DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ACCELERATED ASSETS, LLC, an Arizona limited liability company, Plaintiff-Appellee, v. ALEXANDER PROPERTIES, INC. a Virginia corporation; WAYNE D. ALEXANDER and ANNE C. ALEXANDER, husband and wife; JAY FULK, a single man, Defendants-Appellants.	1 CA-CV 10-0203 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause No. CV-2007-1023

The Honorable James Chaves, Judge (Retired)
The Honorable Lee Frank Jantzen, Judge

AFFIRMED

Pak & Moring PLC
by Thomas S. Moring
Trisha L. Baggs
Attorneys for Appellants Scottsdale

Clark Hill PLC
by Mark S. Sifferman
Kevin J. Sierka
Attorneys for Appellee Scottsdale

W E I S B E R G, Judge

¶1 Alexander Properties, Inc., Wayne D. Alexander, Anne C. Alexander, and Jay Fulk appeal from the judgment awarded to Accelerated Assets ("Accelerated") in the latter's breach of contract action. They challenge enforcement of a fee of $20.00 per day provided by the contract and the resulting calculation of Accelerated's damages. For reasons that follow, we affirm.

BACKGROUND

¶2 Alexander Properties ("Alexander") was in the business of selling timeshares in a resort near Basye, Virginia. To purchase a timeshare interest, a buyer who did not pay in full could make a cash down payment and sign a promissory note for the balance due, payable to Alexander. A deed of trust encumbering the timeshare interest secured repayment of the note. In November 2000, Accelerated offered to purchase promissory notes worth approximately $1.16 million from Alexander by paying 90% of the outstanding principal balance of the notes. Alexander warranted that each note was current (i.e., "not more than one monthly payment unpaid") as of the closing date. Alexander also agreed that it would "repurchase any defective Promissory Notes secured by Deeds of Trust sold to [Accelerated] hereunder promptly on notice thereof from [Accelerated] at a price equal to the outstanding principal balance plus accrued interest [on the notes] . . . multiplied by 0.9000% [sic]." Further, Alexander agreed that as to any

promissory note which had "one or more payments more than sixty (60) days past the due date," Alexander "if so notified in writing, [would] repurchase the promissory Notes . . . at a price equal to the outstanding principal balance of the Promissory Notes . . . discounted by the Discount Factor and any commissions plus accrued but unpaid interest within thirty (30) days of written notification to [Alexander]."

¶3 In lieu of repurchase, however, Alexander could "substitute another current Promissory Note . . . of satisfactory quality to [Accelerated] at full value of the remaining balance on said Promissory Note. *If elected, said substitution shall occur within thirty (30) days of written notification to [Alexander]*. (Emphasis added.) Alexander also agreed to *"pay to [Accelerated] the sum of twenty dollars ($20.00) per day for each Promissory Note . . . that is not repurchased on or before the 31st day following notification* of the repurchase requirement until repurchased." (Emphasis added.) Finally, "any differences in value [would] be handled by credit carried until capable of being swapped." The three individual defendants guaranteed Alexander's performance of the agreement.

¶4 Accelerated retained Equiant Financial Services to send invoices to note makers, to receive payments, to send past due notices, and to provide accounting services. Each week

Equiant generated a “Swap Report” and a “Detailed Aging Report,” which showed the remaining principal balance on each note that Accelerated had purchased and the date the next payment was due. Accelerated in turn sent the weekly reports to Alexander.

¶5 After Accelerated’s purchase of the notes, some of the note makers failed to make timely payments. Alexander alleges that it substituted other notes that were not in default for those in default but does not state precisely when it swapped the individual notes. The parties agree that the required substitution was based on the dollar amount of the defaulted notes rather than simply the number of notes.

¶6 In 2007, Accelerated filed suit against Alexander and the guarantors alleging that Alexander had neither repurchased certain defaulted promissory notes nor substituted performing notes in breach of the agreement, which entitled Accelerated to damages in the amount of the repurchase price of each note plus $20.00 per day for each day after the thirty-day notice that Alexander had not replaced or repurchased the specific defaulted notes.

¶7 After Alexander answered, Accelerated moved for summary judgment and asked for damages of $619,117.63 as of October 22, 2007. In an attached affidavit, Tom Balames, a member of Accelerated, stated that when Alexander did not timely repurchase defaulted notes, Accelerated incurred “additional

servicing and collection costs." He stated that these extra costs were "not recovered from the interest accruing" on the notes (which also is in default) and that the $20.00 "serve[d] as partial compensation" for its additional costs. In its reply, Accelerated noted that the presence of defaulted notes in its portfolio hampered its ability to borrow funds to run the business.

¶8 In its response, Alexander stated that in April and December 2006, it had replaced the non-performing notes but did not assert that it had replaced each nonperforming note within thirty days of receiving notice that the note was delinquent. Alexander argued, however, that Accelerated's failure to timely and correctly service the notes had caused some notes to go into default and that the $20.00 daily charge was an unenforceable penalty rather than a reasonable liquidated damage provision.

¶9 After striking hearsay portions of an affidavit submitted by Alexander, Judge Chavez granted summary judgment in part to Accelerated. He ruled that the $20.00 daily fee related to extra costs testified to by Accelerated employees and that Alexander had not refuted the testimony. After a bench trial to determine damages, Judge Chavez entered judgment for Accelerated in the amount of $657,145.63 and awarded Accelerated attorney's fees in the amount of $30,869.00.

¶10 Alexander moved for a new trial and alleged that the damages were excessive and unsupported by the evidence. Because Judge Chavez had retired, Judge Jantzen issued an order denying the motion. Alexander timely appealed from the order denying a new trial.

DISCUSSION

¶11 Alexander contends that the $20.00 per day penalty provision is unenforceable and that it was entitled to a new trial. Whether a particular contract provision constitutes a penalty is a question of law for the court. *Pima Sav. & Loan Ass'n v. Rampello*, 168 Ariz. 297, 301, 812 P.2d 1115, 1119 (App. 1991). Moreover, when contract terms devised by the parties are clear and unambiguous, we attempt to give them effect. *Hadley v. Sw. Properties, Inc.*, 116 Ariz. 503, 506, 570 P.2d 190, 193 (1977); *Grubb & Ellis Mgmt. Serv.s, Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 86, ¶ 12, 138 P.3d 1210, 1213 (App. 2006). We will not "alter, revise, modify, extend, rewrite or remake an agreement" the parties have made for themselves. *Goodman v. Newzona Inv. Co.,* 101 Ariz. 470, 472, 421 P.2d 318, 320 (1966). Thus, if the parties provided for liquidated damages, and the damages do not constitute a penalty, we will give effect to their agreement as written. *Roscoe-Gill v. Newman*, 188 Ariz. 483, 485, 937 P.2d 673, 675 (App. 1996).

¶12 Our courts have acknowledged that a liquidated damages provision is "an economical alternative to the costly and lengthy litigation involved in a conventional breach of contract action, and efforts by the contracting parties to avoid litigation and to equitably resolve potential conflicts through the mechanism of liquidated damages should be encouraged." *Pima Sav. & Loan,* 168 Ariz. at 299, 812 P.2d at 1117 (citing Restatement (Second) of Contracts § 356, comment a (1981)). But, although the parties may agree on the matter of damages in advance of a breach, the Restatement (Second) of Contracts § 356 also takes the position that contracting parties may not impose a penalty for a breach because contract remedies are intended to offer compensatory rather than punitive relief. *Id.* We adopted this view in *Rampello,* and held that punishing a party "for having broken [a] promise has no justification on either economic or other ground[s] and a term providing such a penalty is unenforceable" as a matter of public policy." *Id.* at 299-300, 813 P.2d at 1117-18 (citing Restatement § 356). We also held that "[t]he difficulties of proof of loss are to be determined at the time the contract is made and not at the time of the breach." *Id*. at 300, 812 P.2d at 1118.

¶13 Alexander argues on appeal that the $20.00 daily charge is a penalty because it was a fixed amount not tied to the extent of the breach, that the charge did not reasonably

approximate the just compensation Accelerated expected from the contract, that the actual injury caused by a breach was easily calculable, and that the charge was grossly disproportionate to the actual damages. It cites *Miller Cattle Co. v. Mattice*, 38 Ariz. 180, 190, 298 P. 640, 643 (1931), which held that we should interpret a liquidated damage provision in light of the surrounding circumstances and consider whether payment is "fixed and definite" regardless of the magnitude of the breach.[1]

¶14 In addition to the fixed nature of damages, in *Larson-Hegstrom & Assoc.s, Inc. v. Jeffries*, 145 Ariz. 329, 333, 701 P.2d 587, 591 (App. 1985),[2] we noted that the Restatement mentions two factors that shape a determination of whether a provision constitutes a reasonable liquidated damage clause. First, "the amount fixed . . . must be a reasonable forecast of just compensation for the harm that is caused by the breach [and] . . . the harm that is caused by any breach must be one

[1]Although a fixed daily dollar amount, the amount of late fees generated by Alexander's failure to timely either repurchase or swap the delinquent accounts was not fixed in advance and did vary over time. Furthermore, Alexander was in control of the fees and could stop their accretion by promptly either swapping or repurchasing the delinquent notes.

[2]Section 356 states: "(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."

that is incapable or very difficult of accurate estimation." Restatement § 356. After applying those factors in *Jeffries*, we upheld a contract provision negotiated by sophisticated parties that required payment of six percent of the gross sales price for breach of a real estate listing agreement. *Id*. at 333-34, 701 P.2d at 591-92. In that context, the clause was a reasonable forecast of compensation for the harm, and the value of the lost opportunity to present a qualified buyer was difficult to determine. *Id*. at 334, 701 P.2d at 592.

¶15 Conversely, in *Aztec Film Prod.s, Inc. v. Quinn*, 116 Ariz. 468, 470, 569 P.2d 1366, 1368 (App. 1977), we held that although a defendant's acceptance of work and receipt of $1,652.02 breached a non-compete clause in his employment contract, his forfeiture of $40,000.00 was so excessive compared to the actual damages and "disproportionate to any possible loss" that it was an unenforceable penalty.

¶16 Here, in explaining the charge of $20.00 per day, Balames testified in deposition that when Alexander did not swap a performing note for a non-performing one, "it create[d] tremendous extra work for us" such as "phone calls to the developer [and] a lot more work [in] dealing with our servicer." Thus, aside from the note maker's delayed payment, which might not be brought current, it was uncertain when or whether Alexander would fulfill its obligation to repurchase or swap the

note, making it impossible for Accelerated to accurately estimate the harm caused by Alexander's breach.

¶17 Balames also testified that because Accelerated could only borrow against performing notes, the presence of non-performing notes on its books limited its ability to borrow funds. Trying to calculate in advance the actual dollar amount of harm caused by this circumstance would be largely speculative. In response, Alexander offered no controverting evidence of a more reasonable forecast of the harm resulting from its failure to timely repurchase or swap non-performing notes. Instead, it offered the testimony of Stephen Maguigan about the amounts of principal and interest that Accelerated had collected on the 138 original notes and on the 158 replacement notes. That testimony did not address Alexander's failure to timely repurchase or swap the non-performing notes. Maguigan also testified that he did not understand the weekly swap reports he received and quit reviewing them because they showed balances in excess of $500,000.00. The court certainly could regard Maguigan's testimony as being unresponsive and not on point.

¶18 Accordingly, we cannot conclude as a matter of law that the $20.00 per day charge Alexander incurred by failing to promptly either repurchase or replace a nonperforming note was grossly disproportionate to the amounts due. Alexander received

notice from Accelerated about the overdue notes and had an opportunity to repurchase or replace notes so as to avoid the $20.00 daily fee. Therefore, we affirm the superior court's conclusion that the liquidated damage provision was enforceable as a matter of law.

¶19 Alexander also argues that the superior court abused its discretion in denying the motion for new trial. We will not overturn the superior court's ruling absent a clear abuse of discretion. *Herberman v. Bergstrom*, 168 Ariz. 587, 590, 816 P.2d 244, 247 (App. 1991).

¶20 Alexander cites several provisions of Arizona Rule of Civil Procedure 59(a) to support its motion. It contends first that the damages awarded were excessive and punitive. We have disposed of that argument above by concluding that the liquidated damages clause was not punitive. Furthermore, part of Accelerated's expected return on its investment may have included damages for Alexander's failure to timely replace or repurchase delinquent notes; the fact that Accelerated received additional funds for Alexander's late performance does not necessarily indicate that Accelerated's actual return exceeded what it had expected. In any event, enforcing the damages clause is not grounds for a new trial.

¶21 Alexander next argues that Accelerated failed to reconcile its proof of damages with that offered by Alexander

and thus that the court failed to require Accelerated to meet its burden to prove its damages with reasonable certainty, citing *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, ¶ 30, 83 P.3d 1103, 1111 (App. 2004). Accelerated's employees did explain and illustrate how they calculated with reasonable certainty Accelerated's damages. If Alexander disagreed with the calculation, it could have shown how the calculation was incorrect. Instead, Maguigan calculated what Accelerated would have received had all of the promissory notes been timely paid. That amount was not helpful because not all of the notes were timely paid, and Alexander did not timely repurchase or replace the delinquent notes. The contract provided for damages if those contingencies arose and specified how the resulting damages would be calculated.

¶22 Finally, Alexander asserts that the amount of damages is not supported by the evidence at trial because Maguigan testified that Alexander provided replacement notes to Accelerated with principal balances of $845,221.65 but the swap report showed receipt of only $509,834.53 in replacement notes. Alexander's counsel elicited from Hubbell, Accelerated's portfolio manager, the latter figure on cross-examination and asked no additional questions. If the swap report figure were incorrect, counsel could have sought further explanation.

¶23 The court then asked Hubbell about her earlier testimony of amounts owed, and she said that because Alexander could choose how to "make good on delinquent accounts," if Alexander had repurchased the notes, it would have cost less than if Alexander had swapped them. The fact that Maguigan calculated a different number than Hubbell does not undermine the court's ruling, which apparently accepted Hubbell's opinion. Hubbell had a degree in accounting and a variety of work experience. Alexander did not challenge her expertise or qualifications. Maguigan, on the other hand, was not an accountant, and he confessed that he did not understand the swap reports and stopped reading them. The trial court acted within its discretion when it accepted Hubbell's opinion and rejected Maguigan's. We cannot say that the trial court clearly abused its discretion in denying the motion for new trial.

CONCLUSION

¶24 For the reasons discussed, we find no error in the superior court's conclusion that the $20.00 per day charge was not a forbidden penalty and no abuse of discretion in denial of Alexander's motion for new trial. We affirm the judgment in favor of Accelerated.

¶25 Accelerated has requested an award of attorney's fees incurred on appeal pursuant to the personal guaranty signed by the individual defendants. It also argues that although the

agreement it executed with Alexander Properties, Inc. contained no attorney's fee provision, this dispute arose out of contract and thus that fees may be awarded pursuant to Arizona Revised Statutes section 12-341.01 (2003).

¶26 The guaranty states that the individuals, Wayne D. Alexander, Anne C. Alexander, and Jay Fulk jointly and severally unconditionally guaranteed "punctual payment, performance and discharge of all debts obligations and liabilities of Alexander Properties, Inc." They also agreed "to pay all costs and expenses incurred by Accelerated Assets, LLC in attempting to enforce the continuing obligations of performance" under the agreement "including . . . reasonable legal fees." Accordingly, we award reasonable attorney's fees and costs to Accelerated subject to its compliance with Arizona Rule of Civil Appellate Procedure 21.

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SHELDON H. WEISBERG, Judge

CONCURRING:

_____
PHILIP HALL, Presiding Judge

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PETER B. SWANN, Judge