IN THE SUPREME COURT OF THE STATE OF NEVADA

W L A B INVESTMENT GROUP, LLC,

Appellant,

v.

TKNR, INC., a California Corporation, and CHI ON WONG aka CHI KUEN WONG, an individual, and KENNY ZHONG LIN, aka KEN ZHONG LIN aka KENNETH ZHONG LIN aka WHONG K. LIN aka CHONG KENNY LIN aka ZHONG LIN, an individual, and LIWE HELEN CHEN aka HELEN CHEN, an individual and YAN QIU ZHANG, an individual and INVESTPRO LLC dba INVESTPRO REALTY, a Nevada Limited Liability Company, and MAN CHAU CHENG, an individual, and JOYCE A. NICKRANDT, an individual, and INVESTPRO INVESTMENTS LLC, a Nevada Limited Liability Company, and INVESTPRO MANAGER LLC, a Nevada Limited Liability Company and JOYCE A. NICKDRANDT, an individual and does 1 through 15 and roe corporation I-XXX,

Respondents.

Supreme Court Case No: 82835
District Court Case No: A785917

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Clerk of Supreme Court

APPEAL

from the Eighth Judicial District Court, Clark County

The Honorable Adriana Escobar, District Judge
District Court Case No. A-18-785917-C

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellent WLAB Investment Group, LLC is a Nevada limited liability company. Its managing member is Marie Zhu. WLAB has been represented by Benjamin Childs, Esq. and Steven L. Day of Steven L. Day PC, dba Day & Nance.

DATED this 18th day of January, 2022.

DAY & NANCE

/s/ Steven L. Day

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JURISDICTION

This Court has jurisdiction under NRAP 3A(b)(1). The district court entered its orders on April 7, 2021 and May 25, 2021. WLAB timely filed its appeals on April 26, 2021 and June 8, 2021, respectively. The orders were consolidated by order on August 30, 2021.

ROUTING STATEMENT

This case does not fall under the Supreme Court or Court of Appeals presumptions. Appellant would ask that the Supreme Court retain jurisdiction of this matter considering the significant Rule 11 sanctions assessed in this case.

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, type-face, and type-style requirement of NRAP 32(a)(4)-(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because it does not exceed 30 pages.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all

applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 18th day of January, 2022.

DAY & NANCE

/s/ Steven L. Day

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CERTIFICATE OF SERVICE

I certify that on January 18, 2022, I submitted the foregoing APPELLANT'S REPLY for file *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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An employee of Day & Nance

ARGUMENT

A. Numerous factual issues exist as to what defects Respondents were aware of when the parties signed the Real Estate Purchase Agreement and at the time of conveyance of the subject property.

Respondents contend that they fully disclosed known defects at the time of their NRS 113.130 disclosure. The evidence suggests otherwise.

1. Appellant did not waive due diligence.

Respondents submit that Appellant waived due diligence twice (p. 1). Respondents further argue that Appellant's failure to retain a "Professional Inspector" somehow constituted a waiver of the opportunity to inspect. (pp. 3-4). Appellant's right to inspect was limited to "non-invasive/non-destructive inspections . . ." (8 App. 1578: ¶ 7(A), ll. 36-37).

The first residential purchase agreement dated August 11, 2017, was signed by Marie Zhu. Subsection 7 titled "BUYER'S DUE DILIGENCE" reflects that Appellant was conditioning its obligation to purchase on Buyer's due diligence. (8 App. 1578: ¶ 7). As Dr. Frank Miao has affirmed, the initial inspection of the subject property occurred on August 10, 2017, the day prior to Ms. Zhu signing the

purchase agreement. (8 App. 1492: ¶ 3). As stated in Appellant's opening brief, Mr. Miao had substantial experience in designing, engineering and constructing buildings with his work. (8 App. 1522, p. 33, ll. 14-19). As Respondents have admitted, Mr. Miao is a professional having purchased and improved a number of rental properties in California and Nevada. Mr. Miao also constructed the family home from ground up in California. (8 App. 1525-26, pp. 45-46). Mr. Miao was more than competent to inspect the subject property prior to his wife signing the purchase agreement. Appellant waived due diligence in the 2nd September 4, 2017, agreement as Mr. Miao had already completed multiple inspections of the property. (8 App. 1493: ¶ 3, 1566: ¶ 7). A second agreement was entered primarily to allow the parties to move the time of closing. (8 App. 1493: ¶3, 1564-73)

2. <u>Issues of fact exist as to what a "non-invasive/non-destructive" inspection should have revealed</u>.

Respondents contend there is no dispute as to what a non-invasive/non-destructive "Professional Inspection" would have revealed. (p. 6, sec. 4) Appellant contends otherwise.

(1) Factual issues exist as to whether Appellant should have discovered faulty wiring installed by Respondents' unlicensed

handyman relative to the installation of air conditioning without code required city building safety inspection and permit.

(2) Factual issues exist as to whether Appellant should have discovered Respondents' failure to install insulated ducting with the installation of air conditioning without code required city building safety inspection and permit.

(3) Factual issues exist as to whether Appellant should have discovered that the dryer ducting had been vented into the walls and attic without code required city building safety inspection and permit.

(4) Factual issues exist as to the condition of the walls at the time of Appellant's inspection versus the condition of the walls several years later as the foundation continued to shift.

(5) Factual issues exist as to whether Appellant should have discovered the broken sewer line that Respondents had failed to disclose.

(6) Factual issues exist as to whether Appellant should have discovered the condition of the foundation covered by new flooring installed by Respondents' unlicensed handyman.

(7) Factual issues exist as to what was "open and obvious" at the time of Mr. Miao's inspection with respect to the subject tile floor versus the condition of the floor several years later with the continuing movement of the foundation.

3. Substantial evidence exists supporting Appellant's contention that Respondents were aware of hidden problems with the subject property.

Respondents contend that there is no evidence that they knew of the alleged conditions. (p. 9, sec. 9). Mr. Lin explained to Mr. Miao during the initial inspection of the property that the property had been completely "renovated." The new painting, new flooring, wall coverings, fixtures and cabinets supported Mr. Lin's claim that the property had been "renovated." In truth, the renovations were nothing more than Respondents attempt to hide the significant problems with the property. Cracks were cocked and painted. New tile and wood laminate flooring had been laid by Respondents' unlicensed handyman over a crumbling foundation. It was Respondents' unlicensed handyman who installed the defective electrical wiring behind the wall in proximity to the sub-panel without permit. Code required a city building inspection which was not done. It was Respondents'

handyman who had investigated the significant sewage issues and found the broken sewer line and thereafter did nothing as required by building code. It was Respondents' unlicensed handyman who had failed to install insulated ducting without permit and city inspection.

4. Factual issues exist as to what Defendants knew and attempted to cover up and what they should have disclosed.

Respondents argue that when a property is sold "as is", the seller is shielded from damages for non-disclosure of adverse information citing *Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 633, 855 P.2d 549, 552 (1993). However, like Nevada, most states do not shield sellers with "as is" clauses who have fraudulently misrepresented the condition of property or who have intentionally concealed known defects. *Mackintosh* at 632, 552.

> Other Courts have followed this rule and recognized that an "as is" provision in a contract for the sale of realty does not preclude an action by the buyer for nondisclosure. *See, e.g., Rayner v. Wise Realty Co.,* 504 So.2d 1361 (Fla.Dist.Ct.App.1987) (holding "as is" clause does not bar a claim for nondisclosure against real estate agency that failed to inform buyer of damage to home from prior termite infestation); *Silva v. Stevens,* 156 Vt. 94, 589 A.2d 852 (1991) (finding a seller of a home has a duty to speak based on superior knowledge of material facts and he knows them not to be within reach of the diligent attention, observation, and judgment of the purchaser); *Stemple v. Dobson,* 184 W.Va.

> 317, 400 S.E.2d 561 (1990) ("as is" clause does not relieve vendor of the obligation to disclose a condition that substantially affects the value or habitability of property which was known to the vendor, and unknown to the buyer, and would not be disclosed by reasonable inspection.)

Id. at 633, 553. Even in cases not involving "as is" clauses, actions for fraud will arise from nondisclosure when the seller has knowledge of material facts that are not available to the buyer. *Epperson v. Roloff*, 102 Nev. 206, 213, 719 P.2d 799, 804 (1986) The Nevada Supreme Court in *Epperson* further submitted that a defendant may be liable for misrepresentation even when the Defendant did not make an express misrepresentation but instead made representations which were misleading because they partially suppressed or concealed information. *Id.*

The district court in ¶ 9 or its amended order, references NRS 113.130-140 stating that the seller does not have a duty to disclose defects of which it is unaware. Respondents contend that they do not have a duty to disclose defects in the subject property of which they are not aware. (P. 16). That is the point of this case. Plaintiff contends that there were numerous defects in the property that Defendants were aware of which they not only had a duty to disclose but that they covered up so

Plaintiff could not find the defects prior to closing. Whether or not any of this is true is for a jury to decide. Specifically, what did Defendants know, what did Defendants cover up and what were Defendants required to disclose? Plaintiff would further submit that what an inspection by Mr. Miao or anyone else would have uncovered considering what Defendants were hiding is also at issue and should be decided by a jury.

After winning the home at the foreclosure auction, Respondents realized they were stuck with a property that should have been condemned. Because they were in the business of "flipping" properties to make a profit, certain things had to be done to hide the dilapidated condition of the triplex before it could be sold. The foundation to the triplex was structurally unsound. As can be seen from the photographs of the foundation, Respondents attempted to patch the foundation so that flooring could be laid to hide the condition of the foundation. (8 App. 1531-39). As per the purchase agreement, Mr. Miao could inspect the property so long as it did not involve "non-invasive/non-destructive" inspections. In other words, Mr. Miao was not allowed to pull up sections of the floor or pull-down wall coverings to see what Defendants were hiding in the floor and walls.

In the Seller's Real Property Disclosure Form (3 App. 518-29), Respondents checked "no" to the following:

1(a) Previous or current moisture conditions and/or water damage? (This property had a history of sewage backup and a broken sewer line that left the foundation to the property inundated with raw sewage and water.)

1(b) Any structural defect? (A trier of fact would have to look no further than photographs of the foundation taken within the last 30 days by Mr. Miao after pulling up the buckled floor installed by Respondents' unlicensed handyman to ascertain the condition of the foundation.)

1(c) Any construction, modification, alterations, or repairs made without required state, city or county building permits? (Defendants checked "no" initially and then thought better of it after considering all of the changes they had made to the property to cover up building defects. Defendants' description of what was done without a license was installing kitchen cabinets and three AC units. Defendants further state "all work done by owner's handyman, owner never reside in the property and never visited the property." (3 App. 518-29) Defendants

were obviously trying to cover up what they had done to the property with this incredibly suspicious statement. Even though their unlicensed "handyman" patched the foundation, laid laminate flooring through-out all three units, painted, put up wall coverings, installed a dryer duct to the attic and installed two air conditioner units without code required permit or city inspection, Respondents wanted the buyer to believe that they "never visited the property" and "never reside in the property" as if to lay foundation for deniability when it was discovered what they were hiding – in other words, blame it on the unlicensed handyman. Respondents wanted the buyer to believe that they purchased a triplex without ever seeing or visiting the property.)

2(b) Any foundation sliding, settling, movement, upheaval, or earth stability problems that have occurred on the property? (*See* 3 App. 518-29)

2(c) Any drainage, flooding, water seepage, or high water table? (Defendants checked this box "no" with the knowledge that sewage had been backing up as a result of a broken sewer line.)

6(a) Any substances, materials, or products which may be an environmental hazard such as but not limited to, asbestos, radon gas,

urea formaldehyde, fuel or chemical storage tanks, contaminated water or soil on the property? (Defendants were aware that the sewer line was broken causing sewage to backup under the foundation and into the plumbing.)

As can be seen from Respondents' disclosures, Respondents not only failed to make necessary disclosures concerning the serious condition of the property, they made material misrepresentations when they checked "no" to conditions found in the triplex. Summary Judgment must be rendered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*; NRCP 56(c); *See also Bird v. Casa Royal W.*, 97 Nev. 67, 624 P.2d 17 (1981); *Montgomery v. Ponderosa Construction, Inc.*, 101 Nev. 416, 705 P.2d 652 (1985); *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 57 P.3d 82 (2002). Appellant has identified numerous factual issues in its' Opening Brief and in this Reply, especially the recent discovery of the condition of the triplex foundation, which would preclude summary judgment in this case. As stated, those issues go to what Respondents knew, what Respondents attempted to hide and

what disclosures should Respondents have made prior to closing as compared with the disclosures they actually made.

B. NRS 113.130 required Respondents to disclose defects of which they were aware, regardless of whether Appellant is considered to have waived due diligence or not.

Respondents argue ad nauseum that Appellant waived due diligence. Appellant emphatically denies that if waived due diligence considering the number of inspections that were conducted of the subject property by Mr. Miao prior to closing and prior to Ms. Zhu signing the first and second purchase agreements. As stated, a review of the first purchase agreement will reflect that Appellant did not waive due diligence. Due diligence was waived in the second agreement (which only moved the closing date) as inspections of the property had already taken place. Whether or not Appellant waived due diligence is an issue of fact for the jury.

Even if Appellant is considered to have waived due diligence, this does not alleviate Respondents of their statutory duty to disclose known defects. *See* NRS 113.130. This begs the question of what Respondents were aware of when seller's disclosure was made versus what they actually disclosed. That issue is for a jury

to determine. It is not the district court's prerogative to make the factual finding that Respondents had made all disclosures they were required to make under NRS 113.130.

The problem with the foundation was not discovered until Mr. Miao, during approximately February of 2021, pulled up the buckling floor. What Mr. Miao discovered was a foundation that was crumbling and unstable. The floor coverings through the rooms of the building were installed by Respondents' unlicensed handyman. The floor coverings were part of the renovation Mr. Lin spoke of when walking through the building units with Mr. Miao. In the photographs reflected in 8 App. 1531-39, it is apparent that Respondents' unlicensed handyman even attempted to patch much of the foundation prior to laying the laminate flooring. Nothing is mentioned in seller's disclosure about the condition of the foundation. In fact, sellers affirmative stated in the NRS 113.130 disclosure that there was nothing wrong with the foundation. Respondents may ultimately argue that the condition of the foundation did not require disclosure to Appellant. Again, this is an issue of fact for the jury to determine.

The foundation affected the overall condition of the subject property. Mr. Miao has affirmed that when he conducted his inspections of the property, there was virtually no visible cracking in the walls and the laminate flooring was not buckling. (8 App. 1493: ¶4). Over time with the foundation deteriorating and shifting and with the walls and floor moving, the walls and laminate and ceramic flooring began buckling and cracking. Mr. Miao was asked during his deposition if the cracking in the walls was open and obvious at the time of Mr. Opfer's inspection. Mr. Miao agreed that it was. However, issues of fact remain as to what the walls and floor looked like at the time of Mr. Miao's initial inspection years prior to the Opfer inspection.

Issues of fact exist as to what Respondents knew about the broken sewer line at the time of seller's disclosure. It is Appellant's contention that Respondents were aware of the problem with the sewer line as their unlicensed handyman had discovered the broken line following tenant complaints. A jury should decide what Respondents knew about the line and what should have been disclosed to the Buyer.

C. The District Court awarded Respondents attorney's fees and costs pursuant to Rule 11.

Beginning on page 23 of Respondents' brief, Respondents submit that they are entitled to attorney's fees because Appellant's case and the prosecution of that case constituted an abuse of process. Respondents further submit that the district court could have awarded sanctions via NRS 7.085 and NRS 18.010(2)(b). (p. 30, Respondents' brief) This is the same argument Respondents made in their opposition to attorney Childs' Petition for Writ of Mandamus which was rejected by this Court. The district court's award of attorney's fees and costs were based on Rule 11, not abuse of process, NRS 7.085 or NRS 18.010.

> Based on the foregoing, the Court GRANTS Defendants Motion, DENIES the Counterclaim, and GRANTS attorneys' fees and costs to Defendants pursuant to Nevada Rule of Civil Procedure 11.

(7 App. 1406-07, District Court's April 7, 2021 Amended Order)

Respondents even admit to failing to adhere to the procedural requirements of Rule 11.

> Therefore, the Interested Parties believe that the imposition of sanctions in this matter – **despite the failure to strictly adhere to the procedural requirements of Rule 11** – . . . was not an abuse of discretion, . . ."

(Respondents' Brief, pp. 30-31, emphasis added).

Understanding that they failed to adhere to the procedural requirement of Rule 11 (p. 31, Respondents' brief), Respondents appear to be asking this Court to amend the district court's order from awarding attorney's fees and costs pursuant to Rule 11 to awarding fees and costs pursuant to NRS 7.085 or NRS 18.010. Needless to say, Appellant is appealing the district court's award of Rule 11 sanctions. Appellant again submits that Respondents' failure to follow the procedural requirements of Rule 11 is fatal to their position. Further, Appellant contends that NRCP 11(5)(A) precludes a district court from imposing monetary sanctions on a represented party.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's April 7, 2021 and May 25, 2021 orders.

Dated this 18th day of January, 2022.

DAY & NANCE

/s/ Steven L. Day

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