

**Trustees of Columbia Univ. in the City of N.Y. v  
D'Agostino Supermarkets, Inc.**

2017 NY Slip Op 32887(U)

February 5, 2017

Supreme Court, New York County

Docket Number: 655914/2016

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SALIANN SCARPULLA  
*Justice*

PART 39

-----X  
THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF  
NEW YORK,

Plaintiff,

- v -

D'AGOSTINO SUPERMARKETS, INC.,

Defendant.

INDEX NO. 655914/2016

MOTION DATE 12/19/2016

MOTION SEQ. NO. 001

**DECISION AND ORDER**

-----X  
The following e-filed documents, listed by NYSCEF document number 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

were read on this application to/for Judgment - Summary

Upon the foregoing documents, it is

In this breach of contract action, plaintiff The Trustees of Columbia University in the City of New York ("Trustees of Columbia") moves for summary judgment on its complaint against defendant D'Agostino Supermarkets, Inc. ("D'Agostino"). D'Agostino cross-moves for summary judgment striking the Trustees of Columbia's claim for liquidated and to enter judgment against it in the amount of \$175,751.73 with accrued interest from October 14, 2016.

On or about December 22, 2002, the Trustees of Columbia, a New York corporation and non-profit institution of higher education, entered into a written lease, as modified within and by a separate Rider and as amended by a Commencement Date Agreement dated as of 2004 (collectively, the "Lease") with D'Agostino. Under the Lease, the Trustees of Columbia agreed to lease space located on the ground floor and basement levels of 2828 Broadway in New York, New York (the "Demised Premises") to D'Agostino commencing on August 23, 2003. The Lease expiration date was August 23, 2018.

D'Agostino states that, because of financial difficulties, it requested to Trustees of Columbia that it be relieved of its obligations under the last part of the Lease. On May 27, 2016, with approximately two years remaining on the Lease term, the parties entered into a Lease surrender agreement (the "Surrender Agreement"). The Surrender Agreement provides, in relevant part, that:

In consideration of Landlord entering into this Surrender Agreement, Tenant shall pay to Landlord (i) concurrently herewith an amount equal to Forty-Three Thousand and 00/100 Dollars (\$43,000.00) (the "Initial Surrender Payment"), (ii) on or before June 1, 2016, an additional amount equal to Forty-Three Thousand and 00/100 Dollars (\$43,000.00) (the "Second Surrender Payment") and (iii) on the first day of each month during the period commencing on July 1, 2016, and ending on and including May 1, 2017, Fifteen Thousand Nine Hundred Seventy-Seven and 43/100 Dollars (\$15,977.43) (each such monthly payment described in this clause (iii), a "Monthly Surrender Payment"). Notwithstanding the foregoing, if Tenant (a) fails to pay the Initial Surrender Payment concurrently herewith, (b) fails to pay the Second Surrender Payment on or before June 1, 2016 or (c) fails to make a Monthly Surrender Payment within five (5) business days after Landlord delivers notice to Tenant that such Monthly Surrender Payment is past due, then (x) the aggregate amount of all Fixed Rent, additional rent or other sums and charges due and payable during the term of the Lease shall immediately thereafter become

due and payable by Tenant to Landlord and (y) Tenant shall no longer be entitled to be released and relieved from and against any Released Claims (as defined below).

D'Agostino made the Initial Surrender Payment and the Second Surrender Payment but failed to make the additional Monthly Surrender Payments.

The Trustees of Columbia sent a notice of default to D'Agostino on October 14, 2016 informing D'Agostino that it was in default of its obligation to pay the Monthly Surrender Payments. D'Agostino did not cure its default, as set forth in the Surrender Agreement, by paying the Monthly Surrender Payments within five business days of its receipt of the notice of default.

On November 10, 2016, the Trustees of Columbia commenced this action seeking: "the aggregate amount of all Fixed Rent," *i.e.*, \$1,029,969.54, plus interest; additional rent; and water costs.<sup>1</sup> D'Agostino answered the complaint on December 5, 2016, then served an amended answer with counterclaim on December 24, 2016. In its counterclaim, D'Agostino seeks an offset for amounts collected by Trustees of Columbia from its new tenant of the Demised Premises.

On December 30, 2016, D'Agostino tendered the full amount due for the Monthly Surrender Payments under the Surrender Agreement of \$175,751.73 (even though the

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<sup>1</sup> Section 40.01 of the Lease states that D'Agostino's monthly Fixed Rent payments are \$38,147.02. The Lease also requires D'Agostino to pay: (1) additional rent in an amount equal to the difference of the Commercial Portion Taxes payable for the Base Tax Year and the Commercial Portion Taxes payable during the period of June 1, 2016 through August 23, 2018, and (2) for water consumed and all sewer charges and any other related rent, tax, levy, or charge.

Monthly Surrender Payments for January-May 2017 were not yet due). The Trustees of Columbia rejected this payment and pressed for the full amount sought in the complaint.

The parties now cross-move for summary judgment.

### Discussion

A party moving for summary judgment "must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Tompa v. 767 Fifth Partners, LLC*, 113 A.D.3d 466, 470 (1st Dept. 2014). If the movant makes a prima facie showing, then "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *Grasso*, 50 A.D.3d at 545 (citation omitted). In order to defeat a summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980) (citation omitted).

### Breach of Contract

Both parties agree that D'Agostino's initial two payments of \$43,000 under the Surrender Agreement were timely made. It is also undisputed that D'Agostino failed to make the required subsequent Monthly Surrender Payments. Thus, I find that D'Agostino breached the Surrender Agreement. The only remaining issue is whether the liquidated damages provision in the Surrender Agreement is enforceable.

### Enforceability of Liquidated Damages Provision

A liquidated damages provision represents the compensation that the parties agree should be paid for any injury stemming from a breach of their contract. *LeRoy v. Sayers*,

217 A.D.2d 63, 69 (1st Dept. 1995). “Contracting parties may agree to such clauses provided they are neither unconscionable nor contrary to public policy.” *Id.*

Whether a contractual provision constitutes an “enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances.” *JMD Holding Corp v. Congress Financial Corp.*, 4 N.Y.3d 373 (2005); *see also United Tit. Agency, LLC v. Surfside-3 Mar., Inc.*, 65 A.D.3d 1134, 1135 (2d Dept. 2009); *555 West John Street, LLC v. Westbury Jeep Chrysler Dodge, Inc.*, 49 N.Y.S.3d 903, 905 (2d Dept. 2017) (finding that the issue of a liquidated damages clause’s enforceability is “readily determinable as a matter of law”). Significantly, “where there is doubt as to whether a provision constitutes an unenforceable penalty or a proper liquidated damage clause, it should be resolved in favor of a construction which holds the provision to be a penalty.” *Willner v. Willner*, 145 A.D.2d 236, 240–241 (2d Dept. 1989).

The burden is on the party challenging a liquidated damages provision to establish “either that actual damages were readily ascertainable at the time the contract was entered into or that the liquidated damages were conspicuously disproportionate to foreseeable or probable losses.” *United Tit. Agency, LLC*, 65 A.D.3d at 1135; *see also 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Ass’n., Inc.*, 24 N.Y.3d 528, 536 (2014). Here, D’Agostino asserts that the liquidated damages clause is unenforceable on both grounds.

First, D’Agostino states that the clause is unenforceable because the Trustees of Columbia’s “actual damages were ascertainable at the time it executed the Surrender

Agreement.” D’Agostino claims that at the time the Surrender Agreement was being negotiated by the parties, the Trustees of Columbia had either already re-leased the Demised Premises or reached an agreement to re-lease the Demised Premises.

D’Agostino submits the affidavit of Robert Del Sole (“Del Sole”), the Senior Director of Store Operations for D’Agostino. Del Sole states that, in May 2016, he was personally involved in discussions with Anil D. Chandra (“Chandra”), the Assistant Director of Acquisitions and Leasing at Columbia University, regarding D’Agostino’s surrender of the Demised Premises. Del Sole further avers that on May 23, 2016, he received an email from Chandra asking if certain D’Agostino equipment would be left in the Demised Premises because the “new tenant wants to know.”<sup>2</sup>

The Trustees of Columbia argues that the Surrender Agreement’s liquidated damages provision, which calls for “the aggregate amount of all Fixed Rent,” additional rent and Water Costs specified in the original Lease, is reasonable because damages were not readily ascertainable at the time of the Surrender Agreement’s execution. David M. Grill, the Trustee of Columbia’s counsel, contends that “[w]hile the [Trustees of Columbia] may have begun the task of seeking a new tenant for the premises in question prior to May 27, 2016, it did not complete negotiations and execute a new lease for the Building with the subsequent tenant until June.”

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<sup>2</sup> Chandra submits an affidavit in which he states: “I have reviewed the May 23, 2016 e-mail annexed to Mr. Del Sole’s affidavit. The so-called “new tenant” that I referred to in that e-mail was, at the time, only a prospective tenant, not an actual tenant pursuant to an executed lease. In retrospect, I should have been more careful with my choice of words in describing that prospective tenant.”

Chandra also claims that, in addition to the \$175,751.73 that D'Agostino failed to pay under the Surrender Agreement, the Trustees of Columbia was also damaged by: 1) "the downtime and free rent afforded to its new tenant (totaling in excess of \$300,000.00)," 2) "the unanticipated obligation to pay commission fees in excess of \$200,000.00 in 2016," and 3) "the incurrence of attorney's fees in connection with [D'Agostino's] surrender of the Building, thus far totaling nearly \$90,000.00."

When the Lease was negotiated in 2002, the Trustees of Columbia might arguably have lacked foresight as to its actual damages in the event of D'Agostino's breach of the Lease during its fifteen-year term. However, this action is based on a breach of the *Surrender Agreement*, not a breach of the Lease.

When the parties executed the Surrender Agreement in May 2016, one month before the new tenant re-let the Demised Premises, the Trustees of Columbia plainly had sufficient information to make a reasonable calculation of its potential damages from D'Agostino's early surrender of the Lease, including the broker's commission, attorneys' fees, and other costs it would incur in reletting the Demised Premises. The Trustees of Columbia then deemed \$261,751.73 (the amount due under the Surrender Agreement) to be fair compensation sufficient to allow D'Agostino to surrender the Lease.

Contrary to the Trustees of Columbia's assertion, damages at the time of the Surrender Agreement were ascertainable. The Surrender Agreement's liquidated damages clause, which is not related in any way to the total amount due under the Surrender Agreement, was therefore plainly a penalty aimed at ensuring D'Agostino's performance via threat of an outsized damages award. *See Quaker Oats Co. v. Reilly,*



274 A.D.2d 565 (2d Dept. 2000) (holding that damages from breach were easily ascertainable thus rendering the liquidated damages clause an unenforceable penalty because “its purpose was to secure performance by threat of a large payment rather than to provide a reasonable assessment of probable damages”).

D’Agostino also argues that the liquidated damages clause is unenforceable because it is conspicuously disproportionate to the Trustees of Columbia’s foreseeable losses. If the amount of the liquidated damages clause is “grossly disproportionate” to the actual amount of damages, then the clause is a penalty and will not be enforced by a court. *G3-Purves Street, LLC v. Thomson Purves, LLC*, 101 A.D.3d 37, 42 (2d Dept. 2012).

D’Agostino argues the “magnitude of the claimed liquidated damages of \$1,020,125.15, when measured against the default, which is late payment of six (6) monthly installments out of eleven (11) monthly installments of \$15,977.43, totaling \$175,751.73 to be paid by June of 2017, speaks for itself.” D’Agostino concludes that the liquidated damages clause is actually a penalty in that it would require it to pay “over 2000% per annum based upon a very short delay in payment of an agreed debt of \$175,751.73.”

The Trustees of Columbia argues that the Surrender Agreement’s liquidated damages provision was not “conspicuously disproportionate” to the losses because it “simply acted to put the parties back to their pre-Surrender Agreement positions in the event that [D’Agostino] breached that agreement.”

The Surrender Agreement's liquidated damages provision, the enforcement of which would result in an award of five and a half times the amount that the Trustees of Columbia would have received if the Surrender Agreement had been fully performed, does not reasonably relate to the potential harm to the Trustees of Columbia engendered by D'Agostino's default thereunder. *See Tullett Prebon Fin. Servs. v. BGC Fin., L.P.*, 111 A.D.3d 480, 481 (1st Dept. 2013) (court held that arbitrator's determination that a damages fee that was "at least 32 times" more than the cost of the data that was appropriated did not reasonably relate to probable loss was supported by the evidence and showed that the fee was an unenforceable penalty because it required "'in the event of contractual breach, the payment of a sum of money grossly disproportionate to the amount of actual damages.'").

I have considered the Trustees of Columbia's remaining arguments and find them unavailing.

Because the liquidated damages clause of the Surrender Agreement constitutes an impermissible penalty, the Trustees of Columbia's motion for summary judgment to enforce this provision is denied and D'Agostino's motion for summary judgment to strike the provision is granted. *See 555 West John Street, LLC*, 49 N.Y.S.3d at 905 (finding that because the parties' liquidated damages clause was an unenforceable penalty, the lower

court “should have granted the defendant’s cross motion for summary judgment dismissing so much of the complaint as was to enforce the liquidated damages clause.”<sup>3</sup>

The Trustees of Columbia, however, is not without remedy. D’Agostino must pay the agreed upon sum for the Monthly Surrender Payments, which will put the Trustees of Columbia in the exact position it would have been had D’Agostino fully performed under the Surrender Agreement. Lastly, having granted summary judgment in favor of D’Agostino, its counterclaims are moot, and accordingly, are dismissed.

In accordance with the foregoing, it is

ORDERED, that The Trustees of Columbia University in the City of New York’s motion for summary judgment on its complaint against defendant D’Agostino Supermarkets, Inc. is denied; and it is further

ORDERED, that defendant D’Agostino Supermarkets, Inc.’s cross-motion for summary judgment against The Trustees of Columbia University in the City of New York is granted; and it is further

ORDERED, that plaintiff The Trustees of Columbia University in the City of New York is awarded judgment against defendant D’Agostino Supermarkets, Inc. in the amount of \$175,751.73, plus interest from October 14, 2016 to the date judgment is entered; and it is further

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<sup>3</sup> Consequently, the Trustees of Columbia’s motion for summary judgment on the second and third causes of action for additional rent and Water Costs pursuant to the liquidated damages clause is also denied.

ORDERED, that the counterclaim of defendant D'Agostino Supermarkets, Inc. is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

2/5/2017  
DATE

*Saliann Scarpulla*  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	DO NOT POST		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE