2011 IL App (1st) 103098-U

SIXTH DIVISION
DECEMBER 16, 2011

Nos. 1-10-3098, 1-10-3103 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HINSDALE FIRST, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 L 11117
	)	
LKJ ENTERPRISES, INC. d/b/a HANA K, HANA LANG, and PIERRE LANG,	)	Honorable
	)	Thomas E. Flanagan,
	)	Judge Presiding.
Defendants-Appellants.	)	
	)	

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court. Justices Garcia and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion in permitting a previously undisclosed witness to testify at trial; and (2) the liquidated damages provision in settlement agreement was an unenforceable penalty and should not have been included in the damages calculation.

¶ 2 Plaintiff Hinsdale First, LLC (Hinsdale First), owned retail space that it leased to LKJ Enterprises, Inc. d/b/a Hana K (LKJ). After LKJ defaulted under the lease, Hinsdale First and LKJ entered into a settlement agreement; defendants Hana Lang and Pierre Lang, who were

officers of LKJ, executed the settlement agreement as guarantors. Hinsdale First later brought suit against LKJ[1] and defendants, alleging that they had breached the terms of the settlement agreement by failing to ensure that there were sufficient funds in LKJ's bank account to cover several post-dated checks given to Hinsdale First pursuant to the agreement. In response, the *pro se* defendants stated that they had not breached the terms of the agreement; rather, they claimed that Hinsdale First breached the settlement agreement by failing to timely deposit the checks.

¶ 3 On the date of the jury trial, Hinsdale First sought to present a witness and documentation that defendants claimed had not been disclosed during discovery. The trial court permitted the witness to testify and use the documentation over defendants' objections. The jury returned a verdict in favor of Hinsdale First and awarded damages of $69,813.74, $50,000 of which was based on a liquidated damages clause in the settlement agreement. Defendants appeal, arguing that the trial court erred by: (1) permitting the witness to testify and (2) allowing Hinsdale First to proceed on its claim for liquidated damages. We affirm in part and reverse in part.

¶ 4 BACKGROUND

¶ 5 On November 8, 2007, Hinsdale First and LKJ entered into a "Settlement Agreement and Surrender of Lease." The agreement stated that Hinsdale First and LKJ were parties to a retail lease dated January 13, 2002, for the premises located at 11-21 First Street in Hinsdale (the premises), and that LKJ was in default under the lease "by failing to pay rent and other charges due and owing under the Lease." The settlement agreement also contained the terms of a

[1] Although there is nothing in the record showing that LKJ was dismissed from the case, no judgment was entered against LKJ and it is not a party to this appeal.

separate agreement between "Hana K"[2] and Rycam, Inc. d/b/a Red 21 (Rycam), the new tenant of the premises, including an agreement that "Hana K" would be permitted to occupy the rear 25% of the premises from November 15, 2007, until January 1, 2008, and would be permitted to utilize the basement storage space for a period of six months.

¶ 6 The settlement agreement contained a number of provisions relevant to the issues in this appeal. Section 2(a) stated that LKJ agreed to vacate the premises immediately, subject to the agreement with Rycam and section 2(b) stated that LKJ acknowledged that as of the date of the settlement agreement, "the amount due and owing to Landlord from Tenant under the Lease is $59,441.24, and further acknowledge[d] that rent and other amounts continue[d] to accrue under the Lease through the end of the Lease."[3]

¶ 7 Section 2 further provided:

> "c. Tenant shall pay Landlord the total amount of $59,441.24 as follows: (i) $9,906.87 upon execution of this Agreement, (ii) Upon execution of this Agreement, Tenant shall

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[2] LKJ was doing business as Hana K. However, My Favorite Coat Company, another business of defendants, was also doing business as Hana K. Since defendants claim these were two separate businesses, we refer to them by their official names for the sake of clarity. The terms discussing Rycam were additions to the agreement and referred only to Hana K, so it is not clear whether the Rycam agreement was with LKJ or My Favorite Coat Company.

[3] The record does not indicate the end date of the lease, nor is there a copy of the lease in the record.

> tender to Landlord 5 additional checks (respectively post-dated December 10, 2007[,] January 10, 2008, February 10, 2008, March 10, 2008[,] and April 10, 2008)[4] each in the amount of $9,906.87. Tenant agrees, represents and warrants that, on the date of each of those checks, each check shall be negotiable on the date thereof and sufficient funds shall be available in the account upon which the check is written to cover the amount of each respective check on each of those respective dates; and
>
> ***
>
> e. If Tenant fails to timely tender possession of the Premises to Landlord pursuant to paragraph 2(a), fails to comply with any of its obligations under this Agreement, or any of the checks tendered to Landlord under paragraph 2(c) above are returned for non-sufficient funds, Tenant agrees and acknowledges that (i) Tenant shall immediately be liable to pay Landlord the additional sum of $50,000.00 as liquidated damages, and not a penalty. The Parties agree and acknowledge that the amount of damages that Landlord will incur as a result of Tenant's breach is difficult to ascertain and that such liquidated damages are

[4] The four checks in the record – two in Hinsdale First's complaint and two in defendants' answer – are all dated the 20th of each month and not the 10th.

> reasonably related to damages Landlord is likely to incur; and (ii) the total settlement amount set forth in Paragraph 2(c) shall be immediately accelerated and Tenant shall immediately owe and pay Landlord $59,441.24, less any amounts paid by Tenant under Paragraph 2(c) and (iii) Tenant shall pay Landlord any and all reasonable attorneys fees, costs and expenses incurred in enforcing any of Landlord's rights and remedies under this Agreement."

¶ 8 The settlement agreement also stated that

> "[a]s additional consideration for Landlord's execution of this Agreement, and in order to induce Landlord to enter into this Agreement, Pierre Lang and Hana Lang, jointly and severally ***, guarantee, absolutely, continually, unconditionally and without limitation, to Landlord, its successors and assigns the full, prompt and unconditional payment when due, whether by the due date or earlier by reason of acceleration or otherwise, and at all times thereafter, any and all of the indebtedness, liabilities and obligations of Tenant under this Agreement."

The settlement agreement in the record on appeal was signed by defendants as guarantors and a representative from Hinsdale First.

¶ 9 On April 8, 2009, Hinsdale First filed an amended complaint against LKJ and defendants. The complaint alleges that Hinsdale First performed all conditions precedent required of it but

that LKJ and defendants defaulted under the terms of the settlement agreement because LKJ agreed that on the date of each check, the check would be negotiable and sufficient funds would be available in its bank account to cover the amount of the check. However, the complaint alleges that the checks dated April 20, 2008, and May 20, 2008, could not be negotiated as agreed because the bank account was closed. Hinsdale First requested judgment in the amount of $69,813.74 plus attorneys' fees and costs: $19,813.74 for the principal amount due and $50,000 in liquidated damages.

¶ 10 In addition to the settlement agreement, the complaint included as an exhibit two checks written from "Hana K My Favorite Coat Company" to Hinsdale First. The first check was dated April 20, 2008, and the second check was dated May 20, 2008. The checks were processed in early August 2008[5] and both were stamped "account closed."

¶ 11 On July 28, 2009, Pierre Lang and Hana Lang filed a *pro se* answer to the amended complaint.[6] In their answer, they denied Hinsdale First's allegation that "LKJ Enterprises, Inc.

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[5] There are two dates on the copies of the checks: August 1, 2008, and August 4, 2008. It is not clear which date is the date that the checks were processed.

[6] No answer was filed on behalf of LKJ. An appearance was filed on its behalf by the attorney who initially represented LKJ and defendants. However, the attorney was given leave to withdraw as Pierre Lang's attorney and does not appear in the record after his motion was granted. Pierre Lang and Hana Lang represented themselves *pro se* after the attorney's withdrawal. The parties do not discuss LKJ further and, as noted, no judgment was entered against LKJ and it is not a party to this appeal.

d/b/a Hana K (a/k/a My Favorite Coat Company)" leased the premises from Hinsdale First. They stated that LKJ was not also known as My Favorite Coat Company and never leased space from Hinsdale First. They stated that My Favorite Coat Company leased the premises from WexTrust Capital, but that My Favorite Coat Company went out of business January 1, 2008. Defendants also claimed that LKJ Enterprises, Inc. and My Favorite Coat Company both filed for Chapter 7 bankruptcy. They attached two "Notice[s] of Bankruptcy Case Filing[s]" showing that LKJ Enterprises, Inc. d/b/a Hana K filed for Chapter 7 bankruptcy on March 11, 2009, and My Favorite Coat Company d/b/a Hana K filed for Chapter 7 bankruptcy on March 11, 2009.

¶ 12 In their answer, defendants also stated that "Hana K is not an entity but agreement was reached to issue one check upon execution of the agreement and 5 post dated checks that are negotiable and have sufficient funds on precise and specific dates. Plaintiff knowing that the company is out of business agreed to abide and deposit the checks on those dates." Defendants further denied the allegation that the April and May checks could not be negotiated as promised due to insufficient funds in the bank account, stating that "[p]laintiff breached the agreement to deposit the checks on the due dates," and that Hinsdale First had also breached the agreement when it deposited the January and February checks "simultaneously without reason or notice on or about March 10th." Defendants claimed that "[t]he account was open on the due dates and there were sufficient funds in the account on the due dates as called for by the agreement. The account was closed in July."

¶ 13 Defendants also denied that they should be held liable for liquidated damages: "The checks were negotiable on their due dates and the accounts had sufficient funds on the due dates.

The checks were not returned due to insufficient funds as called for by the agreement but due to the account being closed. The demand for $50,000 as liquidated damages is irrelevant besides being exorbitant and unlawful."

¶ 14 Defendants further denied that Hinsdale First fulfilled all conditions precedent, stating that Hinsdale First had an obligation to timely negotiate the checks and its failure to do so breached the material terms of the agreement. They also claimed that they did not default under the agreement and had no obligations to Hinsdale First due to its breach.

¶ 15 Defendants also denied that they were liable as guarantors: "The plaintiff has failed to first pursue the company before making claims versus Pierre and Hana Lang who as officers of a company are not liable for the company's alleged obligations and never agreed to guarantee but for the checks to be negotiable precisely on their due dates as called for in the agreement." Defendants requested the court to enter judgment in their favor and dismiss Hinsdale First's complaint "as it is based on false allegations."

¶ 16 Attached to defendants' answer were two bank statements showing that the bank account for LKJ Enterprises d/b/a Hana K had a balance of $100,281.87 on April 30, 2008, and a balance of $21,408.44 on May 31, 2008. There was also a bank statement for My Favorite Coat Company d/b/a Hana K showing that on July 31, 2008, the account had no funds.[7] They also included canceled checks showing that checks from "Hana K My Favorite Coat Company" dated January 20, 2008, and February 20, 2008, were paid to Hinsdale First on March 10, 2008.

[7] While LKJ was the tenant named in the settlement agreement, all four of the checks in the record were written from My Favorite Coat Company's bank account.

¶ 17 On February 2, 2010, the court entered a case management order stating that non-opinion written discovery was to be completed by May 1, 2010. On May 3, 2010, the court entered a case management order stating that non-opinion written discovery was to be completed by June 10, 2010. On June 29, 2010, the trial court set the case for jury trial on August 30, 2010; Hinsdale First was not present in court on June 29, 2010.

¶ 18 According to a bystander's report submitted by defendants and approved by Hinsdale First's attorney and Judge Charles Winkler, on August 30, 2010, defendants stated that they were ready for trial, but Hinsdale First replied that it was not. Hinsdale First's attorney stated that his absence on June 29 was an " 'oversight' " and that he was not ready for trial. In response, defendants requested an immediate dismissal with prejudice. Judge Winkler set a new trial date for September 30, 2010. When defendants asked about their request to dismiss the case, the judge replied, " 'I have set a new date.' " Defendants asked if they could " 'at least' " move up the trial date and the judge told them that they could not if it was a jury trial, but that they could set it for September 15, 2010, if it was a bench trial.

¶ 19 Defendants then waived their right to a jury trial in order to have the case set for trial on September 15.[8] Hinsdale First told the judge that there was outstanding discovery, and the judge responded, " 'Counsel Discovery is closed. You were supposed to be ready for trial today. I have done this against my better judgment, be sure that you are ready for trial on the 15th.' "

[8] The same day, Judge Winkler filed a written order stating that defendants withdrew their request for a jury trial and ordering the matter to proceed as a bench trial, set to begin on September 15, 2010.

¶ 20 On September 15, 2010, Judge Winkler stated that he had a scheduling problem and that all trials set for that day would be assigned to other judges. Judge Winkler transferred the case to the presiding judge of the law division for immediate trial assignment.

¶ 21 Defendants submitted a second bystander's report approved by Judge Thomas Flanagan "as to what the court can recall of it" that stated that on September 15, 2010, the case was assigned to Judge Flanagan for trial, who confirmed that it was a bench trial. Pierre Lang asked " 'for the court's indulgence' " because Hana Lang's " 'mother tongue' " was Hebrew and it might be necessary for Pierre Lang to translate for her. The judge agreed as long as it was acceptable to Hinsdale First; Hinsdale First had no objection.

¶ 22 Defendants objected to " 'the witness and the documents that Plaintiff brought to court today and intends to use in support of his case.' " Defendants further stated that the witness was not disclosed to them in order to depose, the propounded interrogatories were never answered, and the documents were never produced for them to examine.[9] Defendants also stated that Judge Winkler had ordered discovery closed. In response, Hinsdale First stated that the witness was a representative of "the management company,"[10] who brought a file with the company's records. The judge stated that he would allow the witness to testify. Defendants again stated, " 'We

[9] There are no discovery requests from defendants to Hinsdale First in the record. The only discovery request in the record is a "Rule 237 Notice to Produce at Time of Trial" filed by Hinsdale First on September 8, 2010.

[10] The management company was not named, but is likely WexTrust, the company from which defendants claimed My Favorite Coat Company leased the premises.

never deposed this witness, we had no dealings with him, and we never saw the file. Discovery per Judge Winkler was closed and Motion to Barr was not needed.' " The judge replied, " 'Das Ist Alles' " in German and said that defendants' request was denied and that they should " 'move on' " with the trial. Defendants then stated that they wished to exercise their right to a jury trial, and the judge allowed them to do so.

¶ 23 Defendants then told the judge that they had " 'jurisprudence' " that applied to the issue of the liquidated damages sought by Hinsdale First. They requested that " 'it *** be struck from the record and not be given to the jury because it is illegal.' " They asked the judge if they needed to file a written motion and the judge responded that he would take it home overnight and give them his decision the next day. Defendants filed a written motion to bar Hinsdale First's witness and the file prior to the beginning of trial, which was denied.[11]

¶ 24 On September 16, 2010, the judge told defendants that he had read the material they provided concerning liquidated damages and he would " 'let it stand.' " During the trial, when Hinsdale First called its witness to testify, defendants again objected to the witness' testimony because the witness was not previously disclosed; the objection was overruled. The witness had

[11] The record confirms that on September 15, 2010, defendants filed a motion "to compel plaintiff to reply to interrogatories and be barred from using evidence and witness testimony not produced prior to trial. Plaintiff failed to reply to interrogatories. Plaintiff failed to produce witnesses before trial." On the same day, Judge Flanagan denied defendant's motion, including in the order that "the court notes, among other things, the ongoing case management orders entered."

"no direct knowledge of any facts" and defendants objected to the witness' testimony about facts that took place between the management company and defendants, since the witness was not hired by the company until later and so was not present at the time; this objection was also overruled. Defendants asked the witness questions about Rycam and defendants' agreement to share the premises prior to vacating it, and the witness was unable to answer the questions. The witness testified that he knew the answers to other questions that had been asked because " '[t]hat is what the record shows in the company's file.' " The witness testified that he was not employed by the company at the time the file was prepared.

¶ 25 Defendants again raised the issue of liquidated damages being illegal several times, but the judge overruled the objections.

¶ 26 On September 17, 2010, the jury found in favor of Hinsdale First and against defendants and Judge Flanagan entered judgment in the amount of $69,813.74: $19,813.74 for dishonored checks and $50,000 in liquidated damages. Defendants filed notices of appeal on October 15, 2010.[12]

¶ 27 ANALYSIS

¶ 28 On appeal, defendants argue that the trial court erred by: (1) permitting Hinsdale First's undisclosed witness to testify and (2) allowing Hinsdale First to proceed on its claim for liquidated damages. We consider each of defendants' arguments in turn.[13]

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[12] Defendants each filed separate notices of appeal, so there are two case numbers associated with this appeal that have been consolidated.

[13] Hinsdale First has not filed a response brief, so we consider this appeal based on

¶ 29 I. Witness Testimony

¶ 30 Defendants claim that the trial court should not have permitted Hinsdale First to present the testimony of its witness at trial. Defendants argue that the witness was never disclosed to them, so they had no opportunity to depose him or prepare for his testimony at trial. They also argue that the trial court should not have permitted the witness to testify after the previous judge had informed Hinsdale First that discovery was closed.

¶ 31 "It is within the trial court's discretion to decide whether evidence is relevant and admissible, and a court's determination on that issue will not be reversed absent a clear abuse of discretion." *In re Marriage of De Bates*, 212 Ill. 2d 489, 522 (2004) (considering whether the trial court erred in permitting an undisclosed witness to testify). A trial court abuses its discretion "only where the trial court's decision is ' " 'arbitrary, fanciful or unreasonable' " ' or where no reasonable man would take the trial court's view." *People v. Morgan*, 197 Ill. 2d 404, 455 (2001) (quoting *People v. Illgen*, 145 Ill. 2d 353, 364 (1991), quoting *People v. M.D.*, 101 Ill. 2d 73, 90 (1984)).

¶ 32 Upon written interrogatory, a party is required to disclose witnesses who will testify at trial and, in the case of a lay witness as in the case at bar, must identify the subjects on which the witness will testify. Ill. S. Ct. R. 213(f) (eff. Jan. 1, 2007). If the party unreasonably fails to comply with rules governing discovery, the trial court may impose one of a number of sanctions, including barring the witness from testifying. Ill. S. Ct. R. 219(c) (eff. July 1, 2002). " 'The question of the appropriate sanction, if any, to be employed by the trial court for failure to list a

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defendants' brief and the record on appeal.

witness in response to a proper interrogatory is within the discretion of the trial court.' " *Ashford v. Ziemann*, 99 Ill. 2d 353, 368 (1984) (quoting *Ferraro v. Augustine*, 45 Ill. App. 2d 295, 304 (1964)); see also *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 110 (2004) ("The decision whether or not to impose sanctions lies within the sound discretion of the trial court, and that decision will not be reversed absent an abuse of discretion.").

¶ 33 In the case at bar, defendants claim that Hinsdale First's witness was not disclosed to them and that Hinsdale First never answered the interrogatories propounded by defendants. However, the record contains no discovery requests from defendants, so we are unable to determine whether Hinsdale First violated the discovery rules. Moreover, even if we were to conclude that Hinsdale First violated the rule, the record contains insufficient information for us to determine whether the trial court's failure to bar the witness was an abuse of discretion. In determining whether the witness should have been barred as a sanction for nondisclosure, a court must consider: "(1) the surprise to the adverse party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection to the testimony; and (6) the good faith of the party calling the witness." *Sullivan*, 209 Ill. 2d at 110; see also *Boatmen's National Bank of Belleville v. Martin*, 155 Ill. 2d 305, 314 (1993) (noting that a reviewing court must look to the criteria on which the trial court should rely to determine whether the lower court abused its discretion). In the case at bar, the only facts in the record concerning the witness and his testimony are that (1) he worked for the management company, (2) he began his employment sometime after the events at issue, (3) he was questioned about "dealings" between the management company and defendants, and (4) he was Hinsdale

First's only witness. The record contains no further information about the contents of the testimony or any other evidence or witnesses presented by either party. Thus, there is no way for us to determine whether any of the factors listed in *Sullivan* would support the exclusion of the witness.

¶ 34 As the appellants in the case at bar, defendants have the burden of providing a sufficiently complete record to enable us to review their claims. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). Consequently, in any situation where the record is insufficient, we must presume that the trial court acted in conformity with the law and had a sufficient factual basis for his decisions, and any doubts that may arise from the incompleteness of the record will be resolved against defendants. *Foutch*, 99 Ill. 2d at 391. Therefore, we find that the trial court did not abuse its discretion by failing to bar the witness testimony as a sanction for Hinsdale First's discovery violation.

¶ 35 Defendants also claim that the trial court abused its discretion in permitting the witness to testify after the previous judge in the case had ordered discovery closed. Defendants cite *Balciunas v. Duff*, 94 Ill. 2d 176 (1983), as support for their argument, claiming that there were no additional facts or changed circumstances that warranted Judge Flanagan's decision to permit Hinsdale First's witness to testify. *Balciunas* states that "once the court has exercised its discretion, that ruling should not be reversed by another member of the court simply because there is disagreement on the manner in which that discretion was exercised. Rather, a successor judge, before whom the case has been assigned, should revise or modify previous discovery rulings only if there is a change of circumstances or additional facts which warrant such action."

Balciunas, 94 Ill. 2d at 188. The *Balciunas* court noted that such a rule "minimizes the potential for 'judge shopping' and preserves the orderly and efficient functioning of the judicial system." *Balciunas*, 94 Ill. 2d at 188.

¶ 36 We find *Balciunas* to be inapplicable to the case at bar. Here, the bystander's report indicates that on August 30, 2010, before Judge Winkler, defendants waived their right to a jury trial in order to set the case for trial on September 15, 2010. Hinsdale First stated that " 'we still have outstanding discovery,' " and Judge Winkler responded, " 'Counsel Discovery is closed. You were supposed to be ready for trial today. I have done this against my better judgment, be sure that you are ready for trial on the 15th.' " Defendants claim that Judge Winkler's statement that " '[d]iscovery is closed' " is the exercise of discretion that prevented Judge Flanagan from permitting the witness to testify. We do not read Judge Winkler's statement to be the type of ruling at issue in *Balciunas* but merely a response to Hinsdale First's comment about outstanding discovery. Moreover, even if it was such an exercise of discretion, the issue before Judge Flanagan was quite different than that before Judge Winkler.

¶ 37 On the day of trial, Hinsdale First arrived with a witness that defendants claim was never disclosed. In that case, as noted above, Hinsdale First would have committed a discovery violation and Judge Flanagan was required to determine what sanctions, if any, would be imposed. The question of whether the witness would be permitted to testify is consequently a completely different issue than setting a trial date or even ordering discovery closed. Thus, we cannot say that the fact that Judge Winkler stated that discovery was closed in any way prevented Judge Flanagan from permitting the witness to testify.

¶ 38 II. Liquidated Damages

¶ 39 Defendants also claim that the trial court erred by permitting Hinsdale First to proceed on its claim for liquidated damages because the provision in the settlement agreement allowing for liquidated damages was an unenforceable penalty. In the case at bar, section 2(e) of the settlement agreement provided:

> "e. If Tenant fails to timely tender possession of the Premises to Landlord pursuant to paragraph 2(a), fails to comply with any of its obligations under this Agreement, or any of the checks tendered to Landlord under paragraph 2(c) above are returned for non-sufficient funds, Tenant agrees and acknowledges that (i) Tenant shall immediately be liable to pay Landlord the additional sum of $50,000.00 as liquidated damages, and not a penalty. The Parties agree and acknowledge that the amount of damages that Landlord will incur as a result of Tenant's breach is difficult to ascertain and that such liquidated damages are reasonably related to damages Landlord is likely to incur; and (ii) the total settlement amount set forth in Paragraph 2(c) shall be immediately accelerated and Tenant shall immediately owe and pay Landlord $59,441.24, less any amounts paid by Tenant under Paragraph 2(c) and (iii) Tenant shall pay Landlord any and all reasonable attorneys fees, costs and expenses incurred in enforcing

any of Landlord's rights and remedies under this Agreement."

¶ 40 The question of whether a contractual provision is a valid liquidated damages clause or a penalty clause is a question of law that we review *de novo*. *Med+Plus Neck & Back Pain Center, S.C. v. Noffsinger*, 311 Ill. App. 3d 853, 860 (2000). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 41 Courts will generally find a liquidated damages provision to be valid and enforceable where: "(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." *Grossinger Motorcorp, Inc. v. American National Bank & Trust Co.*, 240 Ill. App. 3d 737, 749 (1992) (citing *Curtin v. Ogborn*, 75 Ill. App. 3d 549, 554-55 (1979), and *Hayden v. Keepper-Nagel, Inc.*, 62 Ill. App. 3d 828, 831 (1978)). Additionally, "[t]he damages must be a specified amount for a specific breach, not a penalty to punish for nonperformance or as a means to secure performance." *Grossinger*, 240 Ill. App. 3d at 750 (citing *Builder's Concrete Co. of Morton v. Fred Faubel & Sons, Inc.*, 58 Ill. App. 3d 100, 107 (1978)). There is no fixed rule to apply to all liquidated damages provisions, and each must be decided on its own facts and circumstances. *Dallas v. Chicago Teachers Union*, 408 Ill. App. 3d 420, 424 (2011).

¶ 42 In the case at bar, we agree with defendants that the provision at issue in the settlement agreement was a penalty and not a valid liquidated damages clause. The parties agreed in the

settlement agreement that LKJ was in default in the amount of $59,441.24 at the time of entering into the agreement and further agreed that LKJ should pay this amount through six checks, each in the amount of $9,906.87. However, if any of the checks was returned due to insufficient funds, Hinsdale First would be entitled to $50,000 in addition to the remaining balance of the default. This amount does not bear any relation to the amount of damages that could be sustained.

¶ 43 In the case at bar, since the document at issue is a settlement agreement, we must consider whether the remaining balance of the default plus the additional $50,000 reasonably approximates the amount of damages that Hinsdale First would have received had it litigated the matter. See *Medstrategies Consulting Group, Ltd. v. Schmiege*, 382 Ill. App. 3d 505, 508 (2008). We find no basis for finding that it does. The agreement states that it was intended to settle any controversies between the parties relating to LKJ's "fail[ure] to pay rent and other charges due and owing under the Lease," and the parties agreed on the monetary amount owing at the time of the settlement agreement. Thus, the damages at issue in the underlying lawsuit would have been for the amounts due under the lease, which the parties already agreed was $59,441.24 and which defendants remained obligated to pay under the settlement agreement.

¶ 44 Moreover, those monetary damages likely would have been the sole damages available to Hinsdale First. LKJ agreed under the agreement to immediately vacate the premises, subject to its sublease agreement with Rycam, the new tenant. Additionally, Hinsdale First had already found a new tenant and had leased the premises at the time of entering into the settlement agreement. Thus, there is no issue of Hinsdale First being unable to relet the premises and any

costs of procuring Rycam as a tenant would have been known at the time of the execution of the settlement agreement. The agreement does not reveal any basis for tying the additional $50,000 to the breach of lease suit. Accordingly, we cannot find that the provision allowing for an additional $50,000 in the case of a breach of the agreement relates to damages under the agreement.

¶ 45 Furthermore, there is also no indication that the amount of damages would have been difficult to ascertain. As noted, the primary source of damages would have been the amount that defendants owed under the lease. The parties in the settlement agreement agreed on the amount owed. Even if the parties disagreed as to the exact amount owed, the amount of damages could nevertheless be easily ascertained by examining the lease. While the agreement states that "the amount of damages that Landlord will incur as a result of Tenant's breach is difficult to ascertain and that such liquidated damages are reasonably related to damages Landlord is likely to incur," we cannot agree with either statement and instead find that the provision for the additional $50,000 was an unenforceable penalty. Accordingly, we order the amount of the judgment to reduced by $50,000, modifying the judgment to $19,813.74.

¶ 46 CONCLUSION

¶ 47 The trial court did not abuse its discretion in permitting Hinsdale First's witness to testify at trial. However, the liquidated damages clause in the settlement agreement was an unenforceable penalty and should not have been included in the damages calculation.

¶ 48 Affirmed in part and reversed in part as judgment is modified to $19,813.74.