SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
----------x
WILMINGTON TRUST COMPANY, not in its individual capacity, but solely as Indenture Trustee pursuant to the Trust Indenture and Security Agreement [ATA 1996 A] dated as of December 16, 1996,

Plaintiff,

Index No. 600401/09

- against -

GLOBAL AERO LOGISTICS, INC. f/k/a, NEW ATA HOLDINGS INC.,

Defendant.
----------x

Charles Edward Ramos, J.S.C.:

In motion sequence 001, plaintiff, Wilmington Trust Company, in its capacity as Indenture Trustee ("Plaintiff," "Wilmington," or "Trustee"), moves, pursuant to CPLR 3212 and 3211(b), for summary judgment and to dismiss defendant's affirmative defenses.

Background

This action involves the lease of a 1996 Boeing 757-200 aircraft (the "Aircraft"). In February 2006, after ATA Airlines Inc.[1] (f/k/a/ American Trans Air)("ATA") restructured its debt through Chapter 11 bankruptcy, it received approval from the Southern District of Indiana bankruptcy court (the "Bankruptcy Court") to enter into a lease of the Aircraft (the "Lease"). At the same time, ATA's parent corporation, defendant Global Aero Logistics, Inc. ("Defendant" or "Global"), executed a guarantee

[1] ATA Airlines Inc. was a subsidiary of defendant, Global Aero Logistics, Inc.

on the Lease (the "Guarantee"). Wilmington, as trustee for certificate holders who financed the acquisition and Lease, is the beneficiary of the Guarantee.

On April 2, 2008, ATA again filed for Chapter 11 bankruptcy protection and, with the Bankruptcy Court's approval, rejected the Lease and surrendered the Aircraft to Wilmington.[2] In January 2010, the Trustee, through a broker, sold the Aircraft for $9.5 Million.

Wilmington alleges that ATA defaulted on the Lease by rejecting it in bankruptcy, and seeks to enforce Global's Guarantee. On November 3, 2010, this Court heard oral argument and granted Wilmington's motion for summary judgment on liability for the reasons set forth in the Court's transcript.[3] The Court reserved decision on whether the Lease's liquidated damages provision is valid and enforceable against Global, and if not, the amount of damages that are to be awarded.

Summary Judgment

The proponent of a motion for summary judgment must make a

---

[2] Generally, Section 365 of the U.S. Bankruptcy Code allows debtors to either "assume" or "reject" an unexpired lease.

[3] Briefly, this Court held, *inter alia*, that ATA's act of rejecting the Lease in bankruptcy, which effectively terminated the Lease, constituted an event of default. Appropriate notice of default was provided to ATA triggering the Guarantee. Furthermore, the Court determined that notice to Global was not required because it expressly waived its rights to such notice in the Guarantee (see Guarantee § 1.2).

prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact as to the claim or claims at issue (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

Once the prima facie showing has been made, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" *(Amatulli v Delhi Construction Corporation*, 77 NY2d 525, 533 [1991]).

Discussion

Liquidated Damages

Whether a contract provision constitutes a valid liquidated damages provision or a penalty,[4] is a matter of law to be decided by a court (*JMD Holding Corporation v Congress Financial Corporation,* 4 NY3d 373 [2005]*; Vernitron Corporation v Cf 48 Associates*, 104 AD2d 409 [2d Dept 1984]). Liquidated damages is an “estimate, made by the parties at the time they enter into

[4] As opposed to intending to provide fair compensation in the event of a breach, a “penalty,” in this context, is what results from a liquidated damages provision that is generally designed to secure performance of the contract by compulsion. Public policy is firmly set against the imposition of penalties (see *Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 424 [1977]).

their agreement, of the extent of the injury that would be sustained as a result of breach" (*Crown IT Services v Koval-Olsen*, 11 AD3d 263, 265-266 [1st Dept 2004] quoting *Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 424-425 [1977]). Generally, liquidated damages provisions are enforceable provided that the clause "is neither unconscionable nor contrary to public policy" (*Id*. at 266). However, if "the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced" (*id*.). Conversely, such a provision will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation (*id*.). Here, the liquidated damages clause in Section 15(d) of the Lease is patently unreasonable, plainly disproportionate to the probably loss, constitutes a penalty, and is, thus, unenforceable.[5]

Section 15(d) provides the following:

> "[I]n the event Lessor, pursuant to paragraph (b) above, shall have sold the Airframe and or any Engine, Lessor, in lieu of exercising its rights under paragraph © above with respect to such Aircraft, may, if it shall so

[5] In its Amended Complaint, Wilmington seeks recovery under 15© of the Lease (¶¶ 24 and 42), and in this motion, damages under Section 15(d) of the Lease. However, because both sections substantially overlap and contain similar language with respect to the award of liquidated damages, they will be treated as being one and the same for the purposes of this motion, and referred to hereinafter solely as Section 15(d).

> elect, demand that Lessee pay Lessor, and Lessee shall pay to Lessor, on the date of such sale, as liquidated damages for loss of a bargain and not as a penalty (in lieu of the installments of Basic Rent for the Aircraft due on or after such date), any unpaid Basic Rent with respect to the Aircraft due prior to such date plus any Supplemental Rent due on or prior to the date of such sale plus the amount of any deficiency between the net proceeds of such sale (after deduction of all reasonable costs of sale) and the Stipulated Loss Value of such Aircraft, computed as of the date of such sale together with interest, if any, on the amount of such unpaid Basic Rent or Supplemental Rent and the amount of such deficiency, at the Past Due Rate, from the date of such sale to the date of actual payment of such amount."

Generally, a "Stipulated Loss Value" (hereinafter "SLV"), as set forth in Section 15(d), is a liquidated damages provision common in aircraft leases that sets the amount for which the lessee must insure an aircraft and is also used to calculate damages after a default (see *In re Northwest Airlines Corp.*, 393 BR 352, 354-355 (SDNY 2008). Typically, a SLV will decline over the course of the lease term, appropriately recognizing depreciation and the payment of rent over time (*Id.* at 355).

Here, the SLV, as defined in Section 1 of the Lease, is "an amount equal to 110% of the "Current Market Value" of the Aircraft <u>but in no event less than $35,000,000</u>" (emphasis added).[6] A plain reading of the SLV definition implies the

[6] "Current Market Value" is defined as the amount determined on an annual basis by a "nationally recognized appraiser

possibility that the SLV will exceed $35 million. However, given the value of the Aircraft at the time of the Lease, this scenario is not remotely possible.[7] Therefore, because the amount of the SLV remains static over the term of the Lease (a point that Wilmington fails to dispute), it thus contributes to a formula that results in a grossly disproportionate amount of damages that bears no reasonable relationship to the anticipated harm at the time of contracting (see NY UCC 2A-504[1]; *Crown IT Services*, 11 AD3d 263, 266 [1st Dept 2004]).

Because static SLV's are inherently unreasonable, New York courts or courts applying New York law do not enforce a liquidated damages provision containing a static SLV. Consequently, Wilmington cites to case law involving aircraft leases where liquidated damages provisions are upheld as reasonable, but only under circumstances where a static SLV was avoided because in calculating the SLV, the various damages formulas clearly factored in the aircraft's anticipated depreciation and lease payments (see e.g. *General Electric Capital Corp., LLC v G. Howard Associates, Inc.,* 2010 WL 2346296

---

reasonably acceptable to the Lessee...[who prepares] a desk top appraisal of the Aircraft..." (Lease, 11[b][1]). However, neither party indicates that a Current Market Value was ever determined during the Lease.

[7] In a document entitled, "Secured Senior Debt Proposal for (2) Boeing 757-200 Aircraft on Lease to ATA," prepared by Vx Capital Partners LLC, an affiliate of the owner participant V10A, the fair market value of the Aircraft in March 2006 was between $18.2 and $23 Million.

[EDNY 2010]*; Red Line Air, LLC v G. Howard Associates, Inc.*, 2010 WL 2346299 [EDNY 2010]; *Wilmington Trust Company v Aerovias de Mex., S.A. de C.V.*, 893 F Supp 215 [SDNY 1995]). Therefore, those cases are simply not factually analogous.

In contrast, the Bankruptcy Court in *In re Northwest Airlines Corporation*, 393 BR 352 (SDNY 2008), *supra*, struck down a liquidated damages provision with a static SLV because damages never declined at all.[8] Further, the Court noted that a static SLV is a "clear indication that a liquidated damages clause is an unreasonable penalty--where damages are the same whether the obligor misses the last installment payment or whether it fails to make any payment on the entire obligation" (*Id*. at 357).

Some courts have even criticized the necessity of employing liquidated damages provisions in similar aircraft leases, reasoning that damages are easily ascertainable at the time of breach (see *Interface Group-Nevada v TWA [In re TWA]*, 145 F3d 124, 135 [3rd Cir Del 1998]). In *In re TWA*, the liquidated damages provision was held to be an unreasonable penalty because it unfairly shifted the risk of the aircraft's market depreciation to the lessee, essentially providing the lessor damages that were plainly disproportionate to probable damage,

---

[8] In *In re Northwest Airlines Corp.*, 393 BR 352 (Bankr. SDNY 2008), even though the Southern District applied Minnesota law to the lease, it is very similar to New York law on the issue of liquidated damages (*Id.* at 357, n4).

and was not intended to provide fair compensation but to secure performance by compulsion (*Id*. at 135). This is exactly the type of penalty situation that New York public policy intends to avoid (see *Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 423-424 [1977]).

As the court in *In re TWA* hypothesized:

> "if TWA were to breach with one month remaining on the lease, actual damages would be approximately one month's rent per plane. Under § 17(c)(ii), however, TWA would owe the termination value[9] of $ 12,500,000 minus the resale value at that time. Thus, using 1992 values, TWA would owe $ 5,500,000 as liquidated damages per plane. Similarly, under § 17(c)(I), TWA would owe the termination value of $ 12,500,000 minus one month's rent of approximately $ 100,000, for a total of $ 12,400,000..." (*In re TWA*, 145 F3d at 135).

Here, a similar situation would result if the breach occurred during the last month of the Lease. Under Section 15(d), Wilmington's damages would be the difference between the net proceeds of a sale (after the deduction of reasonable costs) and the $35 million static SLV of the Aircraft. If the Aircraft sold for its estimated value of $10.3 Million at the end of the Lease,[10] Wilmington's hypothetical liquidated damages for a

---

[9] A "Termination Value" is a similar metric to an SLV (see *In re TWA* at 134).

[10] In a document entitled, "Secured Senior Debt Proposal for (2) Boeing 757-200 Aircraft on Lease to ATA" prepared by Vx Capital Partners LLC, an affiliate of the owner participant V10A,

default in the last month of the Lease term would be in excess of $24 million. Such a windfall is patently unreasonable in light of the actual harm, and further exemplifies that the liquidated damages formula for calculating damages in Section 15(d) of the Lease is inherently flawed, and designed only to compel the lessee's performance. Therefore, as a matter of law, the liquidated damages provision as set forth in the Lease is unreasonable and thus, unenforceable.

Notwithstanding the unreasonableness of the static SLV (discussed above), Wilmington argues that the liquidated damages provision should be enforced, relying heavily on the fact that the parties willingly entered into the Lease, are sophisticated, and were represented by capable counsel at the time of the Lease's execution. However, "there is no principle that a sophisticated party should be bound by a patently unreasonable liquidated damages provision" (*Northwest Airlines*, 393 BR at 358). Furthermore, "[c]ontracts that are void as against public policy are unenforceable regardless of how freely and willingly they were entered into" (*In re TWA*, 145 F3d at 135).

Affirmative Defenses

In its Answer, Global interposes ten affirmative defenses.[11]

---

the fair market value of the Aircraft at the end of the Lease term in February 2021 is approximately $10.3 Million.

[11] The ten Affirmative Defenses that appear in Global's Answer are [1] failure to state a cause of action; [2] waiver,

However, irrespective of any lack of validity or enforceability of a guarantee, "where a guarantee states that it is 'absolute and unconditional,' guarantors are generally precluded from raising any affirmative defense" (*HSH Nordbank AG v Swerdlow*, 672 F Supp 2d 409, 418 [SDNY 2009]; see also *Citibank v Plapinger*, 66 NY2d 90 [1985]). In executing the Guarantee, Global provided an irrevocable, absolute and unconditional guaranty, along with numerous waivers of its rights (see, Guarantee §§ 1.1 - 1.6; 1.11). Specifically, *inter alia*, Global expressly waived any "...right of set-off, counterclaim, recoupment, defense, or other right it may have with respect to its obligations hereunder." (*Id*. at § 1.2).

In *Citibank v Plapinger*, 66 NY2d 90, the Court of Appeals held that a defense of fraudulent inducement of a guarantee was barred by the express terms of the guarantee, which stated that it was "absolute and unconditional...irrespective of any circumstance that would constitute a defense." Relying on *Citibank*, the First Department has similarly upheld this type of waiver language in guarantees (see *Reliance Construction Ltd. v Kennelly*, 70 AD3d 418 [1st Dept 2010]*; Sterling National Bank v*

---

estoppel and laches; [3] the damages are grossly disproportionate to the likely harm, [4] the Lease remedies are unenforceable as a matter of law, [5] failure to join a necessary party, [6] that the Trustee is not authorized to commence this action, [7] unjust enrichment, [8] failure to mitigate, [9] failure to fulfill a condition precedent, and [10] the reservation of the right to bring any other affirmative defense.

Biaggi, 47 AD3d 436 [1st Dept 2008]*; Red Tulip, LLC v Neiva*, 44 AD3d 204 [1st Dept 2007][dismissing all affirmative defenses to guarantee including estoppel, waiver, and failure to mitigate damages]). Accordingly, given the clear waivers set forth in the Guarantee, Global's affirmative defenses must be dismissed.

Statutory Damages

Because the liquidated damages provision in the Lease is unenforceable, actual damages must be calculated according to statute. Article 2A of the New York UCC "applies to any transaction, regardless of form, that creates a lease" (NY UCC § 2A-102). Further, NY UCC § 2A-528 applies to equipment leases where, as here, the lessor has repossessed the equipment and disposed of it in a sale.

§ 2A-528 calculates the lessor's damages as:

> "(a) accrued and unpaid rent...as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (b) the present value as of the date determined under clause (a) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and © any incidental damages allowed under Section 2A-530, less expenses saved in consequence of the lessee's default".

Given the clear applicability of this statutory damages formula, the parties are directed to expeditiously conclude fact

and expert discovery, file a certificate of readiness, and proceed to a damages trial to ascertain, *inter alia*, any monetary values to be applied under the NY UCC 2A-528 formula (above) that remain in factual dispute.

All other arguments advanced in the parties' briefs were carefully considered and determined to be without merit. Accordingly, it is

ORDERED that Wilmington's motion for summary judgment is granted, in part, as to Global's liability under the Lease's Guarantee for the reasons set forth herein and in the November 3, 2010 transcript of Court proceedings; and it is further

ORDERED that Wilmington's motion for summary judgment is granted, in part, dismissing Global's affirmative defenses set forth in its Answer; and it is further

ORDERED that Wilmington's motion for summary judgment is denied, in part, as to the enforceability of the liquidated damages provisions in the Lease; and it is further

ORDERED that the parties shall proceed to a damages trial on June 13, 2011 at 2:00 P.M., or at a date and time that all parties agree, and that this Court has authorized.

Dated: April 11, 2011

ENTER:

_____

J.S.C.