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SIXTH DIVISION
September 26, 2014

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GE COMMERCIAL FINANCE BUSINESS PROPERTY)	Appeal from the
CORPORATION, a Delaware Corporation,)	Circuit Court of
)	Cook County.
Plaintiff-Counterdefendant/Appellee,)	
)	
v.)	No. 11 CH 14888
)	
5201 VENTURE, LLC, an Illinois Limited Liability)	
Company,)	The Honorable
)	Robert Senechalle, Jr.,
Defendant-Counterplaintiff/Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶1 *HELD:* Where the parties' liquidated damages provision was clear and unambiguous and was not an unreasonably large penalty for nonperformance or a threat to secure performance of the purchase agreement, the provision did not violate public policy and was enforceable as written.

¶2

BACKGROUND

¶3 Defendant, 5201 Venture , LLC, appeals the circuit court's order dismissing its amended counterclaim pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2006)) in favor of plaintiff, GE Commercial Finance Business Property Corporation. Defendant contends the circuit court erred in dismissing its amended counterclaim where the liquidated damages provision in the parties' contract was unenforceable because it was an unreasonably small award. Based on the following, we affirm the dismissal of defendant's amended counterclaim.

¶4 The following are the relevant facts pleaded in defendant's two-count amended counterclaim. Morando Berrettini, manager of a real estate development company and president of a real estate brokerage business, was hired by Panasonic North America Corporation (Panasonic) to assist Panasonic in relocating its offices. After the brokerage business indentified a piece of property in Rolling Meadows, Illinois, Mr. Berrettini formed 5201 Venture LLC (Venture), at Panasonic's request, to purchase the building. Venture then sought financing in order to purchase and improve the property to Panasonic's specifications. In seeking financing, Venture approached GE Commercial Finance Business Property Corporation (GE) and was advised by GE that it also was interested in purchasing the building.

¶5 GE made an initial proposal in July 2007 that included a deposit of \$200,000. GE also made an amended proposal that included both financing and purchase terms. On October 9, 2007, Venture entered into a construction loan agreement and an agreement for the purchase and sale of the building (purchase agreement) with GE, whereby GE would finance the purchase and construction costs of the building and then GE would purchase the building.

¶6 Per the construction loan agreement, GE agreed to lend Venture \$15,650,000 to improve the property. The loan was evidenced by a balloon promissory note (note) and was secured by a mortgage. The note was to mature in one year; however, section 2.16 of the construction loan agreement provided:

"Notwithstanding any provision of the Note or the Loan Documents to the contrary, the Maturity (as defined in the Note) shall be extended by 365 days provided that Lender fails to purchase the Property from Borrower, Borrower requests such extension in writing prior to the original Maturity, and further provided that Guarantor delivers the fully executed original Guaranty Agreement in the form attached hereto as Exhibit D."

¶7 The purchase agreement provided that GE would purchase the property from Venture for \$21,840,000 and section 2(b) defined the earnest money as \$200,000. The purchase was set to close in October 2008, after Venture acquired the property, made improvements, secured a lease with Panasonic, and Panasonic took possession of the premises. Section 15(b) of the purchase agreement also provided:

"If Purchaser shall be obligated by the provisions of this Agreement to close the purchase and sale transaction contemplated by this Agreement and shall fail to close, Seller shall have the right to retain the Earnest Money, such sum being hereby specifically agreed to be liquidated damages; that such amount constitutes the parties' best reasonable attempt to estimate Seller's actual and consequential damages that would be incurred in the event of such failure, that any such damages would be extremely difficult and impractical to quantify; and that such

damages are expressly intended to and shall constitute Seller's sole and exclusive remedy for such failure."

¶8 In October 2008, GE indicated it was not ready to close on the property and Venture exercised its right to extend the loan's maturity date for one year; however, on October 29, 2008, GE ultimately informed Venture it would not purchase the building and directed the escrow company to pay Venture the \$200,000 earnest money. Thereafter, Venture tried unsuccessfully to refinance the loan or to find a new purchaser, and in October 2009, Venture and GE agreed to another one-year extension of the note's maturity date.

¶9 On April 20, 2011, GE filed a complaint for foreclosure of the mortgage, alleging Venture failed to pay the principal of the note by the October 2010 maturity date. Venture filed an answer, affirmative defenses, and a two-count counterclaim. Count I of the counterclaim alleged breach of contract, while count II alleged fraud and misrepresentation.

¶10 Relevant to this appeal, GE filed a section 2-615 motion to dismiss the counterclaim, contending Venture had no recoverable damages because it had already received the \$200,000 liquidated damages. Venture responded that the liquidated damages provision was unenforceable. The circuit court granted GE's motion to dismiss. Thereafter, GE filed an amended complaint for foreclosure of the mortgage, only adding a tenant as a party defendant. Venture then filed an amended answer and a two-count amended counterclaim. Both counts of the counterclaim alleged that the liquidated damages provision in the purchase agreement was void and unenforceable. More specifically, count I sought a declaratory judgment that the liquidated damages provision in the parties' purchase agreement was unenforceable as a matter of law and count II sought actual damages for breach of contract. GE filed a section 2-615 motion to dismiss both counts of the counterclaim and, after briefing and oral argument, the circuit court

dismissed both counts with prejudice on March 21, 2013. On April 16, 2013, the circuit court entered an order, pursuant to Illinois Supreme Court Rule 304(a) (eff. Jan. 1, 2006), that the dismissal was a final and appealable order. This appeal followed.

¶11

ANALYSIS

¶12 Defendant contends the circuit court erred in dismissing its breach of contract counterclaim where the liquidated damages provision in the parties' purchase agreement was unreasonable and, therefore, unenforceable. In particular, defendant argues that the liquidated damages provision did not provide a reasonable estimate of actual compensatory damages where the liquidated damages were less than 1% of the purchase price. Plaintiff responds that, because defendant challenges the liquidated damages provision as being too small, the provision is necessarily not a penalty. As a result, plaintiff argues that the proper test to apply to this liquidated damages provision is whether the provision was unconscionable.

¶13 A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint. *Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App (1st) 102670, ¶ 9. In considering the motion, a court must accept as true all well-pleaded facts in the complaint and reasonable inferences drawn therefrom. *Id.* However, Illinois is a fact-pleading jurisdiction, and the complaint may not contain mere conclusions of law or facts unsupported by specific factual allegations. *Premier Networks, Inc. v. Stadheim and Grear, Ltd.*, 395 Ill. App. 3d 629, 633 (2009). The ultimate question is whether the pleadings and attachments, when construed in a light most favorable to the plaintiff, clearly demonstrate that there are no set of facts that would entitle the plaintiff to relief. *Karimi*, 2011 IL App (1st) 102670, ¶ 9. We review a circuit court's dismissal of a complaint pursuant to section 2-615 *de novo*. *Id.*

¶14 We recognize that the liquidated damages provision here is atypical of those generally litigated because it is less than the alleged compensatory damages. The law provides that "[w]here 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 inserted each provision deliberately and for a purpose." *Jameson Realty Group v. Kostiner*, 351 Ill. App. 3d 416, 426 (2004). However, courts will not enforce a liquidated damages provision that operates as a penalty for nonperformance or as a threat to secure performance because such a provision violates public policy. *Id.* at 423. " 'A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.' " *Penske Truck Leasing Co. v. Chemetco, Inc.*, 311 Ill. App. 3d 447, 454 (2000) (quoting Restatement (Second) of Contracts § 356 (1979)). Illinois law generally provides that a liquidate damages provision is not against public policy, but rather is valid and enforceable in a real estate contract, when: (1) the parties intended to agree in advance to the settlement of damages that might arise from the breach; (2) the amount of liquidated damages was reasonable at the time of contracting, bearing some relation to the damages which might be sustained; and (3) actual damages would be uncertain in amount and difficult to prove. *Jameson Realty Group*, 351 Ill. App. 3d at 423. That said, "[n]o fixed rule applies to all liquidated damages provisions, and courts must evaluate each one on its own facts and circumstances." *Karimi*, 2011 IL App (1st) 102670, ¶ 16; *Jameson Realty Group*, 351 Ill. App. 3d at 423.

¶15 Here, the language of section 15(b) of the purchase agreement was clear and unambiguous. Section 15(b) provided:

"If Purchaser shall be obligated by the provisions of this Agreement to close the purchase and sale transaction contemplated by this Agreement and shall fail to

close, Seller shall have the right to retain the Earnest Money, such sum being hereby specifically agreed to be liquidated damages; that such amount constitutes the parties' best reasonable attempt to estimate Seller's actual and consequential damages that would be incurred in the event of such failure, that any such damages would be extremely difficult and impractical to quantify; and that such damages are expressly intended to and shall constitute Seller's sole and exclusive remedy for such failure."

The earnest money for the subject property was \$200,000 and the sale price was \$21,840,000. In their appellate briefs, the parties agree that the liquidated damages provision was not unreasonably large. Instead, defendant argues that the liquidated damages provision for plaintiff's breach was too small. We must presume the parties inserted the liquidated damages provision for a purpose and rely on the language of the purchase agreement as it was written. *Id.* "In some instances, the amount of liquidated damages may exceed the amount of actual damages. In other cases, the amount of actual damages will exceed the amount established as liquidated damages. In this case, both parties agreed to accept this inherent risk when they agreed to include a liquidated damages provision in the purchase agreement." *Newcastle Props, Inc. v. Shalowitz*, 221 Ill. App. 3d 716, 725 (1991). We cannot rewrite the contract and provide defendant with a better bargain than what was agreed upon by the parties when entering the purchase agreement. See *Walgreen Co. v. American National Bank & Trust Co.*, 4 Ill. App. 3d 549, 554 (1972).

¶16 Because the liquidated damages here were not unreasonably large, the provision did not act as a penalty in violation of public policy. "Liquidated damages clauses are often entered into to avoid the difficulty of ascertaining and proving damages by such methods as market value,

resale value or otherwise. *Such agreements are binding.* However, when the sole purpose of the clause is to secure performance of the contract, the clause will be deemed a penalty provision and therefore unenforceable." (Emphasis added.) *Siegel v. Levy Organization Development Co., Inc.*, 182 Ill. App. 3d 859, 861 (1989). It cannot be said that the liquidated damages provision in this case was inserted into the purchase agreement to secure performance thereof. The provision, therefore, was not an unenforceable penalty provision in violation of public policy. Moreover, contrary to defendant's argument, it cannot be said that defendant was penalized because plaintiff enjoyed a windfall from the liquidated damages provision. Windfall is defined as "an unanticipated benefit, usually in the form of a profit and not caused by the recipient." Black's Law Dictionary, (9th ed. 2009). Here, plaintiff did not profit from its breach. Defendant retained the opportunity to sell the property after plaintiff failed to purchase it. When, despite extending the maturity date of the loan, defendant could not sell the property or refinance the loan, plaintiff moved to foreclose; however, we do not find that the eventual foreclosure in concert with the liquidated damages constituted a windfall for plaintiff.

¶17 Because we have concluded that the public policy exception restricting parties' freedom to contract is not at issue in this case, we need not apply any additional tests to ascertain whether the liquidated damages provision is enforceable. The supreme court has said, "[t]raditionally, this court, in keeping with the principle of freedom of contract, has been reluctant to invoke its power to declare a private contract void as contrary to public policy." *H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 209 Ill. 2d 52, 57 (2004). This court has additionally stated that "[o]ur courts apply a strict test in determining whether a contract violates public policy; therefore, the courts will not declare a contract illegal unless it expressly contravenes the law or a known public policy of this State." *Stevens v. Rooks Pitts and Poust*,

289 Ill. App. 3d 991, 997-98 (1997). In sum, we find the parties' liquidated damages provision was enforceable as written. See *First National Bank & Trust Co. of Evanston v. First National Bank of Skokie*, 178 Ill. App. 3d 180, 188-89 (1988) (finding the sellers were entitled to retain the earnest money when the purchasers breached the real estate contract where the liquidated damages provision was clear and unequivocal). We, therefore, conclude that defendant's amended counterclaim was properly dismissed.

¶18

CONCLUSION

¶19 The circuit court did not err in dismissing defendant's amended counterclaim where the parties' liquidated damages provision was enforceable as contracted for in the parties' purchase agreement.

¶20 Affirmed.