IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 3D23-2303
Lower Tribunal No. 2022-18466-CA-01

BSE INVESTMENTS, LLC,

Appellant,

v.

ACE GROUP INVESTORS, L.L.C,

Appellee.

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

It is sometimes said that the simplest answer is often the correct one. And sometimes, the simplest answer is just flat wrong. The latter is what happened here when the trial court entered judgment on the pleadings and concluded that the statute of frauds precluded the contractual enforcement of an unsigned condominium purchase agreement against a developer. In reaching this simplistic determination, the trial court departed from plain text of the statute and circularly concluded that allegations of collateral writings could not overcome the statute—because the contract was unsigned.

The trial court erred by ignoring the well-pleaded allegations of the Amended Counterclaim establishing mutuality of assent as to material terms. The statute of frauds must be construed to achieve its narrow purpose of shielding against fraud; not wielded as a sword to extract free financing and endless concessions from real estate buyers, with the effect of converting a garden-variety purchase agreement into a de facto options contract.

The trial court magnified its error by enforcing a lopsided limitation of remedies in a reservation deposit agreement, which precluded only the purchaser—but not the developer—from seeking

specific performance and damages. Controlling caselaw instructs that a default provision which unilaterally permits a developer to breach a preconstruction deposit agreement with impunity is not valid as to the remedial limitation. The judgment must be reversed.

STATEMENT OF THE CASE AND FACTS

This is an appeal of an adverse judgment on the pleadings. The developer of a condominium brought an action for declaratory relief against a purchaser to release its obligation to sell two units in a prospective development at a previously agreed-upon price. The purchaser counterclaimed for specific performance and alternatively promissory estoppel. Taken in the light most favorable to the nonmovant, the pleadings alleged the following.

In May 2021, Appellant, BSE Investments I, LLC ("Buyer") and Appellee, Ace Group Investors, L.L.C. ("Developer") commenced negotiations for the purchase and sale of two luxury properties (collectively "Properties") located in the Coconut Grove neighborhood of Miami, Florida. (R. 617 ¶ 7). On June 10, 2021, Buyer presented Developer with a letter of intent ("LOI") to purchase the Properties. (R. 683-685). Buyer offered $2,000,000 to purchase both Properties, which offer was rejected by Developer, who demanded $2,148,000. (*Id.*; R. 689-691).

In particular, Developer stated:

> Gustavo, Thank you for your offer. Given the short period of time to CO, the Seller decided to adjust the prices from pre-construction to a price more relative to the market

> value of a gated community. We appreciate your Buyer from purchasing both, it prevents the Seller from adjusting the second townhome higher due to supply and demand after the first one is sold. ***This will be the only increase and the Seller is prepared to sell the townhomes immediately at this price***. We have gotten a second offer for both units for a Brazilian Buyer but will give your Buyer the first right of refusal. It is ready to move at this price. If your Buyer would of been here 3 months ago, the Seller would of sold it. ***This is the only price adjustment***. We are looking forward to your feedback.

(R. 687) (emphasis added)). Developer then executed and delivered a revised LOI reflecting the new price to Buyer, who thereafter accepted the price increase. (R. 689-691).

Consistent with the terms of the revised LOI, on August 27, 2021, Buyer and Developer executed two reservation deposit agreements (the "Reservation Deposit Agreements") in connection with the Properties. (R. 702-711). In exchange for Buyer's escrow deposits of $104,900 for Unit 3376A, and $109,900 for Unit 3376B, Developer agreed to the following:

> 2. . . . The Developer agrees that if the Project is sold as presently contemplated by the Developer and no material changes (as determined solely by the Developer) are made to the Project or to the Unit, ***the Developer will not contract to sell the Unit to anyone else*** until [Buyer] has had an opportunity to sign the Developer's standard binding Purchase and Sale Agreement for the Unit . . . .

> 3. The box that is checked indicates the applicable provision in this Section 3:
>
> > xx ***The Purchase Price stated in the Reservation Deposit Agreement will be the purchase price of the unit in the Purchase Agreement***.
> >
> > ___ Developer makes no assurances that the purchase price stated in this Reservation Deposit Agreement will be the purchase price of the Unit in the Purchase Agreement.

(R. 702, 707) (emphasis added)).

Approximately eight months later, on April 19, 2022, Buyer received from Developer a blank draft of the Purchase and Sale Agreement for the Properties. (R. 619 ¶ 14). The next day, Buyer communicated to Developer comments to the blank draft of the Purchase and Sale Agreement. (*Id.* ¶ 15).

As of June 10, 2022, Developer still had not responded to Buyer's comments to the Purchase and Sale Agreement sent on April 20, 2022, notwithstanding the fact that all permitting had been closed and Developer had received a temporary certificate of occupancy for its development of the Properties. (*Id.* ¶ 16).

Thereafter, on June 14, 2022, Developer advised Buyer in writing that it accepted all of Buyer's comments to the Purchase and

Sale Agreement, with the exception of specific, unmaterial items that would be completed at closing. (*Id.* ¶ 17).

On August 9, 2022, Developer submitted the Declaration of Condominium to the Florida Division of Condominiums pursuant to Chapter 718 of the Florida Statutes. (*Id.* ¶ 18). On September 11, 2022, following Developer's repeated assurances that it was preparing the Purchase and Sale Agreement with the comments it accepted from Buyer, Developer finally returned a "revised" draft of the Purchase and Sale Agreement, with none of the agreed-upon comments and once again unilaterally increasing the purchase price by a further $300,000 to $2,448,000. (R. 620 ¶ 19).

Buyer protested, and as a result, on September 20, 2022, Developer proclaimed the "formal termination of negotiations," and took the position that the "parties have not entered into a binding purchase and sale agreement." (R. 713-714). On October 13, 2022, the Declaration of Condominium was filed in the public records of Miami Dade County. (R. 716, *et seq.*).

Based on the foregoing, Developer filed a one-count Complaint for declaratory relief alleging that none of the relevant documents (LOI, Reservation Deposit Agreements, or Purchase and Sale

Agreement), were binding, nor required it to convey the Properties to the Buyer. (R. 14-58). Developer asserted that the Reservation Deposit Agreement contained a remedial limitation that prevented claims for damages or specific performance, as follows: "Under no circumstances will the Developer have any liability to Applicant other than to cause the deposit(s) to be returned." (R. 17-18). Developer further alleged that the Purchase and Sale Agreement was unsigned and therefore unenforceable. (R. 18).

Buyer counterclaimed for specific performance and alternatively promissory estoppel. (R. 620-623). Buyer alleged that "the Reservation Deposit Agreements are a binding contract between the Parties in connection with the sale and purchase of the Properties" and that the Purchase and Sale Agreements are further binding because the Developer "**accepted** in writing all of Buyer's comments to the Purchase and Sale Agreement that included the Final Price, with the exception of specific, unmaterial items that would be completed at closing." (R. 621 ¶27). Buyer further alleged that "the only matters remaining were unmaterial terms to be decided at closing and the draft of this agreement with the Parties' agreed-upon terms as a formality." (*Id.* ¶ 28).

Developer answered the Amended Counterclaim and denied that it accepted all comments to the Purchase and Sale Agreement regarding material terms. (R. 627). Based on the denial, Developer maintained that the contract was unsigned and unenforceable under the State of Frauds. (R. 631). The Developer asserted additional defenses, including, as relevant here, the claim that the Buyer "had no recourse" other than return of the deposits, as set forth in the Reservation Deposit Agreements. (R. 629).

Developer moved for judgment on the pleadings on April 3, 2023, based on its contention that the Statute of Frauds and the remedial limitation of the Reservation Deposit Agreement precluded contractual enforcement. (R. 562-579). Buyer responded, emphasizing that nothing remained to be negotiated between the parties and that Developer accepted all material terms of the Purchase and Sale Agreement, and that execution and delivery of the final draft was a mere formality, which did not occur due to the Developer's deliberate foot-dragging. (R. 656-666).

Buyer further emphasized that the remedial limitation of the Reservation Deposit Agreement was invalid under Interstate Land Sales Act caselaw preventing a developer from imposing one-sided

limitations on Buyers in a deposit agreement and thereby rendering the agreement illusory. (R. 666-669).

The trial court called the matter up for hearing on May 26, 2023. (R. 7). On December 1, 2023, the trial court entered final judgment in favor of Developer and against Buyer in respect to all claims in the Complaint and Amended Counterclaim. (R. 846-852).

The trial court reasoned that the Reservation Deposit Agreements "expressly limit BSE's remedies to the return of its deposits" and that the "Purchase and Sale Agreement was never executed and therefore failed to satisfy the statute of frauds." (R. 849). While accepting the truth of the allegations that "ACE accepted BSE's comments on the draft Purchase and Sale Agreement," the trial court nevertheless found the allegations "insufficient to overcome the statute of frauds" because "[it] was never executed." (R. 850).

This timely appeal follows.

SUMMARY OF THE ARGUMENT

The trial court reversibly erred in failing to assign any significance to allegations of collateral writings in which Developer agreed to all material aspects of the Purchase and Sale Agreement, leaving nothing of significance to be done other than the formality of the execution and delivery of the document to Buyer. It is black letter law in Florida that a "note or memorandum" may satisfy the statute of frauds and "may take almost any possible form." Further, "[c]ourts may aggregate several writings . . . to make out the terms of the whole contract." The trial court got it entirely backwards in concluding that that an unsigned contract marks the end—rather than the beginning—of a statute-of-frauds inquiry.

The trial court further erred in enforcing a default provision by which Developer stripped away all of Buyer's remedies—but not its own—including specific performance and damages. A long line of controlling precedent forbids this outcome. Trial court erred in applying the defective default provision to preclude the possibility of specific performance.

Both of these errors independently require reversal.

STANDARD OF REVIEW

An appellate court reviews a judgment on the pleadings de novo. *Perez Escalona v. City of Miami Beach*, 227 So. 3d 722, 724 (Fla. 3d DCA 2017) (citing *Glenn v. Roberts*, 95 So.3d 271, 272 (Fla. 3d DCA 2012)). "A 'motion for judgment on the pleadings must be decided wholly on the pleadings' and is granted only if the pleadings establish that the movant is entitled to judgment as a matter of law." *Id.* (quoting *Clarke v. Henderson*, 74 So.3d 112, 114 (Fla. 3d DCA 2011)). "In determining whether the movant is entitled to judgment on the pleadings, all allegations in the non-moving party's complaint must be taken as true and all allegations in the moving party's answer, which have been denied, must be taken as false." *Id.* (citing *Salussolia v. Nunnari*, 215 So.3d 156, 157 (Fla. 3d DCA 2017)).

Similarly, "review regarding contract interpretation and the threshold question of enforceability is de novo." *A.I.C. Trading Corp. v. Susman*, 40 So. 3d 769, 772 (Fla. 3d DCA 2010).

Applying these precepts here, the judgment must be reversed.

ARGUMENT

I. COLLATERAL WRITINGS ESTABLISHING MUTUAL ASSENT MAY SATISFY THE STATUTE OF FRAUDS

The plain language of the statute of frauds, Fla. Stat. §725.01, states:

> No action shall be brought . . . upon any contract for the sale of lands, tenements or hereditaments . . . unless the agreement or promise upon which such action shall be brought, or ***some note or memorandum*** thereof shall be in writing and signed by the party to be charged therewith . . . .

Id. (emphasis added).

"To satisfy the statute, a note or memorandum may take almost any possible form." *Kolski ex rel. Kolski v. Kolski*, 731 So. 2d 169, 171–172 (Fla. 3d DCA 1999) (citing *Bader Bros. Transfer & Storage, Inc. v. Campbell*, 299 So.2d 114, 115 (Fla. 3d DCA 1974) (holding settlement sheets were sufficient to constitute memorandum under statute of frauds); *Heffernan v. Keith*, 127 So.2d 903, 904 (Fla. 3d DCA 1961) (finding that telegram constitutes note or memorandum confirming prior agreement)); *see also U.S. Distribs., Inc. v. Block*, 2009 WL 3295099, at *5 (S.D. Fla. Oct. 13, 2009) (holding that signed emails may meet the writing requirement of the statute of frauds).

"All that the statute requires is written evidence from which the

whole contract may be made out." *Kolski*, 731 So. 2d at 172 ("For purposes of the statute of frauds, several writings, only one of which is signed by the debtor, may be aggregated to satisfy the statute provided that the signed writing expressly or implicitly refers to the unsigned document." (alterations accepted; citations omitted)).

In *Kolski*, this Court reversed the dismissal of a lawsuit based on the statute of frauds and held that an implied reference "to the terms of the alleged loan made by [plaintiff] in her will together with the canceled checks signed by [the party to be charged] in the precise amount of the semi-annual interest payments on the $40,000 dollar loan and with notations that they were for 'loan interest', were sufficient writings to take the oral agreement out of the statute of frauds." 731 So. 2d at 172.

Similarly, in *Rohlfing v. Tomorrow Realty & Auction Co.*, 528 So. 2d 463, 464–65 (Fla. 5th DCA 1988), the Fifth District held

> that the written "Real Estate Terms of Sale," together with the written "Buyer's Guide" to which the Real Estate Terms of Sale refers, the written "Memorandum of Sale at Public Auction," and the buyer's deposit check with the notations thereon, are sufficiently definite and certain to establish a contract to buy land that complies with the statute of frauds and is enforceable against the buyer. These documents together also constitute a sufficient "note or memorandum" "in writing and signed by the party to be

> charged therewith" of a "contract for the sale of lands" as to satisfy the requirements of the statute of frauds . . . .

Id.

Frankly, it is not even a close question that the parties' executed Reservation Deposit Agreement—locking in the purchase price and making internal reference to "Developer's standard binding Purchase and Sale Agreement"—coupled with Developer's subsequent acceptance "in writing all of Buyer's comments to the Purchase and Sale Agreement that included the Final Price, with the exception of specific, unmaterial items"—was facially sufficient to satisfy the statute of frauds as to the unsigned Purchase and Sale Agreement. The Amended Counterclaim stated a plausible claim for contractual relief.

"The statute should be strictly construed to prevent the fraud it was designed to correct, and so long as it can be made to effectuate this purpose, courts should be reluctant to take cases from its protection." *LaRue v. Kalex Const. & Dev., Inc.*, 97 So. 3d 251, 253 (Fla. 3d DCA 2012) (quoting *Yates v. Ball*, 132 Fla. 132, 181 So. 341, 344 (1938)).

The trial court erred in circularly concluding that the unsigned

contract could not be enforced because the contract was unsigned. The trial court failed to consider the significance of collateral writings, specifically—notes or memoranda—as expressly provided by the plain language of Fla. Stat. §725.01 and alleged in the pleading.

In the light most favorable to the nonmovant, the referenced documents—considered individually or in tandem, constituted a sufficient "note or memorandum," "in writing and signed by the party to be charged therewith," which demonstrated mutual assent to all materials terms. *Kolski; Rohlfing, supra.* Judgment on the pleadings was improper and must be reversed accordingly.

II. A DEFAULT PROVISION LIMITING THE REMEDIES OF A CONDOMINIUM PURCHASER BUT NOT THE DEVELOPER IS UNENFORCEABLE

Notwithstanding the above, the trial court further reversibly erred in concluding that the Reservation Deposit Agreement was effective in limiting Buyer's contractual remedies to a return of the deposit sums, and nothing more. The trial court's conclusion tainted not only potential relief under the Purchase and Sale Agreement, but independently, the contractual remedies asserted by Buyer against Developer in respect to the Reservation Deposit Agreement, which did not implicate the statute of frauds whatsoever since it was signed by

both sides.

Thus, to sustain the judgment on the pleadings, Developer must prevail on ***both*** claims of error raised in this appeal and defeat the Buyer's facial entitlement to specific performance as to ***both*** agreements. But it can't do either.

Port Largo Club, Inc. v. Warren, 476 So. 2d 1330, 1333 (Fla. 3d DCA 1985) puts a swift end to the discussion. There, this Court held in a virtually identical scenario, that a remedial limitation imposed by a developer on a buyer in a deposit agreement for the purchase of a pre-construction condominium unit that limited remedies to the return of the purchaser's deposit, was invalid, and the Court refused to enforce the limitation. This Court stated:

> [A]s to Port Largo Club's contention that appellees' damages should be limited to the damages stipulated in the contract (i.e., the return of the purchaser's deposit), we disagree since this provision renders the seller's obligation wholly illusory and would permit him to breach with impunity. Persons may limit their liability by contract, but such provisions must be reasonable to be enforced.

Id.

This Court further agreed with the Fourth District's observation in *Blue Lakes Apartments, Ltd. v. George Gowing, Inc.*, 464 So.2d 705 (Fla. 4th DCA 1985) that "[s]uch provisions are antithetical to the

concept of fair dealing in the marketplace and will not be enforced by courts of law." *Port Largo*, 476 So. 2d at 1333 (citing *Blue Lakes*, 464 So.2d at 709 (stating further: "Blue Lakes' heads-I-win, tails-you-lose approach to defaults is so rapaciously skewed as to be patently unreasonable. It subverts the contract by permitting one party to breach with impunity.")).

In evaluating similar default provisions, the appellate court in *Ocean Dunes of Hutchinson Island Dev. Corp. v. Colangelo*, 463 So. 2d 437, 439–40 (Fla. 4th DCA 1985) emphasized:

> There is nothing reasonable about the foregoing default provisions. In this contract, the seller's obligations are wholly illusory, while the buyers' are quite real. The developer can opt to sell the unit to any new buyer willing to pay a higher price than the existing contract price . . . with absolutely no harmful consequences; the developer must only return the buyer's own money. A return of one's own money hardly constitutes damages in any meaningful sense. It is especially unconscionable in this case in light of the buyers' deprivation of the use of their money for several years.
>
> The developer, on the other hand, in the event of a breach by the buyers, is able to choose between retaining the buyers' deposit or resorting "to any other legal or equitable remedy to which Developer may be entitled."

Id.

Based on the foregoing, Developer cannot seriously argue that that the one-sided remedial limitation sustaining the trial court's

decision was enforceable. Pursuant to *Port Largo*, and a trove of similar such cases, the judgment on the pleadings must be reversed.

CONCLUSION

The judgment must be reversed.

Dated: April 10, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished via e-service through the Florida E-filing Portal on this 10th day of April 2024 to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that, pursuant to Fla. R. App. P. 9.045(e) and 9.210(a)(2)(B), this brief has been prepared in Bookman Old Style, 14-point font, and the word count is 3,603.

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