

**DDR Ontario Plaza, LLC v Prime Communications of
N.Y. LLC**

2012 NY Slip Op 32605(U)

October 9, 2012

Supreme Court, Wayne County

Docket Number: 72456/2012

Judge: Dennis M. Kehoe

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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

DDR ONTARIO PLAZA, LLC,

Plaintiff,

-vs

PRIME COMMUNICATIONS OF NEW YORK,
LLC, d/b/a PRIME MOBILE,

Defendant.

DECISION

Index No. 72456

2012

The Brocklebank Firm
Derek G. Brocklebank, Esq., of Counsel
Attorney for the Plaintiff

Goldberg Segalla, LLP
John M. Hanna, Esq., of Counsel
Attorney for the Defendant

The Defendant (hereinafter "Prime") has moved pursuant to CPLR §3212 for an order granting partial summary judgment against the Plaintiff (hereinafter "DDR"). The Defendant maintains that the liquidated damages and the late fee provisions of the commercial lease between the parties constitute a penalty, and as such are unenforceable as a matter of law. DDR has opposed the motion.

DDR, the owner of Tops Plaza in Ontario, New York, and Prime, a business engaged primarily in the retail sale of cellular phones and

accessories, are parties to a commercial lease agreement dated July 21, 2009, whereby Prime agreed to rent premises located on Furnace Road, Ontario, New York from DDR for a term of three (3) years, at the rate of \$1,360.00 per month. The lease agreement also contains the following two provisions:

Late Fee Provision

“Tenant’s failure to pay Rent, Additional Rent, or any other Lease costs when due under this Lease may cause Landlord to incur unanticipated costs. The exact amount of such costs is impractical or extremely difficult to ascertain. Such costs may include, but are not limited to, processing and accounting charges and late charges that may be imposed on Landlord by any ground lease, mortgage, or deed trust encumbering the Shopping Center. Therefore, if Landlord does not receive Rent, Additional Rent, or any other Lease costs in full on or before the tenth (10th) day of the month it becomes due, Tenant shall pay Landlord a late charge, which shall constitute liquidated damages, equal to Twenty-Five Dollars (\$25.00) a day for each day rent is late after the first of the month (“Late Charge”), which shall be paid to Landlord together with such Rent, Additional Rent, or other Lease costs in arrears.”

LIQUIDATED DAMAGES PROVISIONS

"If Tenant shall ...(iii) vacate or abandon the Premises ... Landlord shall, in addition to any other remedy available to Landlord under this Lease, have the right to collect from Tenant in addition to and together with Minimum Rent due under this Lease, and as liquidated damages for such breach, an amount equal to Fifty Dollars (\$50.00) per day for each during such time as any one or more of the aforementioned events shall continue."

The last monthly rent payment was made by Prime in July 2009. Subsequently, on or about January 1, 2011, the Defendant attempted to terminate the lease, and did, in fact, vacate the premises. This action ensued. DDR now seeks a money judgment against Prime in the amount of \$77,584.15, which includes unpaid rent (\$25,284.15), late fees (\$24,350.00), calculated at \$25.00 per day from August 1, 2009 to July 24, 2012, and liquidated damages (\$22,950.00), calculated at \$50.00 per day from January 1, 2011 to January 31, 2012. (The total also includes \$5,000.00 in counsel fees, which the Court will address at a later date.).

In determining the validity of a liquidated damages clause, the burden of proof is on the moving party 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 Title Agency, LLC v Surfside-3 Marina, Inc., 65 AD3d 1134 (2nd Dept, 2009)). The relevant inquiry to determine whether a liquidated damages provision provides compensation that is disproportionate to the injury suffered is whether the challenged provision is a reasonable estimate of the probable loss that would flow from a breach at the time the contract was executed. A liquidated damages provision has its basis in the principle of just compensation for loss and therefore must constitute an amount sufficient to satisfy for actual loss or injury flowing from such a breach. (See, Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc., et al, 41 NY2d 420 (1977)).

The Defendant has cited several opinions (notably, Pyramid Ctr. Co. v. Kinney Shoe, Corp., 244 AD2d 625 (3rd Dept, 1997), which have found a liquidated damages provision to constitute an unenforceable penalty, stating that the subject provision was disproportionate to any subsequent loss suffered by the Plaintiff. In Pyramid, the provision at issue required the tenant to pay double the fixed rent upon vacating the premises. In Vernitron Corp v. CF48 Assoc., 104 AD2d 409 (2nd Dept, 1984), the Court

held that a liquidated damages provision requiring payment of a sum equal to one year's rent for a default of any nature was disproportionate to losses which might be suffered by the landlord.

In response, the Plaintiff argues that the cases relied upon by the Defendant are clearly distinguishable from this situation on their facts. DDR maintains that the liquidated damages provided for in the subject lease agreement are neither excessive nor "draconian", but rather represent a valid estimate of damages to be incurred by the Plaintiff in the event of the Defendant's default, which could not be reasonably calculated by way of actual damages at the time of the signing of the lease. The Court of Appeals has held that contracting parties have the ability to agree between themselves as to the amount of damages to be paid in the event of a breach by the tenant, where those damages would be difficult or impossible to calculate at the commencement of the lease (*Truck Rent-a-Center, Inc.*, supra).

In this lease agreement, the parties - both of which are established businesses and were represented by counsel at the time of execution - agreed to the liquidated damages provision which expressly acknowledges the possibility of resulting expenses which may be incurred by the Plaintiff,

including “diminished salability, mortgagability, adverse publicity on appearance....”. These concerns represent legitimate foreseeable consequences of breach, not readily ascertainable at signing.

“Whether a contractual provision represents 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.” (See *Bates Adv. USA, Inc. v 498 Seventh, LLC.*, 7 NY3d 115 (NY, 2006)). The Defendant maintains that the provision was intentionally included in the subject agreement to coerce or “incentivize” its performance, rather than to provide reasonable compensation to DDR for its projected losses. However, the fact that a provision may operate to encourage a party’s compliance does not transform it into a penalty merely because the provision operates in this way, “...so long as (the damages) are not grossly out of scale with foreseeable losses.” (*Bates*, supra).

The liquidated damages sought as relief by the Plaintiff, while the sum may appear excessive on its face, cannot be said to constitute a penalty as a matter of law. The burden of proof is upon the party challenging a liquidated damages clause as permitting damages that are conspicuously disproportionate to foreseeable or probable loss.” (*Truck*

Rent-A-Center, Inc., supra). As argued by DDR, the cases relied upon by Prime in support of their motion are distinguishable on their facts. Absent other authority, this Court is forced to conclude that the Defendant has not met its burden of proof, and that the liquidated damages provision is enforceable.

However, this action presents a somewhat novel issue, in that the agreement also contains a late fee provision. None of the cases cited by either party appear to deal with the enforceability of both a liquidated damages provisions and a late fee provision in a single agreement. The Court of Appeals has recognized that it is not material whether the parties themselves have chosen to label a provision as one for liquidated damages. (Truck Rent-A-Center, Inc., supra). Indeed, the subject late fee provision itself refers to the charge as liquidated damages.

Given the conspicuous absence of case law, it is this Court's opinion that the express liquidated damages provision, when read together with the late fee provision, constitutes a sort of "double-dipping", which it cannot sanction. The liquidated damages clause has previously been found to constitute an enforceable provision, as a valid estimate of the Plaintiff's probable losses. However, the addition of a late fee - also a form of

liquidated damages - bears no relationship to those estimated losses, and the Court finds that the provision, as it is used in the context of this agreement as a whole, constitutes an unenforceable penalty to which the Plaintiff is not entitled as part of its relief.

Finally, the Defendant has also moved for an order directing that depositions of its employees be held via live video conference. Prime maintains that, since it maintains its primary offices in the State of Texas, it would cause undue hardship if the witnesses were required to travel to Wayne County for depositions. However, the Defendant's arguments regarding the alleged hardship are vague and conclusory in nature, and the case law cited in support of the motion is distinguishable on the facts, as those cases involved individuals who clearly would have incurred serious personal problems if compelled to travel. The Court finds that Prime has failed to make a sufficient showing that attendance by the Defendant's employees at depositions held in Wayne County would be unduly burdensome.

Therefore, the Defendant's motion for partial summary judgment is granted only to the extent that the late fee provision of the lease is hereby determined to be unenforceable as a matter of law, and the Plaintiff's claim

for damages based on that provision is dismissed. All other relief requested by the Defendant is denied.

Counsel for the Defendant shall submit an Order in accordance with this Decision.

Dated: October 9, 2012
Lyons, New York



Honorable Dennis M. Kehoe
Acting Supreme Court Justice

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