IN THE DISTRICT COURT OF APPEAL
FOR THE THIRD DISTRICT OF FLORIDA

BSE INVESTMENTS I, LLC,

Appellant,

CASE NO.: 3D23-2303

vs.

LT CASE NO.: 22-18466 CA (31)

ACE GROUP INVESTORS, LLC,

Appellee.

ANSWER BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

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INTRODUCTION

Appellant BSE opens its brief by acknowledging "the simplest answer is often the correct one." (I.B.1) Appellee ACE agrees.

This Court's binding precedent is simple and logical: Where parties intend there will be no binding contract between them until their negotiations are reduced to a formal writing, there is no contract until that time. Here, the parties executed a document crystallizing that very intent: If they could come to terms, then they would "enter into a Purchase and Sale Agreement" for the two preconstruction condominium units, but in the meantime "no contractual obligation will be created until a final agreement is prepared, mutually accepted and executed by both parties."

The parties acknowledge in their pleadings and appellate briefs that (i) they never did execute a final purchase and sale agreement and (ii) BSE received its entire deposit back plus interest.

Therefore the lower court was therefore correct to rule as a matter of law—consistent with this Court's simple, logical, and *binding* precedent—that there was no contract that could be specifically enforced against ACE. The Judgment must be affirmed.

STATEMENT OF THE CASE AND FACTS

FACTS

A. The Parties.

ACE GROUP INVESTORS, LLC ("**ACE**") is a Florida limited liability company whose principal place of business is Miami-Dade County, Florida. (R.252 at ¶2; R.624 at ¶2; R.16 at ¶9) BSE INVESTMENTS I, LLC ("**BSE**") is a foreign limited liability company whose principal place of business is Ponce, Puerto Rico. (R.16 at ¶9; R.61 at ¶9; R.252 at ¶1)

B. The Subject Real Property.

ACE owed real property in Coconut Grove, Florida, on which it intended to develop a four-unit, residential condominium (the "**Project**"). (R.724 at ¶3.5; 283, 288) The address assigned to two of those contemplated units were Units A and B, 3376 B Perry Frow Drive, Miami, Florida 33133, which are referred to herein collectively as the "**Units**," and individually as "**Unit A**" or "**Unit B**." (R.253 at ¶7; R.625 at ¶7; R.847)

C. June 10, 2021: BSE Conveys its Initial Proposal.

On or about June 10, 2021, BSE presented ACE with a written, proposed letter of intent to purchase both Units from ACE for $2,000,000.00 (the "**Initial Proposal**"). (R.253 at ¶8; R.625 at ¶8; R.262, 264-266) This Initial Proposal was prepared and conveyed by BSE's counsel—Nelson Taracido, Esq. of Nelson Taracido, P.A.—on his letterhead. (R.262, 264)

The very first paragraph of BSE's Initial Proposal stated that "it is anticipated that ***[BSE] will enter into a Purchase and Sale Agreement*** (the 'Contract') for the purchase and sale of the above referenced Property" (R.274 (emphasis added)) It then went on to state that:

> **Binding Effect:** This proposal, if accepted, shall be deemed only an expression of interest and except for the provisions described in the following sentence, it is meant only to discuss the intentions of the parties with respect to the matters set forth herein. Although the parties intend to proceed promptly and in good faith to achieve the consummation of the proposed transaction and either party may commence preparation of a Contract for Sale and Purchase (Contract) pursuant to the terms and conditions of this Letter of Intent, this proposal does not constitute an offer by the seller to sell nor an offer by buyer to purchase and is not a binding agreement.

(the "**First Non-Binding Clause**") (R.265; R.16 at ¶13; R.62 at ¶13)

BSE's Initial Proposal also contained the following language immediately under the signature blocks: "This letter is meant to be an outline of the major business points and ***no contractual obligation will be created until a final agreement is prepared, mutually accepted and executed by both parties***" (the "**Second Non-Binding Clause**") (R.266; R.17 at ¶14; R.62 at ¶14 (emphasis added))

D. June 17, 2021: The Non-Binding Letter of Intent.

ACE did not agree to sell both Units for $2,000,000.00. (R.625 at ¶8) So BSE revised its Initial Proposal to increase the purchase price to $2,148,000.00 (the "**Non-Binding Letter of Intent**"). (R.274)

BSE did not change anything else from its Initial Proposal (*e.g.,* it was still on BSE's counsel's law firm letterhead, it still contained the First and Second Non-Binding Clauses, etc.). (R.274-276) On or about June 17, 2021, BSE and ACE executed this Non-Binding Letter of Intent. (R.274-276; R.16 at ¶12; R.62 at ¶12; R.253 at ¶9; R.625 at ¶9)

E. September 2, 2021: The Non-Binding Reservation Deposit Agreements.

By September 2, 2021, BSE and ACE executed a pair of **Non-Binding Reservation Deposit Agreements**, one for each Unit. (R.281, 283-285, 288-292; R.17 at ¶¶16-17; R.62 at ¶¶16-17; R.254 at ¶12; R.626 at ¶12) These instruments were identical except for the price, deposit, and referenced Unit. (R.17 at n.3; R.283-285; 288-290) They contained the following language:

- "[BSE] has been advised that the proposed sale is subject to a number of contingencies and that [ACE] in its sole discretion will determine whether to proceed with the Project" (R.283 at ¶1, R.288 at ¶1; R.17 at ¶18; R.62 at ¶18);

- "[ACE] agrees that if the Project is sold as presently contemplated by [ACE] and no material changes (as determined solely by [ACE]) are made to the Project or the Unit, [ACE] will not contract to sell the Unit to anyone else until [BSE] has had an opportunity to sign and return [ACE's] standard binding Purchase and Sale Agreement for the Unit ("Purchase Agreement")" (*Id.* at ¶2); and

- "In the event that (i) [ACE] is unable to or decides not to go forward with the Project, or (ii) [ACE] makes any material changes in the Unit, [ACE] will notify [BSE], and if either of these contingencies occurs, the deposit(s) will be promptly returned to [BSE], except that in the case of the latter contingency, [BSE] must first request the return of the deposit(s) from the Escrow Agent or [ACE] in writing." (R.284 at ¶6; R.289 at ¶6).

Importantly, the Non-Binding Reservation Deposit Agreements also stated that BSE had the right to cancel "and obtain an immediate unqualified refund of the deposits at any time and for any reason prior to the execution of the Purchase Agreement" as well as "interest earned on any deposit(s"). (R.284 at ¶¶5, 8; R.289 at ¶¶5, 8)

The Non-Binding Reservation Deposit Agreement for Unit A required BSE to deposit $104,900 with the escrow agent. (R.283-285; R.17 at ¶16; R.62 at ¶16) The escrow agent acknowledged receipt of that deposit. (R.286-287)

The Non-Binding Reservation Deposit Agreement for Unit B required BSE to deposit $109,900 with the escrow agent. (R.288-290; R.17 at ¶17; R.62 at ¶17) The escrow agent also acknowledged receipt of that deposit. (R.291-292)

F. April 2022: The Unexecuted, Draft Purchase and Sale Agreement.

Eventually ACE sent BSE a "draft" purchase and sale agreement for the Units. (R.255 at ¶¶14-15; R.626 at ¶¶14-15) BSE did not sign and return it. (R.255 at ¶15; R.626 at ¶15) Instead, BSE made comments and, on April 20, 2022, communicated them to ACE. *Id.*

BSE also made redlines to the "draft" purchase and sale agreement, and even added an entirely new "paragraph 9," which ACE never accepted. (R.256 at ¶20; R.626 at ¶20)

G. September 11, 2022: BSE Continues to Negotiate the Terms of the Draft Purchase and Sale Agreement.

On September 11, 2022, BSE's counsel emailed ACE. (R.256 at ¶20; R.626 at ¶20) In this email, BSE (i) agreed to remove its proposed paragraph 9 from the draft purchase and sale agreement; (ii) stated that it was "under the impression" that ACE was agreeable to BSE's other proposed redlines; and (iii) announced that it was "ready to proceed to contract and a subsequent closing once you and I have settled these matters." *Id.*

H. September 20, 2022: ACE's Termination Letter.

By September 20, 2022, BSE and ACE still had not settled all outstanding matters and therefore a purchase and sales agreement had still not been executed for either Unit. (R.18 at ¶25; R.63 at ¶25) At this point, over 15 months had passed since BSE and ACE executed the Non-Binding Letter of Intent. (R.270-272) Accordingly, ACE sent BSE a **Termination Letter** that day announcing that ACE

was terminating their negotiations. (R.36-37; R.18 at ¶21; R.63 at ¶21; R.256 at ¶21; R.626 at ¶21)

I. September 23, 2022: BSE Responded to the Termination Letter.

On September 23, 2022, BSE—through its second counsel, Zachary S. McWilliams, Esq. of Zachary S. McWilliams, P.A.—sent ACE a letter responding to the Termination Letter. (R.58; R.18 at ¶21; R.63 at ¶21) BSE's response letter (i) announced that it refused to accept the termination and (ii) demanded that ACE send BSE purchase agreements for the Units. *Id.*

J. BSE's Deposits Were Returned, Plus Interest.

All deposits that BSE paid towards the Units were returned to BSE in addition to interest earned on those deposits. (R.631 (#13); R.575) BSE accepted the return of its deposits and, upon receipt, did not subsequently deposit them into the court registry. (R.6-10)

LOWER COURT PROCEEDINGS AND DISPOSITION

A. September 23, 2022: ACE Sued BSE.

On September 23, 2023, ACE followed through on its promise to file the Draft Complaint. (R.14-58) ACE's suit against BSE proceeded on a single count for declaratory judgment. (R.18-20) The

relief ACE sought therein was a declaration that (i) neither the Non-Binding Letter of Intent nor the Non-Binding Reservation Deposit Agreements bound ACE to convey the Units to BSE; and (ii) ACE was free to cease negotiating with BSE and authorized to proceed negotiating to sell the Units to other prospective purchasers. (R.20)

B. September-October 2022: BSE Filed a Lis Pendens, Answered ACE's Complaint, and Counterclaimed.

On September 29, 2022, BSE—through its third counsel, Keith Silverstein, Esq. of Armstrong Teasdale, LLP—filed a *Notice of Lis* Pendens on the Project. (R.59, 310) That lis pendens was recorded in the Public Records of Miami-Dade County. (R.10)

On October 31, 2023, BSE answered and counterclaimed for specific performance. (R.60-194) The "wherefore" clause for BSE's counterclaim sought "specific performance of the terms of the [Non-Binding Letter of Intent] and the [Non-Binding Reservation Deposit Agreements]." (R.70) Notably, BSE *did not* counterclaim for:

- specific performance of an executed purchase and sale agreement for the Units since BSE and ACE never executed a purchase and sale agreement (R.18 at ¶25; R.63 at ¶25); or
- the return of BSE's deposits since BSE already received and accepted them. (R.631 (#13); R.575).

C. March-April 2023: BSE Amended its Counterclaim.

On March 1, 2023, BSE moved to amend its specific performance counterclaim to add a promissory estoppel claim. (R.248-383) On March 27, 2023, the lower court authorized BSE's proposed amendment. (R.560-561)

D. April 3, 2023: ACE Moved for Judgment on the Pleadings.

On April 3, 2023, ACE moved for judgment on the pleadings. (R.562-623) BSE filed its opposition on May 25, 2023. (R.656-802)

E. May 26, 2023: The Lower Court Presided Over a Special Set Hearing on ACE's Motion for Judgment on the Pleadings.

On May 26, 2023, the lower court presided over a special set hearing during which it heard oral argument from counsel for the parties on ACE's motion for judgment on the pleadings and BSE's opposition thereto. (R.7, 846) A transcript of that hearing was never filed in the lower court. (R.6-10)

F. December 2023: The Lower Court Entered Judgment on the Pleadings, Which BSE Appealed.

On December 1, 2023, the lower court entered judgment on the pleadings (the "**Judgment**"). (R.846-852) BSE did not move for rehearing, choosing instead to appeal. (R.6-7, 834-843)

STANDARD OF REVIEW

An order granting a motion for judgment on the pleadings is reviewed on a *de novo* standard. *IMC Group, LLC v. Outar Inv. Co., LLC*, 336 So. 3d 1217, 1219 (Fla. 3d DCA 2022) (affirming order granting motion for judgment on the pleadings).

A trial court's interpretation of a contract or statute involves a pure question of law, which is reviewed *de novo*. *Lazzari v. Guzman*, 314 So. 3d 374, 376 (Fla. 3d DCA 2020).

Whether a contract was formed is also a legal determination that is reviewed *de novo*. *Nakash v. Covenant Palms ULGM, LLC*, No. 3D23-1656, 2024 WL 1896056, at *1 (Fla. 3d DCA May 1, 2024) (*citing Evans v. Diaz*, 365 So. 3d 1176, 1178 (Fla. 4th DCA 2023).

SUMMARY OF THE ARGUMENT

1. This Court has held that where parties intend there will be no binding contract between them until their negotiations are reduced to a formal writing, there is no contract until that time. Here, the parties executed a document stating that if they could come to terms, then they would "enter into a Purchase and Sale Agreement," but in the meantime "no contractual obligation will be created until a final agreement is prepared, mutually accepted and executed by both parties." The parties acknowledge in their pleadings and appellate briefs that they never executed a purchase and sale agreement. The lower court was therefore correct to rule as a matter of law—consistent with this Court's binding precedent—that there was no contract that could be specifically enforced.

2. This Court has held that to compel the sale of real property through specific performance, the statute of frauds requires the movant to demonstrate that the writing it is seeking to enforce (i) is signed by the party against whom enforcement is sought and (ii) contains all of the essential terms of the sale without needing to be explained by parol evidence. None of the documents that Appellee

seeks to enforce contain all essential terms for the sale of a preconstruction residential condominium unit and are signed by Appellee. The lower court was therefore correct to rule as a matter of law—consistent with this Court's binding precedent—that the statute of frauds barred the specific enforcement of those documents.

3. If a condominium is comprised of more than 25 units, then a buyer's remedy for a seller's default cannot be contractually limited to the return of that buyer's deposit. That legal principle is not applicable here because the parties never executed a purchase and sale agreement. The case law interpreting the Interstate Land Sales Act to require specific performance be available as a remedy to buyers in purchase and sales agreements does not apply because Appellee was only constructing a four-unit condominium. And the remedy the parties agreed to in their Non-Binding Reservation Deposit Agreements was the return of appellant's deposit plus interest, which is legally permissible given that either party could opt out of that agreement at any time for any reason without penalty prior to the execution of a purchase and sale agreement.

ARGUMENT

I. THE PARTIES CONTRACTUALLY AGREED NOT TO BE BOUND "UNTIL A FINAL AGREEMENT IS PREPARED, MUTUALLY ACCEPTED AND EXECUTED BY BOTH PARTIES." THIS COURT MUST AFFIRM BECAUSE THE PARTIES DID NOT SUBSEQUENTLY EXECUTE A FINAL PURCHASE AND SALE AGREEMENT.

A. This Court's Binding Caselaw Requires Affirmance of the Judgment.

Pursuant to this Court's binding[1] precedent, "where the parties intend that there will be no binding contract until the negotiations are reduced to a formal writing, there is no contract until that time." *Club Eden Roc, Inc. v. Tripmasters, Inc.*, 471 So. 2d 1322, 1324 (Fla. 3d DCA 1985); *Midtown Realty, Inc. v. Hussain*, 712 So. 2d 1249, 1251 (Fla. 3d DCA 1998) (favorably citing *Club Eden Roc*); *Jones v. Turlington*, 504 So. 2d 811, 812, n.3 (Fla. 3d DCA 1987) (same). That simple principle of law requires the affirmance of the Judgment.

On June 17, 2021, the parties executed a Non-Binding Letter of Intent. (R.270-272) Within that instrument:

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[1] "[I]f the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it." *Pardo v. State*, 596 So. 2d 665, 666–67 (Fla. 1992) (citing *State v. Hayes*, 333 So. 2d 51, 53 (Fla. 4th DCA 1976)).

(i) the first paragraph states in pertinent part "it is anticipated that ***[BSE] will enter into a Purchase and Sale Agreement*** (the 'Contract') for the purchase and sale of the above referenced Property" (R.274 (emphasis added));

(ii) the First Non-Binding Clause states that the Non-Binding Letter of Intent is just a "proposal" and "an expression of interest," "does not constitute an offer by the seller to sell," and "is not a binding agreement" (R.275); and

(iii) the Second Non-Binding Clause immediately under the signature blocks states "This letter is meant to be an outline of the major business points and ***no contractual obligation will be created until a final agreement is prepared, mutually accepted and executed by both parties***." (R.276 (emphasis added))

This clear and unambiguous language unequivocally demonstrated the parties' intent that there would be no binding contract between them unless and until their negotiations were reduced to a final purchase and sale agreement.

The legal effect of that language prevented the lower court from ruling that a binding contract existed between these parties unless the parties "prepared, mutually accepted, and executed" a final purchase and sale agreement for the Units. *See* R.274-276; *see also Club Eden Roc*, 471 So. 2d 1322 at 1324; *Hussain*, 712 So. 2d 1249 at 1251; *Jones*, 504 So. 2d 811 at n.3.

On this point, BSE admits no purchase and sale agreement was subsequently executed:

- ACE's complaint alleged "No final purchase and sale agreement was ever executed between the parties" (R.18 at ¶25);

- in response, BSE answered "Admitted" before going on to blame ACE for the absence of an executed purchase and sale agreement (R.63 at ¶25); and

- BSE's amended counterclaim alleges "execution of the Final Purchase and Sale Agreement, which contains the Parties' agreed-upon terms, was only a formality." (R.257 at ¶28);

- BSE's initial appellate brief refers to the "unsigned Purchase and Sale Agreement." (I.B.14);

- No pleading alleges the existence of an executed purchase and sale agreement for the Units; and

- No pleading attaches an executed purchase and sale agreement.

That is the entire appeal. It really is that simple. Since there is no final, executed purchase and sale agreement between the parties for the sale of the Units, this Court—based on its own binding precedent—must affirm the Judgment.

B. The Preconditions the Parties Agreed to in the Non-Binding Letter of Intent Render BSE's "Collateral Writings" Caselaw Inapplicable.

Notwithstanding the absence of an executed purchase and sale agreement, BSE argues that ACE was contractually obligated to sell the Units because the parties executed other documents from which—BSE contends—an agreement should be cobbled together and enforced over ACE's objection. (I.B.12-15) In support, BSE cites a series of "collateral writing" cases.[2] *Id.*

BSE's "collateral writing" cases have no application to this appeal because the parties in those cases did not expressly limit their ability to be contractually bound on the subsequent execution of a formal written document. Therefore, those courts were legally allowed to foist a contract on the resisting parties by piecing together various terms found in "collateral writings" those parties previously exchanged with their opponents.

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[2] *U.S. Distribs., Inc. v. Block,* 2009 WL 3295099 (S.D. Fla. Oct. 13, 2009); *Kolski ex rel. Kolski v. Kolski*, 731 So. 2d 169, 171-172 (Fla. 3d DCA 1999); *Rohlfing v. Tomorrow Realty & Auction Co.,* 528 So. 2d 463 (Fla. 5th DCA 1988); *Heffernan v. Keith*, 127 So. 2d 903, 904 (Fla. 3d DCA 1961).

Here BSE and ACE signed a document wherein they expressly and unequivocally agreed there would be no binding contract between them unless and until they subsequently executed a final purchase and sale agreement. (R.274-276) The parties' agreement to that specific condition is critical because it completely eliminates the application of BSE's "collateral writing" decisions, which, in turn, greatly simplifies the analysis here.

Instead of hunting and gathering for terms in "collateral writings" and arguing whether "collateral writing" case law authorizes the creation of an enforceable contract here, the Non-Binding Letter of Intent limits this Court's analysis to the single issue of whether the parties' satisfied their agreed-to pre-condition to be contractually bound.

Put simply, *after* the parties' executed the Non-Binding Letter of Intent, did the parties *subsequently* prepare, mutually, accept, and execute a "final" purchase and sale agreement? (R.276) The answer is no. The Non-Binding Reservation Deposit Agreements were not a final purchase and sale agreement because (i) they mention that a purchase and sale agreement still needs to be executed and (R.283

at ¶2; R.288 at ¶2; R.285, 290) (ii) BSE admits no purchase and sale agreement was ever executed. (R.18 at ¶25; R.63 at ¶25; R.257 at ¶28; I.B.14)

Therefore, this Court's binding precedent prohibited the lower court from following BSE into error by foisting a contract upon the parties contrary to their clearly and expressly articulated intent. *Club Eden Roc*, 471 So. 2d 1322 at 1324; *Hussain*, 712 So. 2d 1249 at 1251; *Jones*, 504 So. 2d 811 at n.3. Since the lower court had to enter the Judgment, this Court should affirm it.

II. THE STATUTE OF FRAUDS ALSO REQUIRES AFFIRMANCE OF THE JUDGMENT.

Section I of the Argument is dispositive of this appeal. Full stop. Florida's statute of frauds does, however, independently provide an alternative basis for the affirmance of the Judgment.

The statute of frauds is codified in *Fla. Stat.* § 725.01, and states, in pertinent part, that:

> No action shall be brought . . . upon any contract for the sale of lands . . . unless the agreement . . . upon which such action shall be brought . . . shall be in writing and signed by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized.

This law "was enacted to prevent perjury and the enforcement of claims based on memories made faulty by the lapse of time, or loose verbal statements." *Rowland v. Ewell*, 174 So. 2d 78, 80 (Fla. 2d DCA 1965). Accordingly, its application "should be strictly construed." *Id.*

A. This Court's Binding Caselaw Requires Affirmance of the Judgment.

Pursuant to this Court's binding[3] precedent, for BSE to compel the sale of real property through specific performance, the statute of frauds required BSE to demonstrate that the writing it is seeking to enforce satisfies two conditions: one, it "must be a writing signed by the party against whom enforcement is sought. Two, the writing must contain all of the essential terms of the sale and these terms may not be explained by resort to parol evidence." *Fox v. Sails at Laguna Club Dev. Corp.*, 403 So. 2d 456, 458 (Fla. 3d DCA 1981).

The facts of this case are akin to *Fox,* wherein the plaintiff buyers (i) "executed unit reservation and deposit receipt agreements for the purchase of three condominium units,"—but not purchase

[3] *Pardo*, 596 So. 2d at 666–67.

and sale agreements—and (ii) thereafter sued for specific performance when the defendant developer cancelled those reservation and deposit agreements. *Id.* at 457-458. Notably, the documents executed in *Fox* were analogous to the documents BSE executed in this case in that they clearly stated the buyer's deposit was returnable to the buyer upon written demand at any time and for any reason prior to execution of a final purchase and sale agreement. *Id.* at n.1; *see also* R.284, 289.

With those analogous facts in mind, this Court affirmed the trial court's ruling that the statute of frauds precluded the *Fox* buyers from obtaining specific performance as a matter of law because all essential terms of a real estate sales contract were not present within the four corners of the reservation and deposit agreements. *Id.* at 458. On this particular point, this Court emphasized that "The writing itself must contain all of the necessary terms of sale, and missing elements may not be filled in by resort to parol evidence." *Id.*

B. Certain Terms are Essential to the Formation of Contracts for the Preconstruction Sale of Residential Condominium Units.

As a general rule, "[t]here is no definitive list of essential terms that must be present and certain to satisfy the statute of frauds. Rather, the essential terms will vary widely according to the nature and complexity of each transaction and will be evaluated on a case by case basis . . ." *All Seasons Condo. Ass'n, Inc. v. Patrician Hotel, LLC*, 274 So. 3d 438, 446 (Fla. 3d DCA 2019) (citing *Socarras v. Claughton Hotels, Inc.*, 374 So. 2d 1057, 1060 (Fla. 3d DCA 1979)).

Terms that courts have found to be essential to the formation of contracts to sell real estate include:

- A specific description of the property;[4]
- The identity of the buyer and seller;[5]
- The purchase price;[6]
- The financing terms;[7]

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[4] *Fox*, 403 So. 2d 456 at 458.

[5] *Id.*; *Socarras v. Claughton Hotels, Inc.*, 374 So. 2d 1057, 1060 (Fla. 3d DCA 1979).

[6] *Fox*, 403 So. 2d 456 at 458.

[7] *Id.*; *David v. Richman*, 568 So. 2d 922, 924 (Fla. 1990).

- The time of payment;[8]

- The closing date;[9] and

- The type of instrument the seller is obligated to execute to convey title of the unit to the buyer (*e.g.,* quitclaim deed, warranty deed, special warranty deed, etc.).[10]

Where the subject of a real estate contract is a preconstruction condominium unit, the following terms are also essential:

- Details concerning the assumption or satisfaction of existing mortgages secured by the subject property;[11]

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[8] *Fox*, 403 So. 2d 456 at 458; *Berkery v. Pratt*, 390 F. App'x 904, 908 (11th Cir. 2010) (citing *Rundel v. Gordon*, 111 So. 386, 389 (1927)).

[9] *Cardona v. Lynstar Corp.*, 955 So. 2d 25, 27 (Fla. 3d DCA 2007) (citing *Theocles v. Lytras*, 518 So. 2d 936 (Fla. 3d DCA 1987)).

[10] *Compare Dumas v. First Fed. Sav. & Loan Ass'n*, 654 F.2d 359, 361, n.2 (5th Cir. 1981) ("When plaintiff submitted a draft of the purchase and sale agreement to the bank, it was not merely restating the terms set forth in the two-page letter agreement. Instead the draft contained twenty-two pages of terms and conditions, many of which did not appear in the letter agreement. For example, . . . the type of warranty deed (limited or general) . . ."); *with Fla. E. Coast Ry. Co. v. Patterson*, 593 So. 2d 575, 577 (Fla. 3d DCA 1992) (describing effect of a quitclaim deed); *and PGA N. II of Fla., LLC v. Div. of Admin., State of Fla. Dep't of Transp.*, 126 So. 3d 1150, 1152, n.1 (Fla. 4th DCA 2012) (describing difference between effect of a general warranty deed and a special warranty deed).

[11] *Farrell v. Phillips*, 414 So. 2d 1119, 1120 (Fla. 4th DCA 1982); *Socarras,* 374 So. 2d 1057 at 1060.

- Whether the seller is obligated to deliver the condominium unit to buyer in a "decorator ready" format (*i.e.,* as a concrete shell without any floor tiles or other finishes);[12]

Finally, if the subject of a real estate contract is a residential condominium unit, then the contract must also, statutorily, include certain language and disclaimers. § 718.503(1)(a)(1)-(8), *Fla. Stat.*

C. The Non-Binding Reservation Deposit Agreements Do Not Contain All Essential Terms.

The following essential terms to a contract for the sale of preconstruction residential condominium units do not appear anywhere within the four corners of the Non-Binding Reservation Deposit Agreements:

- The financing terms;
- The time of payment;
- The closing date;

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[12] "It strains logic that the DiMases would be willing to pay $1,262,000 for two luxury condominiums, only to live on cement floors. . . . It strains logic to determine that, as a matter of law, the flooring was not an essential term." *DiMase v. Aquamar 176, Inc.*, 835 So. 2d 1150, 1157 (Fla. 3d DCA 2002) (Ramirez, J., dissenting). On rehearing en banc, this dissent by Judge Ramirez was adopted as the majority opinion. *DiMase v. Aquamar 176, Inc.*, 835 So. 2d 1158, 1159 (Fla. 3d DCA 2003).

- The type of instrument the seller is obligated to execute to convey title of the unit to the buyer;

- Details concerning the assumption or satisfaction of existing mortgages secured by the subject property;

- Whether the seller is obligated to deliver the condominium unit to buyer in a "decorator ready" format; and

- The language required by § 718.503(1)(a)(1)-(8).

Accordingly, this Court's binding precedent in *Fox* legally precluded the lower court from relying on the Non-Binding Reservation Deposit Agreements as a basis to compel ACE to convey the Units to BSE. 403 So. 2d 456 at 458.

D. The Non-Binding Letter of Intent Does Not Contain All Essential Terms.

The following essential terms to a contract for the sale of preconstruction residential condominium units do not appear anywhere within the four corners of the Non-Binding Letter of Intent:

- The closing date;[13]

- The type of instrument the seller is obligated to execute to convey title of the unit to the buyer;

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[13] While the Non-Binding Letter of Intent states "closing shall be 30 days from the effective date of the Contract," it does not contain a definition of the "effective date" of non-existent, not-yet-negotiated Contract (*i.e.,* final purchase and sale agreement). (R.275)

- Details concerning the assumption or satisfaction of existing mortgages secured by the subject property;

- Whether the seller is obligated to deliver the condominium unit to buyer in a "decorator ready" format; and

- The language required by § 718.503(1)(a)(1)-(8).

Accordingly, this Court's binding precedent in *Fox* legally precluded the lower court from relying on the Non-Binding Letter of Intent as a basis to compel ACE to convey the Units to BSE. 403 So. 2d 456 at 458.

E. The Other Unexecuted Writings Mentioned in—But Not Attached To—BSE's Pleading Were Never Executed And Each Does Not Contain All Essential Terms.

BSE alleged that after the Non-Binding Letter of Intent and the Non-Binding Reservation Deposit Agreements were executed, a draft purchase and sale agreement was circulated between the parties; BSE made comments to it; and ACE accepted some of those comments, but not other "specific, non-material items." (R.257 at ¶27) Accordingly, BSE argued, "[ACE's] written acceptance of [BSE's] comments to this draft purchase and sale agreement constitutes a complete and binding purchase and sale agreement for the [Units]." *Id.* at ¶28.

BSE did not attach to its amended counterclaim (i) this supposed, unexecuted draft purchase and sale agreement; (ii) any emails or text messages containing BSE's supposed written comments to the unexecuted draft purchase and sale agreement; (iii) any emails or text messages containing ACE's supposed agreement to some of those comments (the "**Unexecuted Writings**"). Therefore, none of the Unexecuted Writings could legally be considered in the resolution of ACE's motion for judgment on the pleadings. *Wilkins v. Tebbetts*, 216 So. 2d 477, 478 (Fla. 3d DCA 1968) ("In a motion for judgment on the pleadings, the court may not go outside the pleadings to determine the case.").

But even if BSE's alleged *description* of the contents of the Unexecuted Writings in BSE's pleading are taken as true—albeit solely for the purpose of ACE's motion for judgment on the pleadings—the Judgment still must be affirmed. *Wilkins* at 478 ("A motion for judgment on the pleadings admits, for the purpose of the motion, all well-pleaded facts contained in the non-moving party's pleading."). This is because BSE admits the parties did not sign those documents, which violates the first *Fox* condition. (R.257 at ¶28)

The failure to satisfy the first *Fox* condition is dispositive, as demonstrated by a recent appellate decision relying on *Fox*: *Walsh v. Abate*, 336 So. 3d 50 (Fla. 4th DCA 2022). The facts in *Walsh* are as follows:

- On December 30, 2020, the interested buyer's agent emailed an offer to purchase a home for $3.1 million with closing occurring on January 19, 2021, attaching a FAR/BAR[14] contract executed by the buyer;

- The sellers' agent replied via email that the sellers would only accept the list price of $3.4 million;

- Less than an hour later the interested buyer's agent responded by saying (i) the buyer would "meet the Seller's $3.4M with all other terms remaining the same" and "a quick cash close" and (ii) "please have the Seller counter the offer on our contract at $3.4M, sign and return and I will get you the contract fully executed today";

- The sellers' agent responded via text message that the sellers "accept the $3.4 million" and "ask to close 2/1";

- The interested buyer's agent texted back, "Perfect and confirmed. Thank you!";

- Several days later, the sellers' agent emailed the buyer's agent, stating: "Please let the buyer know that the seller thanks him for his patience and accepts $3.4 million." The

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[14] "A contract for sale and purchase of the property on a preprinted form approved by the Florida Association of Realtors and The Florida Bar." *Syvrud v. Today Real Est., Inc.*, 858 So. 2d 1125, 1127 (Fla. 2d DCA 2003).

> agent reiterated that the sellers "would like to close 2/1/21"; and
>
> - A few days after that, the sellers' attorney announced via email that "Seller accepted a different offer."

336 So. 3d 50 at 52.

Relying explicitly on this Court's *Fox* decision, the Fourth District affirmed the trial court's ruling that those interested buyers were not entitled to specific performance as a matter of law on the ground that "there was no written agreement signed by both parties as required by the statue of frauds." *Id.* at 53. In so ruling, the Fourth District explained:

> Rather, the record reflects an initial offer signed by [the proposed buyer] and thereafter only unsigned text messages and emails exchanged between the buyer's and sellers' agents. ***Significantly, the offer of purchase itself contemplated a signed written agreement*** as it stated that the effective date of the agreement would be "the date when the last one of the Buyer and Seller has signed or initialed and delivered this offer or final counter-offer." ***Dispositively, the sellers did not sign the initial contract, and neither party signed the modification of price and closing date.***

Id. at 53-54 (emphasis added).

The *Walsh* decision reinforces this Court's binding *Fox* decision's prohibition against relying on parol evidence, particularly unsigned documents, when the parties' agreement is that there must be a final, signed document. *Fox*, 403 So. 2d 456 at 458 (holding "the contract must be a writing signed by the party against whom enforcement is sought"); *Walsh*, 336 So. 3d 50 at 53-54 ("Dispositively, the sellers did not sign the initial contract, and neither party signed the modification of price and closing date.").

In sum, there is no real estate deal until it is reduced to writing and signed. Since that did not occur here, the Judgment must be affirmed.[15]

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[15] The Unexecuted Writings were not filed in the lower court and are not part of the record for this appeal. Nor was the transcript of the special set hearing on ACE's motion for judgment on the pleadings. This leaves BSE without any way to demonstrate each Unexecuted Writing satisfied the second *Fox* condition. BSE's failure to satisfy its responsibility to provide this Court with an adequate record on appeal is yet another reason the Judgment should be affirmed. *Shojaie v. Gables Ct. Pro. Ctr., Inc.*, 974 So. 2d 1140, 1141-1142 (Fla. 3d DCA 2008) (citing *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979)).

III. THE DEFAULT REMEDIES IN THE NON-BINDING RESERVATION DEPOSIT AGREEMENTS ARE LEGALLY ENFORCEABLE, BUT ULTIMATELY IRRELEVANT.

The lower court cited a number of reasons to support its ruling that the Non-Binding Reservation Deposit Agreements did not obligate ACE to convey the Units to BSE. (R.849) One reason was that paragraph 7 of those instruments "expressly limit BSE's remedies to the return of its deposits." *Id.*

BSE, citing a series of 1985 cases,[16] argues the lower court should have refused to enforce that default remedy—despite BSE signing the document agreeing to it—because it was "one-sided" and violative of the Interstate Land Sales Full Disclosure Act ("**ILSA**"). (I.B.15-18; R.666-669) If paragraph 7 was properly stricken, then, BSE argues, it would not have been a barrier to the specific enforcement of the Non-Binding Reservation Deposit Agreements, thereby requiring reversal of the Judgment. *Id.* Not so.

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[16] *Port Largo Club, Inc. v. Warren,* 476 So. 2d 1330 (Fla. 3d DCA 1985); *Blue Lakes Apts., Ltd., v. George Gowing, Inc.,* 464 So. 2d 705 (Fla. 4th DCA 1985); *Ocean Dunes of Hutchinson Island Dev. Corp. v. Colangelo,* 463 So. 2d 437 (Fla. 4th DCA 1985). (I.B.16-17)

First, parties are legally allowed to contractually limit the remedies available in the event of a breach. *Ament v. One Las Olas, Ltd.*, 898 So. 2d 147, 151 (Fla. 4th DCA 2005). Moreover, there is no requirement that the parties have identical remedies. *Redington Grand, LLP v. Level 10 Properties, LLC*, 22 So. 3d 604, 608 (Fla. 2d DCA 2009). Accordingly, there was nothing inherently unlawful about BSE agreeing to limit its remedy for an ACE breach of the Non-Binding Reservation Deposit Agreements to the return of BSE's deposits plus interest. (R.284 at ¶¶6, 7; R.289 at ¶¶6, 7)

Second, BSE waived all objections to the default term by agreeing to it; paying the deposits in August 2021; not complaining about that term while its deposits were held in escrow; and then accepting the return of the deposits plus interest once the Non-Binding Reservation Deposit Agreements were terminated in September 2022. (R.36-37, 286-287, 290-291) BSE's failure to complain about the Non-Binding Reservation Deposit Agreements' default term even once during those 13-months was a waiver.

Third, the 1985 cases that BSE relies on are factually distinguishable for three reasons. Reason one is that the default

term at issue in those cases appeared in fully executed purchase and sale agreements. *Port Largo,* 476 So. 2d 1330 at 1332; *Blue Lakes,* 464 So. 2d 705 at 707; *Ocean Dunes,* 463 So. 2d 437 at 438. Here, BSE and ACE never executed purchase and sale agreements for the Units. Reason two is that the default term at issue in BSE's 1985 cases limited those buyers to the return of their deposit without interest. *Port Largo* at 1332; *Blue Lakes* at 707; *Ocean Dunes* at 438. The Non-Binding Reservation Deposits that BSE executed entitled BSE to its deposit and all interest earned on its deposit. (R.284 at ¶¶6, 7; R.289 at ¶¶6, 7) And reason three is that the purchase and sale agreements in BSE's 1985 cases obligated the buyers to perform (*i.e.,* pay and close) or sustain a penalty (*i.e.,* lose their entire deposits) while allowing the developers to breach with impunity. Here, BSE and ACE each have the "immediate unqualified" right to refuse to perform at any time without incurring any penalty. (R.284 at ¶¶5-8; R.289 at ¶¶5-8)

Fourth, ILSA did not entitle BSE to specific performance as a remedy because ILSA "shall not apply to the sale or lease of lots in a subdivision containing less than twenty-five lots." 15 U.S.C. §

1702(a)(1). The condominium ACE was constructing is only comprised of four units. (R.724 at ¶3.5) ILSA therefore has no applicability to these parties or these Units.[17]

Fifth, even if BSE were correct that paragraph 7 was unenforceable, BSE would still not be entitled to the reversal of the Judgment. This is because the Non-Binding Reservation Deposit Agreements would still not legally require ACE to convey the Units for other reasons. These include, (i) as briefed in section 1 above, the parties' previously agreement that no contractual obligation will be created until a final purchase and sale agreement "is prepared, mutually accepted and executed by both parties" (R.276), and (ii) as briefed in section 2 above, the fact that the Non-Binding Reservation Deposit Agreements were not that "final agreement" and do not

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[17] BSE's reliance on *Samara Dev. Corp. v. Marlow*, 556 So. 2d 1097 (Fla. 1990), is also misplaced. (R.667-669) *Samara* obligates preconstruction condominium developers claiming to be exempt from ILSA pursuant to the two-year completion exemption to provide specific performance as a remedy to buyers. 556 So. 2d at 1100-1101. ACE does not seek to avoid ILSA by claiming its two-year completion, or any other, exemption. ILSA's inapplicability to ACE's 4-unit condominium obviates the need for ACE to claim an exemption. 15 U.S.C. § 1702(a)(1).

independently contain all essential terms of a contract to sell real estate that could form the basis of a specific performance claim.

CONCLUSION

ACE respectfully requests this Court **(i)** affirm the Judgment (R.846-852); **(ii)** hold that ACE is the prevailing party entitled to recover its appellate costs to be paid for by BSE; and **(iii)** grant ACE such other and further relief that this Court deems just and proper.

[CERTIFICATE OF SERVICE AND COMPLIANCE IMMEDIATELY FOLLOW]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served *via* automatic emails generated through the E-Filing Portal System this 6th day of June 2024 upon Marlon J. Weiss, Esq., Keith D. Silverstein, Esq., and Jose A. Peralta, Esq., of Armstrong Teasdale LLP, ***Counsel for Appellant, BSE Investments, LLC***, 355 Alhambra Circle, Suite 1200, Coral Gables, Florida 33134, at mweiss@atllp.com, ksilverstein@atllp.com, jperalta@atllp.com, miamiefiling@atllp.com.

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CERTIFICATE OF COMPLIANCE

WE FURTHER CERTIFY that this brief complies with *Fla. R. App. P.* 9.045 because **(i)** it is submitted in Bookman Old Style, 14-point font and **(ii)** it contains 6,634 words in compliance with the word count limit articulated in *Fla. R. App. P.* 9.210(a)(2)(B).

By /s/ Thomas S. Ward, B.C.S.
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