

FIRST DIVISION

May 14, 2012

No. 1-10-3535

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

DILLIS V. ALLEN and IRENE F. ALLEN,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellants,)	Cook County.
)	
v.)	No. 07 CH 36894
)	
HAMILTON TRAILS, LLC, an Illinois limited)	
liability corporation, HAMILTON HOMES, INC.,)	
an Illinois corporation, and RICHARD B.)	Honorable
LYNAM,)	Leroy K. Martin, Jr.,
)	Judge Presiding.
Defendants-Appellees.)	

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

ORDER

¶ 1 **Held :** Summary judgment for the buyer was proper where the contract language demonstrated the parties' intent to provide for liquidated damages rather than a penalty to secure performance of the contract.

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¶ 2 Plaintiffs Dillis V. Allen and Irene F. Allen (the Allens) appeal from an order of the Circuit Court of Cook County granting summary judgment to the defendants, Hamilton Trails, LLC, Hamilton Homes, Inc. and Richard B. Lynam (collectively the defendants). On appeal, the Allens contend that the defaults and remedies clause (default clause) of the real estate contract (the contract) entered into by the parties was unenforceable, and that they should be allowed to pierce the corporate veil to hold Mr. Lynam liable for their damages.

¶ 3 We conclude that the default clause was a valid liquidated damages provision and not an unenforceable penalty. Therefore, we do not reach the piercing of the corporate veil issue. The following pertinent facts are taken from the record on appeal.

¶ 4 **FACTS**

¶ 5 On October 30, 2006, the Allens entered into the contract with Hamilton Trails. Under the terms of the contract, the Allens agreed to sell 5.15 acres of real property, located at 31 W 211 Route 58, Elgin, Cook County, Illinois, to Hamilton Trails for the purchase price of \$233,009.71 per acre (approximately \$1.1 million total). The purchase price was to be paid in increments, starting with a deposit of \$1,000 and then \$2,750, each month until the closing at which time the remaining balance of the purchase price would be paid in cash by Hamilton Trails. The purchase of the property was subject to Hamilton Trails securing municipal approvals for the construction of its planned development. The closing on the property was to take place 30 days after the municipal approvals were obtained. The contract was signed by the Allens and by Mr. Lynam on behalf of Hamilton Trails.

¶ 6 At the center of the dispute in this case is the default clause of the contract, which provided

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in pertinent part as follows:

"In the event of a default or breach by Buyer of any of the covenants or conditions or obligations of Buyer under this Contract, Seller's sole and exclusive remedy shall be to give written notice thereof to the Buyer and to retain the Deposit as full liquidated damages, actual damages being difficult if not impossible to ascertain and the parties having made a bona fide effort to estimate Seller's damages."

¶ 7 In April 2007, the Allens received another offer for the property for \$1.2 million with no contingencies. In exchange for the Allens' refusal of the new offer, Mr. Lynam agreed to remove the municipal approvals contingency from the contract. The parties amended the contract to reflect the removal of the contingency.

¶ 8 The Allens continued to receive the monthly payments until September 7, 2007, by which time they had received \$28,700. The deposit payments ceased after that date. Mr. Lynam did not respond to Mr. Allen's letter inquiring about the absence of the October 2007, payment. In November 2007, Mr. Lynam's attorney informed Mr. Allen that Mr. Lynam had abandoned the Hamilton Trails project and that he no longer represented Mr. Lynam. Late in November, Mr. Allen spoke with James Donahue, the planning director for the Village of Hoffman Estates, which was involved in the project. According to Mr. Allen, Mr. Donahue told him that the Hamilton Trails project had been proceeding but, for the last month, there had been no contact with Hamilton Trails.

¶ 9 On December 13, 2007, the Allens filed their complaint against the defendants. In attempting to serve the defendants, the Allens learned that the various offices of the defendants

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had been closed.

¶ 10 Following the filing of an amended complaint, the parties engaged in discovery. In his deposition testimony, Mr. Allen acknowledged that the parties had negotiated the terms of the contract over a period of several months. He maintained, however, that he did not recall reading the default clause.

¶ 11 The defendants filed a motion for summary judgment. In the motion, the defendants maintained that the Allens were bound by the default clause in the contract, and therefore, they were not entitled to damages beyond the payments they had received. In their response to the motion, the Allens argued that the default clause was unenforceable.

¶ 12 The circuit court granted summary judgment to the defendants. The court found that the default clause constituted the parties' good-faith estimate of damages since the actual damages were difficult to ascertain. The Allens filed a timely notice of appeal.

¶ 13

ANALYSIS

¶ 14

I. Standard of Review

¶ 15 We apply the *de novo* standard when reviewing the circuit court's grant of summary judgment. *Luise, Inc. v. Village of Skokie*, 335 Ill. App. 3d 672, 678 (2002). "The validity of a liquidated damages provision is a question of law, which is reviewed *de novo*." *Dallas v. Chicago Teachers Union*, 408 Ill. App. 3d 420, 424 (2011).

¶ 16

II. Discussion

¶ 17 Our review is guided by the well-settled principle that "[s]ummary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits and other relevant matters on file

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show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Illinois Farmers Insurance Co. v. Hall*, 363 Ill. App. 3d 989, 993 (2006).

Summary judgment should be granted only when the movant's right to judgment is free and clear from doubt. *Hall*, 363 Ill. App. 3d at 993.

¶ 18 In Illinois, a liquid damages provision is enforceable as long as three requirements are met: "(1) the parties intended to agree in advance to the settlement of damages that might arise from a breach, (2) the amount provided as liquidated damages was reasonable at the time of contracting, bearing some relationship to the damages which might be sustained, and (3) the actual damages would be uncertain in amount and difficult to prove." *Dallas*, 408 Ill. App. 3d at 424. For reasons of public policy, courts will not enforce a liquidated damages provision that operates as a penalty for nonperformance or as a threat to secure performance. *Jameson Realty Group v. Kostiner*, 351 Ill. App. 3d 416, 423 (2004). "An agreement setting damages in advance of a breach is an unenforceable penalty unless: (1) the amount so fixed is a reasonable forecast of just compensation of the harm that is caused by the breach; and (2) the harm caused is difficult or impossible to estimate." *Hidden Grove Condominium Ass'n v. Crooks*, 318 Ill. App. 3d 945, 947 (2001).

¶ 19 The Allens contend that the default clause is an unenforceable penalty. They point out that the \$28,500, the amount they retained as liquidated damages, was only 2.38% of the purchase price. They maintain that the amount was unreasonable in light of the purchase price of \$1.2 million, and bore no relationship to their actual damages of \$400,000. The Allens rely on *Siegel v. Levy Organization Development Co.*, 182 Ill. App. 3d 859 (1989).

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¶ 20 In *Siegel*, the purchase price of the property was \$1.6 million. A clause in the contract provided that in the event of a default by the buyer, the seller would retain the earnest money and all payments it had received. At the time the buyer defaulted, the seller had received \$386,594. Holding that the clause was a liquidated damages clause and not a penalty, the reviewing court concluded that the parties had bargained for and believed that the earnest money was adequate to cover any potential losses. "Otherwise, the provision would reasonably not have been included in the agreement. The mere fact that the sum is not now what [the seller] claims to be its damages is not determinative." *Siegel*, 182 Ill. App. 3d at 862. The court further found that the record supported the determination that the amount specified as liquidated damages was reasonable in light of any losses that could have been anticipated at the time the contract was entered into and that the clause was included to avoid the difficulty of ascertaining any losses in the event of a breach. *Siegel*, 182 Ill. App. 3d at 862.

¶ 21 The Allens maintain that, since *Siegel* found liquidated damages at 22.6% of the purchase price to be reasonable, the 2.38% they received is unreasonable. However, a liquidated damages clause must be evaluated on its own facts and circumstances. *Dallas*, 408 Ill. App. 3d at 424. In *Siegel*, the court's decision that the liquidated damages clause was not a penalty was based on the terms of the provision and the facts in the record. See *Siegel*, 182 Ill. App. 3d at 862.

¶ 22 In the present case, the record reflects that the parties engaged in extensive negotiations prior to entering into the October 30, 2006, contract. Under the default clause, the amount the Allens were entitled to retain should Hamilton Trails default increased each month until the time of the closing. The language of the default clause reflects that the parties considered the potential

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damages to the Allens difficult to determine and intended that the retention of the initial deposit and the monthly payments would constitute liquidated damages rather than a penalty. Compare *Med+Plus Neck & Pain Center, S.C. v. Noffsinger*, 311 Ill. App. 3d 853, 860-61 (2000) (liquidated damages clause to cover employee training expense was clearly a penalty where the damages decreased the longer the employee stayed with the company).

¶ 23 The Allens' reliance on *Bauer v. Sawyer*, 8 Ill. 2d 351 (1956), is misplaced. In *Bauer*, the supreme court found the language used by the parties significant in determining whether they intended to forecast the probable damages from a breach or impose a penalty for nonperformance. In determining that the parties intended to impose a penalty, the court noted that the parties used the term "forfeiture," which tended to exclude the idea of liquidated damages. *Bauer*, 8 Ill. 2d at 359. In addition, rather than a specified payment in the event of a breach of the covenant not to compete, money was withheld and then paid over time to the departing partner, indicating that the purpose of the provision was to secure compliance with the covenant. *Bauer*, 8 Ill. 2d at 359-60. In the default clause, the parties spoke in terms of damages rather than forfeiture, even providing that the parties had made *bona fide* efforts to determine the damages. Unlike the contract in *Bauer*, the language of the default clause supports the determination that the parties intended to anticipate and settle the amount of potential damages and not to impose a penalty to ensure performance of the contract.

¶ 24 The Allens' contention that the default clause was inserted solely to protect the defendants is not supported by the record. The terms of the October 30, 2006, contract, which included the default clause, were arrived at after extensive negotiations between the parties. Even after the

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contract was amended to remove the contingencies, the default clause remained in the contract.

¶ 25 The Allens then contend that the default clause is unenforceable as a penalty because the determination of the actual damages in case of a breach would not have been difficult to calculate, relying on *Hickox v. Bell*, 195 Ill. App. 3d 976, 988 (1990). In *Hickox*, the reviewing court acknowledged that a liquidated damages clause would be given effect if it was difficult to determine the actual amount of the damages. The court found that the damages were not difficult to calculate in the case of the installment sale of a farm; the contract established the value of the land, evidence of the changing land values was available, and the rents and profits generated during the relevant period could easily be determined. Therefore, as a matter of law, the liquidated damages clause was not enforceable. *Hickox*, 195 Ill. App. 3d at 987-88.

¶ 26 *Hickox* does not support the Allens' penalty argument. Unlike the liquidated damages clause in *Hickox*, in the present case, the parties specified in the default clause that they had made efforts to determine the actual damages, and agreed that it would be difficult if not impossible to determine the actual damages in the event of a breach.

¶ 27 Finally, the Allens contend that the default clause is a penalty because it has no relation to the actual damages they sustained. The issue is not whether the actual damages ultimately caused by the breach are the same as the amount specified in the liquidated damages provision. Rather, the issue is whether, at the time the contract is entered into, the liquidated damages amount was reasonable and related to the amount of damages that might be sustained in the event of a breach. *Dallas*, 408 Ill. App. 3d at 425.

¶ 28 From the language of the default clause, it is clear that at the time the contract was

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entered into, the parties considered the potential loss to the Allens should the defendants default. The Allens acknowledged in their brief that no one could have predicted the decline and near collapse of the new construction market. As their actual damages were based on an event that no one could have predicted, the Allens failed to establish that the liquidated damages specified in the default clause were unreasonable and unrelated to the amount of damages they anticipated at the time they entered into the contract.

¶ 29 The Allens' reliance on *Hidden Grove Condominium Ass'n* is misplaced. In that case, the association charged \$25 for the month an assessment was not paid and for each month thereafter until the assessment was paid. The reviewing court found the charge to be a penalty because it exceeded the administrative costs and loss of interest to the association and amounted to a 225% return for nonpayment of \$88.23. In contrast, the liquidated damages in the default clause were agreed to by the parties because the actual damages could not be determined in advance.

¶ 30 The Allens' other arguments may be disposed of summarily. They contend that the defendants may not just abandon the contract because it became unprofitable, citing *City of East Peoria v. Colianni & Dire Co.*, 334 Ill. App. 108 (1948). While we do not disagree with the Allens' contention, it has no relevance to the issue before us. The Allens also contend that the default clause must be construed against the defendants. Their argument is limited to one sentence and does not cite any authority in support of their contention. Therefore, the argument is waived. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 31 "Where the terms of an agreement are unambiguous, the parties' intent must be determined solely from the language of the agreement itself, and it is presumed that the parties

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inserted each provision deliberately and for a purpose." *Jameson Realty Group*, 351 Ill. App. 3d at 426. In this case, the default clause was clear and unambiguous and demonstrated that the parties intended to agree in advance to the settlement of damages that might arise from a breach.

¶ 32

CONCLUSION

¶ 33 We conclude as a matter of law that the default clause was a valid and enforceable liquidated damages provision. Therefore, the circuit court's award of summary judgment to the defendants was proper.

¶ 34 Affirmed.