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

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 PETITION FOR REHEARING

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RULE

NRAP 40(2) 1

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 40(b)(3) because it does not exceed 10 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 14th day of June, 2022.

DAY & NANCE

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CERTIFICATE OF SERVICE

I certify that on June 14, 2022, I submitted the foregoing APPELLANT'S PETITION FOR REHEARING for file *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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STATEMENT OF THE PETITION

Pursuant to NRAP 40(2), appellant respectfully requests a rehearing of points of law and fact which appellant believes the court has overlooked. Specifically, in affirming the District Court's granting of summary judgment in favor of respondents, this court contends that appellant failed to present any evidence raising an inference that the seller/respondents were aware of defects or of defects that could not discovered by the buyer/appellant. It is appellant's position that the court may have overlooked factual issues which would preclude the district court from awarding summary judgment. Appellant respectfully requests an order granting its Petition for Rehearing.

A. Respondent Sellers TKNR and the InvestPro "flipping fund" purchased the subject property to renovate and "flip" the property to share the profit.

TKNR and InvestPro, through the "flipping fund", purchased the subject property at auction. (4 App. 725-27). InvestPro and TKNR were the buyers, owners, renovators and sellers of the subject property. *Id.* InvestPro "flipping fund" solicited out-of-state Chinese investors, such as TKNR, to invest in the Nevada real estate market so they could

claim that the "owner never reside in the property and never visited the property" and do not know anything which is not true. *Id.*

B. <u>Appellant presented compelling evidence that Sellers were aware of problems with the subject property that would not and could not have been discovered during the buyer's inspection of the property</u>.

Contained within this Court's Order Affirming (Docket No. 82835), the Court states: ". . . appellant's opening brief fails to cite to any evidence in the record that might raise an inference that respondents were aware of a particular complaint-of defect, such that a genuine issue of material fact existed regarding the viability of appellant's NRS Chapter 113 claim or any of the related claims." (Court's Order, p. 4). The Court references *Nelson v. Herr*, 123 Nev. 217, 224, 163 P.3d 420, 425 (2007) "holding that for purposed of a claim under NRS Chapter 113, in order for a seller to be "aware" of a defect such that the seller is obligated to disclose it, the seller must be able to "realize, perceive, or have knowledge of that defect or condition." (Court's p. 4). This court further found that appellant's summary judgment opposition failed to identify any evidence that might raise an inference that respondents were aware of materially adverse facts that could not have been discovered by the buyer after diligent inquiry.

Appellant believes that the court may have overlooked important facts that create such an inference.

Prior to selling the subject property, a complete renovation was done by respondents which included new walls, kitchen, bathrooms and flooring. Many property defects were covered up with flooring and wall renovation.

1. **Respondents covered up serious issues with the subject property by completing renovation.**

Respondent Lin, during Appellant's initial inspection of the property, explained that the entire property had been renovated. (8 App. 1492: ¶ 3). Respondents were obviously aware of the condition of the property before they covered it up with the complete renovation.

2. **Respondents were aware of the crumbling foundation**.

As part of the "renovation", laminate flooring had been laid in the bedrooms. (8 App. 1492: ¶ 3; 8 App. 1531-39). In laying the laminate, Respondents covered the severely deteriorated condition of the foundation. (8 App. 1531-39). In 2021, Frank Miao noticed severe buckling in the laminate floor after the tenant had moved out. The flooring was removed by Mr. Miao who discovered that the foundation

concealed by the flooring was severely damaged. (8 App. 1531-39). An inference that Respondents attempted to cover-up the condition of the subject property could be made from evidence of newly laid flooring which covered a severely damaged foundation.

Appellant was not aware of the condition of the foundation as a result of Mr. Miao's 2017 inspection nor could it have been discovered without conducting a destructive inspection by pulling up the floor. One simply needs to look at the photographs of the newly laid laminate which has been pulled up exposing a crumbling foundation to infer that respondents were aware of the condition of the foundation when they covered it up. (8 App. 1531-39). You can even see where respondents attempted to patch the floor before laying the laminate.

3. Respondents piggybacked electrical circuits behind the sheetrock wall when they installed window air conditioning units.

When a tenant complained to Mr. Miao about an electrical fuse that kept burning out. (4 App. 713, 8 App. 1484: ¶ 7). The contractor discovered that when the window air conditioning units were installed, respondents' had piggybacked the AC circuit onto other circuits causing an overload on the fuse which is a building code violation. *Id.* There

was not anyway for appellant to discover the problem wiring during an inspection without opening up the wall.

4. **<u>Respondents created other issues with the property that should have been disclosed to the buyer</u>**.

    a. When respondents replaced the swamp cooler with a heat pump unit, they left the uninsulated swamp cooler duct in the attic which resulted in condensation occurring in the unit C ceiling. (4 App. 1495, ¶ 8).

    b. Respondents installed wood paneling over a significant wall crack that was discovered when the wood paneling was removed during December of 2020. (4 App. 711, 773).

    c. Respondents discovered a problem with the sewer line when tenant Nicholas Quioz, complained about the slow drainage issues. (8 App. 1496: ¶ 10). Respondent's handyman spent several weeks attempting to open up the line. *Id.* They reported to Mr. Quioz that the sewer line was broken. *Id.* Respondents were not only aware of the broken sewer line, they failed to disclose the problem to the appellant.

In each of these incidents, it certainly can be inferred that respondents, who created the situations, were aware of the issues and yet failed to make appropriate disclosures to appellant.

5. <u>The condition of the property deteriorated over time because of earth movement which created an unstable foundation</u>.

Mr. Miao conducted his initial inspection of the property on August 10, 2017. (8 App., 1492: ¶ 3). Respondents' expert, Neil Opfer, conducted his inspection of the property November 17, 2020, over three years after Mr. Miao's initial August, 2017 inspection. (3 App. 543). Over that time, the condition of the property had significantly deteriorated because of the unstable foundation. What was open and obvious at the time of Mr. Opfer's inspection was not open and obvious at the time of Mr. Miao's initial inspection.

What Mr. Miao could not inspect was the crumbling foundation which had been covered by new flooring. When Mr. Miao conducted his initial inspection, the units looked recently renovated as Mr. Linn had represented. (8 App. 1493: ¶ 4). The floors were not buckling and no cracks were noticed in the walls. *Id.* With the movement of the

foundation, the cracks in the walls began to form over time and the floors started buckling. (8 App. 1496, ¶ 9).

As stated in appellant's opening brief, the ultimate factual issue in the case is what respondents knew at the time of the sale and what they failed to disclose in 2017. Appellant contends that respondents hid a number of defects with the subject property by covering those defects with new drywall and new flooring. It was respondents who "completely renovated" the property. It was respondents who installed the new flooring over a crumbling foundation. It was respondents who piggybacked AC wiring behind a sheetrock wall. It was respondents who left uninsulated ducting after removing swamp coolers. Appellant could not discover the condition of the foundation, electrical wiring or ducting without removing flooring or cutting holes in the walls and ceiling.

C. The District Court order incorrectly identifies numerous "uncontested" facts.

The District Court order granting summary judgment contains **28 pages** of what the district court held to be "uncontested" facts. Appellant contends that the 28 pages of "uncontested" facts contains

many facts which are actually "contested." The following are a few of those "contested" facts.

1. The first heading under "Findings of Facts" states: "First Residential Purchase Agreement and Waiver of Inspections, Contractual Broker Limitation" which led the district court to grant summary judgment for respondents. p. 3, ¶ 4. Plaintiff did not waive right to inspect as evident in the August 11, 2017 Purchase Agreement. (3 App. 509, ¶ 7). Mr. Miao inspected the property with Kenny Lin on August 10, 2017, before the Purchase Agreement was e-signed on August 11, 2017. (8 App. 1493: ¶ 4).

2. "As to Paragraph 7(A), Mr. Miao specified that he believes that his inspection and conversations with the tenant constituted the action necessary to deem the Property as satisfactory for Plaintiff's purchase." (7 App., 1371, ll. 13-15). However, respondents had covered up the foundation with new flooring which could have only been found at the time of sale with a destructive inspection. (8 App. 1531-39)

3. ". .. Plaintiff had access to inspect the entire property and conduct non-invasive, non-destructive inspections: . . ." (7 App. 1371, ll. 22-23). That is the problem. Many of the defects with the property had

been covered up by respondents and were not detectible without a destructive inspection.

4. "Despite these disclosures, Mr. Miao never followed up." (7 App. 1375, l. 8). Mr. Miao followed up repeatedly with Ms. Chen about fixing issues discovered during initial inspection. Mr. Miao made numerous later inspections of the property to verify that identified issues were being taken care of. (8 App. 1492: ¶ 3, 1493: ¶ 4). Respondents' sellers' disclosure stated that there were no problems with the sewer system and foundation. (3 App. 518-19).

5. "The alleged defects identified by both parties' experts could have been discovered at the time of the original purchase." (7 App. 1377-78, ¶ 39). This statement is patently false. The foundation was covered up by respondents with new flooring. (8 App. 1531-39). The only way the condition of the foundation could have been observed in 2017 was with a destructive inspection; i.e., pulling up the flooring.

D. NRCP 56(c) requires "a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies."

Respondents' opening summary judgment brief was based primarily upon the opinions of counsel, purchase agreements and counsel's expert

report without citing to any evidence or laying foundation for any document introduced. A trial court can only consider admissible evidence in ruling on a motion for summary judgment. *Romero v. Nevada Department of Corrections,* 2013 WL 6206705, P. 3 (U.S. Dist. Nev. 2013); *Orr v. Bank of America, NT & SA*, 295 F.3d 764, 773 (9th Cir. 2002). During the hearing and in the final order, the district court failed to factually cite to specific evidence supporting summary judgment as to each of appellant's 15 causes of action.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court grant its Petition for Rehearing.

DATED this 14th day of June, 2022.

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