

STATE OF MICHIGAN
COURT OF APPEALS

NORTHPORT CONDOMINIUM
MARINA ASSOCIATION,

UNPUBLISHED
March 21, 1997

Plaintiff-Appellee,

v

No. 188971
Arenac Circuit Court
LC No. 93-004308-CH

KENNETH PINDER and JO RAE PINDER,

Defendants-Appellants.

Before: Fitzgerald, P.J., and MacKenzie and A.P. Hathaway*, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment of foreclosure and an order for the sale of defendants' property should defendants not pay plaintiff \$5,318 plus late fees, delinquent charges, and attorney's fees by September 10, 1995. We affirm.

Plaintiff is a non-profit condominium association that collects fees to maintain the docks in the association. Defendants own twenty-three docks. Plaintiff placed a statutory lien on defendants' property and then filed the present suit to foreclose on the property for the unpaid association fees and late fees. Defendants paid the association fees but claimed that they should not be required to pay the late fees because they were penalties, as opposed to liquidated damages.

Defendants first argue that plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) was defective because (1) the only documentary evidence presented in support of the motion was an affidavit by plaintiff's attorney that was not based on personal knowledge, and (2) the documents referenced in the affidavit were not attached, in violation of MCR 2.119(B)(1). Because defendants failed to challenge the validity of the affidavit below, we decline to review this issue on appeal. *Eastway & Blevins Agency v Citizens Ins Co of America*, 206 Mich App 299, 303; 520 NW2d 640 (1994).

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendants next argue that, procedurally, the grant of summary disposition was improper pursuant to MCR 2.116(C)(9) because defendants properly alleged the affirmative defense that the late fees were penalties. This argument is intertwined with the merits of the issue of whether the late fees were liquidated damages or penalties. Because we find as a matter of law that the late fees were liquidated damages, we do not reverse based on this issue.

In order for the late fees to be liquidated damages, the damages must be uncertain and the late fees must closely approximate the damages. *E F Solomon v Dep't of State Highways & Transportation*, 131 Mich App 479, 483-484; 345 NW2d 717 (1984). Defendants argue that plaintiff's damages are ascertainable in that they should be calculated according to what plaintiff would have earned had it invested the money. Because plaintiff is not in the business of investing money for profit and is in fact a non-profit organization, defendants' method of calculating plaintiff's damages is inappropriate. This Court finds that plaintiff's damages are unascertainable because, unlike lost profits or foregone opportunities, it is difficult to ascertain how much plaintiff is damaged by not having the assessed payments available for use when they are due. Moreover, a \$10 a month late fee is a reasonable assessment of how much it would cost plaintiff administratively for the inconvenience of the late payment and for taking steps to enforce the payment, such as sending overdue bills and extra bookkeeping. We therefore hold that the late fees were not penalties but rather, that they were liquidated damages.

Finally, defendants argue that the late fees are usurious. We disagree. The usury statute, MCL 438.31; MSA 19.15(1), which establishes the legal interest rate that may be charged, is not applicable to a liquidated damages clause. Interest is "a charge for the loan or forbearance of money." *Balch v Detroit Trust Co*, 312 Mich 146, 152; 20 NW2d 138 (1945). A liquidated damages clause, if legitimate, is not a charge for the loan or forbearance of money, but rather is a charge to cover actual expenses engendered by a breach of contract.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Amy P. Hathaway