SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

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SOL FRIEDMAN, PETER DIMATEO, DAISY KANTROWITZ and PAUL GOLDHAMMER, Individually and d/b/a MIDDLEHOPE ASSOCIATES VENTURE,

Plaintiff(s),

-against-

PENUEL PENTECOSTAL TABERNACLE, INC.,

Defendant.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 7178/2009
Inquest Date: April 28, 2010

The Court, having taken an inquest on damages as against defendant during a bench trial by the parties in this matter, and the testimony of the plaintiffs and the defendant, and based upon the submissions which included, among other things, the purchase and sale agreement, further letter agreement, tax bills and the post trial memoranda of the parties and the defendant's reply memorandum of law[1], and after due and deliberate consideration, the Court decides as follows:

This is an for breach of contract wherein plaintiffs and defendant entered into a contract for the purchase of real property located in the Town of Newburgh for the defendant's purpose of building a church thereon. The issue of the defendant's liability was previously determined by this Court in a decision granting plaintiff a default judgment dated February 3, 2010 and for

[1]The Court failed to receive plaintiff's reply memorandum of law by the June 7, 2010 5:00 p.m. deadline and therefore any such reply hereafter submitted will not be considered.

which this inquest was set down for a determination of the plaintiffs' damages. The matter was brought on for an inquest and was heard on April 28, 2010.

Plaintiffs contend that they are entitled to the difference between the contract price of $900,000.00 and the value they claim the property was worth at the time of the breach (March 31, 2009) which is alleged to be $650,000. Plaintiffs further contend that they are entitled to receive the $50,000.00 down payment to be credited against the aforesaid difference in property value, leaving a total owed of $200,000.00 plus the carrying charges for the property incurred as a result of defendant's breach in the amount of $26,029.48 which includes a credit for $4,715.09 already paid by defendant. Defendant contends that plaintiffs are not entitled to any further damages since the $50,000 down payment which it forfeited was, according to the contract, a liquidated damages provision. Defendant further contends that the counterproposal letter was not legally enforceable and that the plaintiffs failed to prove any consequential damages or, to the extent proven, failed to mitigate same.

The first question is whether the plaintiffs are entitled to damages under the original contract of sale. A liquidated damages clause is "an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement." *Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc*, 41 NY2d 420, 424 (1977) (*("Truck RAC"*). The liquidated damages estimate cannot be used to impose a penalty upon the party that breaches. *Id.* In deciding whether a liquidated damages clause is considered a penalty, the clause "must be judged, not by the loss which actually ensues, but by the situation as it existed at the time of [the] making of [the] contract." *Downtown Harvard Lunch Club v Rasco,* 201 Misc 1087, 1091 (S. Ct. N.Y. 1951). A liquidated damages clause will be sustained

if, at the time of the creation of the contract, the amount bore a reasonable relation to the amount of probable loss if the Defendant were to breach the contract, and "the amount of actual loss [was] incapable or difficult of precise estimation." *Truck RAC* 41 NY2d at 425. "Whether a contractual provision is enforceable presents a question of law for the court." *Miller v Boyanski*, 2009 WL 3853817 at 5; *citing Mosler Safe Co. v Maiden Lane Safe Deposit Co.,* 199 NY at 485. "Where a liquidated damages provision is deemed enforceable, 'the measure of damages for a breach will be the sum in the clause, no more, no less." *Zeer v Azulay*, 50 AD3d 781, 785-86 (2nd Dept. 2008).

Damages resulting from a breach of a real estate contract are not readily ascertainable at the creation of the contract, due to the regular market fluctuations of the value of real property in the real estate market. *See e.g., Price v Price*, 113 AD2d 299, 307 (2nd Dept. 1985); *In re Davenport's Will*, 104 NYS2d 433, 436 (Surr. Kings 1951). In *Downtown Harvard Lunch Club*, the Court held that in a contract for leasing a lunch club, the damages that would be suffered by the plaintiff if the defendant was to breach was uncertain at the creation of the contract, due to the variable of when the defendant would breach and the availability of other similar lunch club facilities at the time of the breach. *See, Downtown Harvard Lunch Club*, 201 Misc at 1091. Therefore, the "parties reasonably and properly could decide to estimate and fix in advance a stated sum which would be regarded as proper compensation for a breach." *Id.*

Here, the amount of damages if the defendant breached was also uncertain at the creation of the contract, due to market fluctuations in the property's value. *See, In re Davenport's Will*, 104 NYS2d at 436; *See, Downtown Harvard Lunch Club*, 201 Misc at 1091. The actual damages to the plaintiff would depend entirely upon the market value of the property at the time that the

defendant breached, and the availability of other similar properties at the time of the breach. *Id.* Therefore, in this case, it is also appropriate to allow the parties to agree to a reasonable estimate in advance of "proper compensation for a breach" due to the difficulty in ascertaining the actual loss to the plaintiff if the defendant breached at the creation of the contract. *See, Downtown Harvard Lunch Club,* 201 Misc at 1091.

A liquidated damages clause "which provides for an amount plainly disproportionate to real damage [as ascertained at the making of the contract] is not intended to provide fair compensation but to secure performance by the compulsion of the very disproportion." *Truck RAC*, 41 NY2d at 424. If the clause is "intended as security for performance of the contract" by threatening "monetary forfeiture intended to inject fear into the offending party, then it will be considered a penalty and will therefore be unenforceable." 36 NY Jur 2d § 162. However, if the liquidated damages clause is "compensatory in nature and of a character to indemnify the injured party for actual losses," then it is valid and the court will enforce the liquidated damages clause. *Id.* Although labeling a clause in a contract as "liquidated damages" does not automatically mean that it is a valid liquidated damages clause, the court will look at the intent of the parties and use this language as evidence showing a "clear and undoubted intention to fix the sum mentioned as liquidated damages in case of default of performance," which will then be enforced by the court. 36 NY Jur 2d § 163.

Here, both of the parties held equal bargaining power when making the contract, and the Plaintiff's law firm actually drafted the contract themselves. Defendant's MOL[2] at 3. "When the terms of a written contract are clear and unambiguous, the intent of the parties must be found

[2]Defendant's Memorandum of Law

within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations." *Willsley v Gjuraj*, 65 AD3d 1228, 1230 (2nd Dept. 2009). Considering that the plaintiffs' law firm was the one who drafted this contract, and that the plaintiff claims to have "extensive knowledge and expertise in...real estate matters," which include drafting real estate contracts, it is clear that the plaintiffs knew how to properly draft a real estate contract, and was reasonably aware of the implications that labeling a clause "Liquidated Damages" would entail. Plaintiff's Post-Trial Brief, at 7, Defendant's MOL, at 4. By labeling the clause "Liquidated Damages,"the Plaintiff represented to the Defendant that this clause was, in fact, a Liquidated Damages provision. The court must keep the meaning of the contract within its four corners because the language in the contract is clear and unambiguous. *See, Willsley*, 65 AD3d at 1230. The court therefore must enforce the liquidated damages provision, and limit the plaintiff's damages to the $50,000.00 provided in the contract.

In *Wojciechowski v Birnbaum*, 191 AD2d 247 (1st Dept. 1993), the Court held that a liquidated damages provision for $63,500 on a $630,000 contract was not "unreasonably large" and therefore could not be considered a penalty; making the provision enforceable. *See, Id* at 247. In some cases the Court has held that a liquidated damages provision which ends up being far below the actual amount of damages can be considered a penalty, but this amount would have to be extremely unreasonable as perceived at time of the creation of the contract. *Downtown Harvard Lunch Club*, 201 Misc at 1091. Here, considering that at the creation of the contract it was difficult to ascertain the amount of actual damages that would ensue from the breach of the contract, the Court will have to give the parties "considerable leeway...in agreeing in advance that damages shall be deemed to be a certain sum." *Id.* "It is fundamental that the parties to a

contract have the right to insert any stipulation to which they may agree, provided it is not unconscionable or contrary to public policy...A liquidated damages clause will be upheld if the measure of damages to be paid upon breach of the contract is not such as to shock moral sense." 36 NY Jur 2d § 161. In *Shulkin v Dealy*, 132 Misc2d 371 (Sup NY 1986), the Court stated that they would uphold a liquidated damages clause in a contract unless is was clearly a penalty. *See, Id.* at 374. Here, because the actual damages were unforeseeable at the creation of the contract, and $50,000 is not "unreasonably large" and does not "shock the moral sense" in a contract for $900,000, the Court must allow the liquidated damages provision to stand because it is not a penalty to the plaintiff.

A liquidated damages clause must bear a "reasonable relation to [the] amount of probable actual harm" that could have been foreseen to the Plaintiff if the Defendant breached at the time of the drafting of the contract. *Truck RAC*, 41 NY2d at 425. The amount of money agreed upon by both parties "must constitute an amount sufficient to satisfy for actual loss or injury flowing from such breach. A liquidated damages clause will be upheld when the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation." 36 NY Jur 2d § 168, at 239-40. As stated above, in *Wojciechowski* the Court held that a liquidated damages clause in the amount of $63,500 in the event of a breach by the Defendant was not unreasonably large for a $630,000 contract. *Wojciechowski*, 191 AD2d at 247. Here, a $50,000 liquidated damages clause in the event of a breach by the defendant on a $900,000 contract is also not unreasonably large. In the event of a breach in this case, the amount of actual damages was not readily ascertainable at the creation of the contract. As such, both the defendant and the plaintiff agreed "between themselves as to the amount of damages to

be paid upon breach rather than leaving that amount to the calculation of a court or jury." *Truck RAC*, 41 NY2d at 424. It was reasonable for the parties to assume when creating the contract that the market value of the property would fluctuate in the event of the defendant breaching. Therefore, $50,000 would appear to have a reasonable amount of probable loss to the plaintiff if the defendant breached. That the market value of the property decreased substantially by $250,000 to $650,000[3], or that the plaintiff could not mitigate the damages because of a decrease in the demand for property could not have been foreseeable at the time of the creation of the contract cannot be taken into account. "In deciding whether a liquidated damages clause is considered a penalty, it "must be judged, not by the loss which actually ensues, but by the situation as it existed at the time of [the] making of [the] contract." *Downtown Harvard Lunch Club*, 201 Misc at 1091.

"The parties to a contract may, where the damages consequent upon a breach are of an uncertain nature, estimate them in advance of a breach and agree upon their measure, and such an agreement when entered into in good faith will be enforced. 17 C.J. 931. It is quite obvious that the actual damages flowing from the breach of a contract for the purchase or sale of real estate are generally uncertain and difficult of ascertainment." *Norris v McMechen*, 135 Misc 361, 364 (Sup. Warren 1930). The court in *Norris* held that because the contract in question had a fixed provision for liquidated damages,

> the language used [was] precise and explicit, leaving nothing for construction or intendment, [t]he parties have declared, in language not capable of being misunderstood or misinterpreted, [and] that they have ascertained and liquidated the damages at $2,000 to be paid by the party failing to perform the agreement to the injured

[3]Based upon the plaintiffs' own testimony.

> party, [t]he court [was] bound to ascertain and carry into effect their intent. It is not authorized by construction to make a new contract for them. The rule deducible from the reported cases is that where the parties have agreed upon a sum of money as the measure of damages which will be sustained by the nonperformance of the agreement, and the sum thus agreed upon under the circumstances is not so excessive as to shock the moral sense, the courts will hold the parties to their agreement and keep them bound by their contract.

Norris, 135 Misc at 364. Here, there was a fixed provision for liquidated damages. Defendant's Exhibit A, at 8. The liquidated damages are ascertained at $50,000 explicitly, and the language is not capable of being interpreted in any other manner. The plaintiffs' law firm drafted the contract and plaintiffs were very experienced at drafting real estate contracts, and therefore knew the implications of inserting a Liquidated Damages Clause into the agreement. Plaintiff's Post-Trial Brief p. 7, Defendant's MOL p. 4. $50,000 is not an excessively large amount of money to be paid in damages to a breach of a $900,000 contract so as to shock the moral sense. Therefore, the plaintiffs are only entitled to recover the $50,000 stipulated in the liquidated damages provision of the contract that they, themselves, drafted into the contract and was agreed upon by both of the parties. The liquidated damages provision is valid and enforceable. The $50,000 has already been received by the plaintiff from the defendant, and therefore the plaintiff is not entitled to recover any further compensation for the defendant's breach as pertains to the contract of sale itself. See, Defendant's MOL, at 2. Therefore, the plaintiffs' damages on the contract of sale is limited to the liquidated damages of $50,000.00 which the parties acknowledge have already been released to plaintiffs.

Subsequent to the making of the contract in question, the parties entered into a letter agreement whereby the defendant agreed to pay plaintiff additional sums representing carrying charges for the property at issue in the event the closing on the property did not occur by a date

certain, time being of the essence. Part of that payment was supposed to be $8,294.11 to be returned along with the signed letter agreement. Defendant, in fact, returned the countersigned letter agreement dated January 29, 2009 agreeing to pay the carrying charges and further agreeing to pay the $8,294.11. Defendant issued a check to plaintiffs in that sum but there was no signature on the check. Defendant now contends in its post-trial memorandum that the letter agreement is not valid due to the fact that the failure of the defendant to return the signed check despite its signature on the letter agreement represented a lack of "meeting of the minds", vitiating the letter agreement between the parties. This assertion is contrary to the defendant's own Court testimony in which the defendant's witness admitted to an oversight in not signing the check. The parties both countersigned the letter agreement and the defendant issued a check in the amount of $8,294.11. For the defendant to now claim that it purposely failed to sign the check in order to precipitate an incident where there was no "meeting of the minds" is disingenuous at best. The parties obviously understood that the plaintiffs would be incurring additional ascertainable costs associated with the delayed closing on the property and agreed separately and outside of the underlying contract of sale to provide compensation to plaintiffs for those very costs. *See, Panasia Estates, Inc. v Hudson Ins Co.,* 10 NY3d 200 (2008); *Bi-Economy Market, Inc. v Harleysville Ins. Co. of New York*, 10 NY3d 187 (2008)..Therefore, in addition to the liquidated damages previously paid, plaintiffs are entitled to the consequential damages agreed upon by the parties subsequent to the making of the underlying contract to the sum of $26,029.48.

Plaintiffs may enter judgment with the Orange County Clerk for the amounts specified hereinabove along with the appropriate partial satisfactions of judgment in accordance with the

CPLR.

The foregoing constitutes the decision and order of the Court.

Dated: June 9, 2010 E N T E R
Goshen, New York

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HON. CATHERINE M. BARTLETT,
A.J.S.C.