

**Linea Aerea Cuencana v ECC Leasing Co. Ltd.**

2022 NY Slip Op 33701(U)

October 28, 2022

Supreme Court, New York County

Docket Number: Index No. 650486/2018

Judge: Arthur F. Engoron

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART 37

*Justice*

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LINEA AEREA CUENCANA,	INDEX NO. <u>650486/2018</u>
Plaintiff,	MOTION DATE <u>09/15/2022</u>
- v -	MOTION SEQ. NO. <u>002</u>

ECC LEASING COMPANY LIMITED, EMBRAER  
NETHERLANDS B.V.,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion for

SUMMARY JUDGMENT

Upon the foregoing documents, and for the reasons stated hereinbelow, the motion by defendant for summary judgment is denied and summary judgment for plaintiff, in the amount indicated below, is granted.

This case arises out of the ultimately fruitless attempts of plaintiff, Ecuadorean airline Linea Aerea Cuencana (“Buyer”), to buy an airplane from defendant ECC Leasing Company Limited (“Seller”), a wholly owned subsidiary of Empresa S.A., since subsumed by defendant Embraer Netherlands B.V., and the efforts of the latter to retain a “non-refundable deposit” from the former.

Background

On July 22, 2011, representatives of Buyer and Seller signed “Commercial Proposal ECC-130/2011” (“Proposal 130”), the purpose of which was to facilitate Buyer entering into a purchase agreement for “2 (two) pre-owned EMB-145 aircraft” for \$10,900,000 each, or \$21,800,000 total. NYSCEF Doc. No. 46.

Pursuant to Proposal 130 § 3.1, within two days of signing Buyer was to “remit to [Seller] a non-refundable cash Initial Deposit for each Aircraft in the amount of 10% (ten percent) of the Price,” or \$2,180,000. Id. Pursuant to Proposal 130 § 10, should “Buyer fail or be unable to execute a Purchase Agreement, the Initial Deposit will be kept by [Seller] as liquidated damages.” Id.

Proposal 130 expired on July 29, 2011, without a deposit having been made or a purchase agreement having been executed.

On August 30, 2011, representatives of Buyer and Seller signed “Commercial Proposal ECC-165/2011” (“Proposal 165”), the purpose of which was to facilitate Buyer entering into a Purchase Agreement for “One (1) pre-owned EMB-145LR aircraft,” for the price of \$10,900,000. NYSCEF Doc. No. 47.

Pursuant to Proposal 165 § 3.1, within two days of signing Buyer was to “remit to [Seller] a non-refundable Initial Deposit for the Aircraft in the amount of 20% (twenty percent) of the Price,” or \$2,180,000. Id. Pursuant to Proposal 165 § 9, the parties were to prepare, negotiate, and execute a binding purchase agreement within 75 days of Buyer’s initial deposit, and that should “Buyer fail or be unable to execute a Purchase Agreement, the Initial Deposit will be kept by [Seller] as liquidated damages.” Id.

On August 31, 2011, Buyer wired \$2,180,000 (the “Deposit”), or 20% of Proposal 165’s total airplane price, to Seller as an initial deposit. NYSCEF Doc. Nos. 42 ¶ 24 and 43 ¶ 25.

Proposal 165 expired without the execution of a purchase agreement, but Seller “did not declare a default” so as “to allow additional time to conclude the sale.” NYSCEF Doc No. 42 ¶ 27.

On May 17, 2012, Buyer and Seller signed “Commercial Proposal ECC-185-2012” (“Proposal 185”), the purpose of which was to facilitate Buyer entering into a Purchase Agreement for “One (1) pre-owned EMB-145MP aircraft” for the price of \$7,900,000. NYSCEF Doc. No. 48. Pursuant to Proposal 185 § 9 should “Buyer fail or be unable to execute a Purchase Agreement, the Initial Deposit will be kept by ECC as liquidated damages.” Id.

On October 4, 2012, Buyer and Seller executed an Aircraft Sale Agreement (the “Purchase Agreement”) for the sale of one EMB-145MP aircraft for \$7,900,000. NYSCEF Doc. No. 44.

Article 4.1.1 of the Purchase Agreement states: “Buyer has already paid to Seller a non-refundable Initial Deposit in the amount of USD 2,200,00.00 [sic] ... on August 31, 2011.” Id.

Article 5.3.5 of the Purchase Agreement says that should “Buyer fail to perform the acceptance and transfer of title to the Aircraft and execute a certificate of acceptance of the Aircraft ... within the periods provided for and in accordance with this [Article] 5, Seller shall be entitled, at its discretion, to either re-negotiate the terms of this Agreement with Buyer or terminate this Agreement with regard to the Aircraft pursuant to Article 15.3.” Id.

Article 14 of the Purchase Agreement submits both parties to the exclusive jurisdiction of the United States District Court for the Southern District of New York and the Supreme Court of the State of New York, New York County. Id.

Article 15.3 of the Purchase Agreement allows that “if Seller terminates this Agreement, pursuant to Articles 4.22, 5.3.5 or 5.5.1.5 hereof, Buyer shall pay to Seller (i) partially liquidated damages in an amount equal to fifteen percent (15%) of the Aircraft Purchase Price, and (ii) the value of equipment ... and services previously delivered and/or performed by Seller.” Id.

In July 2013 the parties entered into an amendment of the Purchase Agreement (the "Amendment") which reduced the Aircraft Purchase Price to \$6,000,000 and pushed back the date for the aircraft to be inspected and accepted by Buyer to August 26, 2013. NYSCEF Doc. No. 45.

In a letter dated April 1, 2014, Seller notified Buyer that it was in default of Article 5.3.5 of the Purchase Agreement and gave Buyer 30 days to cure. NYSCEF Doc. No. 49.

On August 4, 2014, Seller notified Buyer that, as Buyer was still in default, Seller was terminating the Purchase Agreement and, pursuant to Article 15.3, would "retain all amounts previously paid by Buyer to Seller in total of USD 2,180,000.00." NYSCEF Doc. No. 50.

#### Procedural History

On December 22, 2015, Buyer sued Seller, under Index Number 450897/2016; Seller moved to dismiss the complaint in its entirety, that motion was denied, and Seller appealed.

On October 12, 2017, the Appellate Division, First Department, unanimously reversed and dismissed the complaint. NYSCEF Doc. No. 8. In its decision the First Department noted that the court below had identified factual issues as to whether the Deposit was a valid liquidated damages provision or an unenforceable penalty, and that Buyer "may have a claim for at least a partial return of its deposit based on this theory." Id.

On January 31, 2018, Buyer commenced the instant action against Seller, asserting five causes of action. NYSCEF Doc. No. 43.

On June 21, 2018, Seller moved for, inter alia, partial summary judgment. NYSCEF Doc. No. 6.

On April 23, 2019, this Court granted Seller's motion and struck plaintiff's third, fourth, and fifth causes of action as well as their related paragraphs in the complaint. NYSCEF Doc. No. 27. This left plaintiff with two causes of action essentially seeking a determination and declaration that the Purchase Agreement's liquidated damages provision was an unenforceable penalty.

On August 9, 2022, Seller moved, pursuant to CPLR 3212, for summary judgment dismissing Buyer's remaining causes of action.

Seller argues that the \$2.18 million Deposit it retained represents the 15% liquidated damages provided by Article 15.3 of the Purchase Agreement, which it asserts is a reasonable amount of liquidated damages for this type of contract between sophisticated business entities. In the alternative, Seller argues that if the liquidated damages provision is found to be an unenforceable penalty, Seller should still be granted "liquidated damages of \$1,185,000, which is 15% of the Purchase Price at the time Article 15.3 was agreed," as well as \$1,309,669.63 in equipment and service costs, as alleged in various invoices filed under NYSCEF Doc. No. 51, for a total of \$2,494,699.60.

In opposition Buyer argues that: Article 15.3 should be found void as a matter of law and as against public policy; Seller is wrong to keep 15% of an earlier purchase price as opposed to the

Aircraft Purchase Price from the amended Purchase Agreement; it is unconscionable for Seller to collect both liquidated damages and actual damages; in any event, the actual damages alleged by Seller are not the sort of charges allowed by Article 15.3.

#### Discussion

In order to obtain summary judgment, the “movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests’ [M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’ for this purpose.” Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988) (internal citations omitted).

The primary issue before this Court is whether the “liquidated damages” provision in Article 15.3 of the Purchase Agreement is enforceable, either in whole or in part.

“Liquidated damages constitute the compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of their contract.” Truck Rent-A-Ctr., Inc. v Puritan Farms 2nd, Inc., 41 NY2d 420, 423. “In effect, a liquidated damage provision 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.” Id. Parties have a right to contract to such provisions, “provided that the clause is neither unconscionable nor contrary to public policy.” Id.

“Where the court has sustained a liquidated damages clause the measure of damages for a breach will be the sum in the clause, no more, no less. If the clause is rejected as being a penalty, the recovery is limited to actual damages proven.” JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373, 379-80 (2005), quoting Brecher v Laikin, 430 F Supp 103, 106 (SD NY 1977) (citations omitted).

Here Buyer and Seller, both well-represented, sophisticated parties, entered into the Purchase Agreement, which included a seemingly two-part liquidated damages provision allowing, in the event of certain Buyer defaults, for Seller to keep: “(i) partially liquidated damages in an amount equal to fifteen percent (15%) of the Aircraft Purchase Price, and (ii) the value of equipment ... and services previously delivered and/or performed by Seller.”

Seller supports its contention that this provision is not an unenforceable penalty by providing the affidavit of Marcio Almeida (“Almeida”), a Sales Director for Seller, who affirms that, in his 19 years of experience in aircraft sales, “a liquidated damage remedy equal to 10-20% of the Purchase Price” is common. Almeida also attests to the myriad potential complications that can make selling commercial aircraft unpredictably expensive from the perspective of the negotiating table. NYSCEF Doc. No. 42.

In reply, Buyer provides an affidavit Victor Astudillo, a co-owner of Buyer, disputing Almeida’s credibility and citing a transcript of Almeida’s deposition in which he acknowledges having never, in his 19 years of experience in aircraft sales, been involved in a transaction where a

purchaser was unable to actually close on a sale let alone where a two-million-dollar deposit was retained. NYSCEF Doc. No. 59.

As Buyer has not offered any evidence beyond conclusory statements that a liquidated damage provision between 10-20% is uncommon in such airplane sales, this Court defers to the language of the Purchase Agreement and finds the Purchase Agreement's liquidated damage clause of 15% of the Airplane Purchase Price is not an unlawful penalty. Addressing Sys. and Products, Inc. v Friedman, 59 AD3d 359, 360 (1st Dep't 2009) ("Where, as here, the parties to the agreement were sophisticated business people, and the terms of the agreement were mutually negotiated, with each party represented by experienced counsel, a liquidated damages provision which is reached at arm's length is entitled to deference.").

The next question is: what is 15% of the Airplane Purchase Price?

Seller argues, inter alia, that it is entitled to keep the \$2.18 million (or more than 36% of the Airplane Purchase Price) as liquidated damages because that number was 20% of the Airplane Purchase Prices contemplated by the proposals that pre-dated the Purchase Agreement. Seller also argues that the Airplane Purchase Price in Article 15.3 should be read as referring to the \$7,900,000 in the original Purchase Agreement (as opposed to the lower amended price) and so Seller was entitled to a "base of 15%," or \$1,185,000 (or 19.75% of the amended price of \$6,000,000).

However, the Purchase Agreement is clear: in the event of certain defaults by Buyer, including the type of default at issue, Seller is entitled to "partially liquidated damages in an amount equal to 15% of the Aircraft Purchase Price."

At the time of the Purchase Agreement, the Aircraft Purchase Price was defined by Article 3.1 of the agreement as \$7,900,000. But when both parties signed the Amendment, the definition of "Aircraft Purchase Price" became \$6,000,000. Nowhere in the Amendment is the liquidated damages provision mentioned, nor is there an indication anywhere on the record that the "Aircraft Purchase Price" referred to in Article 15.3 differs from the price listed in Article 3.1.

Therefore, pursuant to Article 15.3 of the Purchase Agreement, Buyer is entitled to retain 15% of the Aircraft Purchase Price, as defined in the Amendment, or \$900,000 ( $\$6,000,000 \times 15\%$ ).

Article 15.3 of the Purchase Agreement provides that, in the event of Buyer's default, Seller is not only entitled to "partial liquidated damages" but *also* to actual damages in the form of various equipment and services (which Seller now alleges equals \$1,309,669.63, or 21.8% of the Aircraft Purchase Price). However, awarding actual calculable damages defeats the purpose of liquidated damages, which is to establish a value in "those situations where it would be difficult, if not actually impossible, to calculate the amount of actual damage." Truck Rent-A-Ctr. at 424. In effect Seller, while still retaining possession of the airplanes in question, is attempting to collect liquidated *and* actual damages, and so retain 36.33% of the Aircraft Purchase Price in the process – *far* more than the industry standard of 10-20% alleged by Almeida.

Here, Article 15.3’s provision for liquidated damages *and* actual damages is an improper and unenforceable penalty.

And so, having found the first part of the Purchase Agreement’s damages provision, for liquid damages, to be valid, this Court hereby severs the second portion of that provision, for actual damages, as unenforceable against public policy. NYSCEF Doc. No. 44 (“If any provision or part of a provision of this Agreement ... shall be ... unenforceable... such unenforceability shall not affect the other provisions or parts of such provisions of this Agreement.”).

Therefore, Seller is entitled to retain \$900,000 of the Deposit but must return the remaining \$1,280,000.

And so, Seller’s motion for summary judgment is denied and summary judgment instead is granted to Buyer. CPLR 3212(b) (“If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion”).

This Court has considered the parties’ remaining arguments and finds them to be unavailing or non-dispositive.

Conclusion

The motion for summary judgment of defendant Emraer Netherlands B.V. as the successor corporation to co-defendant ECC Leasing Company Limited, is denied and summary judgment is granted to plaintiff Linea Aerea Cuencaca on its first and second causes of action, and the Clerk is hereby directed to enter judgment in favor of plaintiff in the amount of \$1,280,000 (the \$2,180,000 deposit – \$900,000 [liquidated damages of 15% of the Aircraft Purchase Price of \$6,000,000]).

<u>10/28/2022</u> DATE	<u>ARTHUR F. ENGORON, J.S.C.</u>			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED		<input type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE