involve two separate properties with two separate purchase agreements. (*See* Opening Br. at 2, 17-18.) The sole paragraph of Plaintiffs' motion dedicated to the merits did not distinguish between the two units, but rather merely alleged that Defendant orally extended the deadline for the "upcoming deposit amounts due for both units" to December 29, 2023, and "[Plaintiffs] acted in accordance with the represented December 29, 2023 deadline." (A.142.)

Plaintiffs' motion did not mention a separate-contract theory, nor did it explain why Plaintiffs were substantially likely to succeed on the merits of

their claims as to one unit, but not the other.[3] The trial court could not have "overlooked" arguments that Plaintiffs failed to present in their motion.[4]

II. The Trial Court Did Not Abuse Its Discretion In Denying Plaintiffs' Motion Without an "Evidentiary Hearing."

There is similarly no merit to Plaintiffs' claims that the trial court was required to hold an "evidentiary hearing" before denying its motion for a temporary injunction. (*See* Opening Br. at 11-13.) As described above, Plaintiffs' motion was fatally deficient on its face, as it failed to address the relevant legal standards or provide any basis for the trial court to conclude that Plaintiffs were substantially likely to prevail on the merits of their claims.

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[3] Plaintiffs first raised their separate-contract theory in their motion for reconsideration. (*See* A.183.) Because Plaintiffs failed to present that argument in the underlying motion, the trial court acted well within its discretion in refusing to entertain a new theory for relief in a motion for reconsideration. *See Chris Thompson, P.A. v. GEICO Indem. Co.*, 349 So. 3d 447, 448-49 (Fla. 4th DCA 2022) ("it is not an abuse of discretion to deny a motion for reconsideration which raises an issue that could have been, but was not, raised in a pre-hearing filing"). Moreover, Plaintiffs did not appeal the trial court's *de facto* denial of their reconsideration motion.

[4] Following the denial of Plaintiffs' motion for a temporary injunction, the parties continue to litigate the merits of Plaintiffs' claims in the trial court. If Plaintiffs have any evidence that they tendered a deposit on the units within the cure period, they will have the opportunity to present that evidence in the trial court. To date, Plaintiffs have failed to provide any such evidence. Neither the complaint nor Plaintiffs' motion for a temporary injunction presented any evidence that Plaintiffs tendered the deposits by the deadlines specified in the Purchase Agreement or default notice.

Plaintiffs fail to cite any authority holding that a hearing is required in such circumstances.

"[T]he purpose of an evidentiary hearing is to allow a party to have a fair opportunity to contest the factual issues." *United Auto. Ins. Co. v. Pro. Med. Grp., Inc.*, 318 So.3d 1261, 1263 (Fla. 3d DCA 2021) (emphasis added; internal citations and quotations omitted). When a motion for a temporary injunction hinges on a disputed factual assertion (*e.g.*, whether the movant has demonstrated irreparable harm), then a trial court "may consider evidence in support of a motion for temporary injunction." Temporary injunctions, 5 Fla. Prac., Civil Practice § 29:1 (Westlaw 2024 ed.) (emphasis added). But contrary to Plaintiffs' assertions, the rule governing temporary injunctions (Rule 1.610) does not require the trial court to hold an evidentiary hearing.

None of the cases relied upon by Plaintiffs (at 11-13) holds to the contrary. Two of those cases involved disputed issues of material fact, which the trial court should not have resolved without allowing the parties to put on evidence. *See Kedac, Inc. v. Export Dev. Corp.*, 685 So.2d 97, 97 (Fla. 4th DCA 1997) (remanding for a hearing on disputed question of material fact regarding whether money damages could repair the harm the movant asserted); *Lopez v. Paredes*, 653 So. 2d 472, 474 (Fla. 3d DCA 1995)

(remanding for a hearing on a disputed proffer of facts). The other two cases are inapposite, as they involved procedural flaws (*e.g.*, lack of proper notice) in the trial court. *See USA Prescription, Inc. v. Celestial Grp., Inc.*, 817 So.2d 1005, 1006 (Fla. 4th DCA 2002) (remanding because moving party did not have proper notice of prior hearing); *Shir Law Group, P.A. v. Carnevale*, 317 So.3d 211, 214 (Fla. 3d DCA 2021) (remanding because trial court provided insufficient notice and failed to make "sufficient factual findings to support" an injunction). None of those cases establishes a blanket rule that an evidentiary hearing is required, even when the facts are not in dispute.

The dispute in this case did not turn on any disputed issue of <u>fact</u>. Rather, the trial correctly recognized that Plaintiffs' motion was legally deficient, because it failed to address the "relevant law" or provide any substantive analysis of the merits of Plaintiffs' claims. (A.175–76.) A motion for a temporary injunction is <u>legally</u> deficient if "it has no basis in the pleadings and evidence before the trial court." *Northwestern Nat'l Ins. Co. v. Greenspun*, 330 So.2d 561, 563 (Fla. 3d DCA 1976). And that was precisely the case here: the facts as alleged by Plaintiffs, even if true, failed to establish a valid basis for finding that Plaintiffs were likely to prevail on their claims for oral modification of the Purchase Agreements.

Indeed, Plaintiffs' brief effectively concedes there were no disputed issues of fact warranting an "evidentiary hearing." Plaintiffs repeatedly note that Defendant did not present any "rebuttal evidence" in response to their motion. (*See* Opening Br. at 3, 9, 19.) But Defendant did not present any "rebuttal evidence" because it recognized, just as the trial court did, that Plaintiffs failed to demonstrate a sufficient <u>legal</u> basis for the "extraordinary remedy" of a temporary injunction. And in the absence of any disputed issue of fact, there was no reason for the trial court to hold an "evidentiary hearing" before denying Plaintiffs' motion. *See First Fid. Tr. Servs., Inc. v. Shelter Cove Condo. Assn, Inc.*, 329 So. 3d 222, 228 (Fla. 1st DCA 2021) ("an evidentiary hearing is not required . . . where the factual allegations" supporting the motion "are not in dispute").

III. Plaintiffs Also Failed to Carry Their Burden of Establishing the Remaining Factors for Injunctive Relief.

To obtain a temporary injunction, Plaintiffs also bore the burden of demonstrating a likelihood of irreparable harm, the unavailability of an adequate remedy at law, that the balance of harms tipped in their favor, and that the issuance of an injunction would not disserve the public interest. *VME Grp.*, 305 So. 3d at 31. The trial did not reach these factors, given its conclusion that Plaintiffs failed to demonstrate a substantial likelihood of success on the merits. (A.176; *see also St. Brendan High Sch.*, 275 So. 3d

at 222 (noting the movant's failure to meet any one factor dooms the motion).) But on appeal, this Court may affirm on any ground supported by the record. *See Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002). And Plaintiff's opening brief notably fails to address the remaining requirements they must satisfy in order to establish an entitlement to injunctive relief.

Just as they did with respect to their likelihood of success on the merits, Plaintiffs relied on a single, conclusory paragraph to establish irreparable harm and the unavailability of an adequate remedy at law. (*See* A.141–42.) That paragraph alleged only <u>monetary harm</u>; Plaintiffs asserted there was a "substantial likelihood" that Defendant would sell the two units to "other potential buyers for hundreds of thousands, if not millions, of dollars more than the original prices." (*Id.*) But as Defendants pointed out, "irreparable harm is not established where the potential loss can be adequately compensated for by a monetary award." (A.157 (quoting *B.G.H. Ins. Syndicate, Inc. v. Presidential Fire & Cas. Co.*, 549 So. 2d 197, 198 (Fla. 3d DCA 1989).) Moreover, the two units remain available for sale, so there is no basis for Plaintiffs to complain they would be deprived of any "unique" interests in the property in the absence of an injunction. (A.157.)

Plaintiffs' showing on the remaining factors was similarly sparse. Plaintiffs dedicated three sentences to the balance of harms and the public

interest, summarily asserting that Defendant was damaging potential buyers. (A.143) That discussion neglected to mention the parties' express agreement, which required Plaintiffs to make timely deposits in order to finance construction of the building.

As Defendant explained in response, a temporary injunction would threaten grave harm to Defendant's development of a large-scale luxury condominium complex. (*See* A.159) To fund construction of the building, Defendant sells units in a pre-construction stage (such as the two units at issue in this case) to buyers at a significant discount, and then uses the periodic deposits that those buyers agree to pay to complete the project. (A.26, 83.) This business model is reflected in the Purchase Agreements, which expressly required Plaintiffs to make timely deposits and precluded reliance on non-written modifications to the payment schedule. And developers like the Defendant rely on compliance with those payment schedules to "offset the enormous financial risks and burdens" of completing a 792-unit luxury condominium building. (A.159)

The public has an interest not only in the successful completion of such projects, but also in the enforceability of written contracts. *See Quirch Foods LLC v. Broce*, 314 So. 3d 327, 343 (Fla. 3d DCA 2020) ("[T]he public has a cognizable interest in the protection and enforcement of contractual rights."

(quotation omitted)). Inviting unsupported oral modifications to written contracts that expressly require any such modifications to be in writing would upend the settled expectations of the contracting public.

Despite bearing the burden of establishing their clear entitlement to injunctive relief, Plaintiffs did not address any of this in their motion for a temporary injunction, or in their brief before this Court. Accordingly, Plaintiffs' failure to carry their burden of establishing the remaining factors for injunctive relief provides an additional basis for this Court to affirm the trial court's order.

CONCLUSION

For all these reasons, this Court should affirm the trial court's order denying Plaintiffs' motion for a temporary injunction.

Dated: August 1, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on August 1, 2024, the following document was served via e-mail to the service list below:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated Answer Brief complies with the typeface requirements of Fla. R. App. P. 9.045(b), and was prepared using Arial 14-point font.

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