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

SERGEY SAVCHUK, Appellant, v. STEVEN G. JERDE and DARLYCE J. JERDE, husband and wife Respondents.	)	No. 64269-3-I UNPUBLISHED OPINION FILED: November 1, 2010

schindler, j. — Steven and Darlyce Jerde (the Jerdes) entered into a real estate purchase and sale agreement (REPSA) with Sergey Savchuk (Savchuk). Savchuk agreed to purchase the property for $725,000. Savchuk made a number of installment payments but did not have the funds to close. At Savchuk's request, the parties entered into an agreement to extend the closing date by nine months, to May 2008. Savchuk agreed to a new payment schedule and to immediately pay the Jerdes $250,000. The extension agreement also provides that "[a]ll payments are nonrefundable in the event of failure to close." When Savchuk did not close, the Jerdes retained the $500,000 in payments made by Savchuk. Savchuk sued the Jerdes for breach of contract and refund of $480,000. On summary judgment, the trial court ruled that the nonrefundable payment provision was unambiguous, dismissed

Savchuk's lawsuit, and awarded the Jerdes attorney fees. Because there are material issues of fact as to whether the nonrefundable payment provision is an enforceable liquidated damages clause or an unenforceable penalty, we reverse and remand for trial.

FACTS

Steven and Darlyce Jerde own a home and several acres of property in Ferndale, Washington. In 2006, the Jerdes listed their property for sale. Sergey Savchuk (Savchuk), a local real estate developer, offered to purchase the property for $950,000, contingent on a subdivision feasibility study. Based on the analysis of the number of potential lots that could be developed on the property, Savchuk offered the Jerdes $725,000.

On October 2, 2006, the Jerdes signed a real estate purchase and sale agreement (REPSA) to sell the property for $725,000. The REPSA scheduled January 8, 2007 as the counteroffer expiration date and August 31, 2007 as the closing date. The terms of the "Payment Terms Addendum" state that the buyer agrees to pay $525,000 down, including $20,000 in earnest money. The balance of the purchase price was to be paid to the Jerdes in installments of "interest only on the principal balance" at a rate of seven percent. The agreement states that "[t]his indebtedness shall be evidenced" by a promissory note and deed of trust. A blank form promissory note is attached. The entire balance was due at closing on August 31, 2007.

On January 8, 2007, Savchuk entered into a REPSA that contained an "Addendum/Amendment to Purchase and Sale Agreement" with different payment

terms. Instead of paying $525,000 as a down payment, Savchuk agreed to pay a $20,000 nonrefundable earnest money deposit, followed by a payment of $30,000 due in January 2007, and four payments of $50,000 over a five-month period, with a final payment of the balance on August 31, 2007. Savchuk also agreed to make interest payments on the unpaid balance at seven percent. The amendment again refers to a "Note and Deed of Trust." Savchuk paid the Jerdes $200,000 but was unable to pay the balance due before the scheduled closing date of August 31. Savchuk contacted the Jerdes' to request an extension of the closing date. The Jerdes agreed to extend the closing date another nine months, to May 30, 2008. In the "Extension of Closing Date Addendum" the parties agreed to new payment terms. Savchuk agreed to pay an additional $250,000 to the Jerdes on August 31 and $25,000 on September 7, with the condition that "[a] penalty of 5% of payment due shall accrue" on any late payments. The extension agreement also included a $10,000 fee to extend the closing date from August 31 to May 30, 2008, and increased the interest rate on the unpaid balance to seven and a half percent per year. The extension agreement does not include any reference to a promissory note or a deed of trust.

The payment schedule in the extension agreement required payments of $25,000 on 9/7/07, 10/10 [sic]/07, 12/1/07, 2/1/08, and 4/1/08, with a late fee of five percent for payments not made within three business days of the due date. The remaining balance of $188,908.20 was due on May 30, 2008. The extension agreement states that "[a]ll payments are non-refundable in the event of failure to close."

Savchuk made payments of $15,000 on October 18, $10,000 on November 9, and $25,000 on December 10. Savchuk made no further payments after December, and did not close on May 30.[1]

On February 5, 2009, Savchuk filed a lawsuit against the Jerdes, seeking to recover $480,000 of the $500,000 in payments made to the Jerdes. Savchuk alleged breach of contract and that the nonrefundable payment provision in the REPSA was void as an unenforceable penalty. The Jerdes filed a motion for summary judgment dismissal, asserting the nonrefundable payment provision was unambiguous and enforceable. The trial court granted the motion, dismissed the lawsuit, and awarded the Jerdes attorney fees.

ANALYSIS

Savchuk asserts the trial court erred in dismissing his lawsuit on summary judgment because (1) the REPSA violates the statute of frauds; (2) he did not breach the terms of the REPSA; and (3) the nonrefundable payment provision was an unenforceable penalty.

Standard of Review

We review the decision to grant summary judgment de novo. Hadley v. Maxwell, 144 Wn.2d 306, 310, 27 P.3d 600 (2001). Summary judgment is proper if, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794, 64 P.3d 22 (2003).

[1] According to Anne Inman, Savchuk contact the Jerdes after the closing date to offer to close for $500,000, the amount he had already paid. The Jerdes rejected his offer.

"A 'material fact' is a fact upon which the outcome of the litigation depends . . . ." Morris v. McNicol, 83 Wn.2d 491, 494, 519 P.2d 7 (1974). Summary judgment is appropriate if, in view of all the evidence, reasonable persons could reach only one conclusion. Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). However, where competing inferences may be drawn from the evidence, the case must be resolved by the trier of fact. Hudesman v. Foley, 73 Wn.2d 880, 887, 441 P.2d 532 (1968).

Statute of Frauds

Savchuk asserts the REPSA violates the statute of frauds because the parties did not agree to the terms of the promissory note that was part of the original REPSA.

The statute of frauds requires all real estate contracts to be in writing and to contain all essential and material terms. RCW 64.04.010; Family Med. Bldg., Inc. v. State, Dep't. of Soc. and Health Servs., 104 Wn.2d 105, 108, 702 P.2d 459 (1985).

Savchuk contends two material terms are missing from the REPSA: the amount of monthly installment payments and applicable amortization. While the initial REPSA may have violated the statute of frauds, the extension agreement contains these and all material payment terms.[2] But the case Savchuk cites, Sea-Van Investments Associates

[2] In Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) (citing Hubbell v. Ward, 40 Wn.2d 779, 782-83, 246 P.2d 468 (1952)) the Washington Supreme Court identified the 13 material terms for a real estate contract:

> (a) time and manner for transferring title; (b) procedure for declaring forfeiture; (c) allocation of risk with respect to damage or destruction; (d) insurance provisions; (e) responsibility for: (i) taxes, (ii) repairs, and (iii) water and utilities; (f) restrictions, if any, on: (i) capital improvements, (ii) liens, (iii) removal or replacement of personal property, and (iv) types of use; (g) time and place for monthly payments; and (h) indemnification provisions.

All of these terms are contained in the REPSA and extension agreement.

v. Hamilton, 125 Wn.2d 120, 881 P.2d 1035 (1994), is distinguishable.

In Sea-Van, because the note and deed of trust were not completed, the court would not attempt "'to order execution of documents that might contain very material, but unknown terms,'" and held that the only material term agreed upon was the price. Sea-Van, 125 Wn.2d at 129 (quoting Setterlund v. Firestone, 104 Wn.2d 24, 26, 700 P.2d 745 (1985)).

Here, unlike in Sea-Van, the extension agreement contains all the material terms necessary for the promissory note, including the identities of the parties, the principal amount to be paid, the rate of interest, the date interest would begin to accrue, the amount and date for the installment payments, the final due date, the interest rate in the event of default, and fees for late payments. Without question, all the terms necessary for a promissory note are contained in the extension. We conclude the REPSA does not violate the statute of frauds.[3]

Breach of Contract

Savchuk also contends that the Jerdes failed to show he breached the contract. We disagree. The undisputed evidence in the record shows that Savchuk stopped making the agreed upon scheduled payments in December 2007.

Nonrefundable Payments Provision

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[3] Savchuk also argues that the reference in the initial REPSA to a note and deed of trust creates ambiguity suggesting that mention of the note and deed of trust requires additional seller financing. But unlike in Halbert v. Forney, 88 Wn. App. 669, 676, 945 P.2d 1137 (1997), the blank note does not "seemingly anticipate a second contract that would necessarily include numerous terms to which the parties never agreed." And while the original terms of the REPSA may have been ambiguous, the extension agreement is not. This court will not read ambiguity into a contract where it can reasonably be avoided by reading the contract as a whole. McGary v. Westlake Investors, 99 Wn.2d 280, 285, 661 P.2d 971 (1983).

Savchuk further argues that the nonrefundable payment provision in the extension is an unenforceable penalty. Savchuk relies on RCW 64.04.005 to assert that the Jerdes' remedy in the event of breach is limited to the $20,000 earnest money deposit and the nonrefundable payment provision is an unenforceable penalty. The Jerdes contend the $480,000 in payments made by Savchuk is not an earnest money forfeiture or a liquidated damages provision under the statue, but nonrefundable installment payments "not conditioned upon the default of the purchaser."

RCW 64.04.005 provides:

> (1) A provision in a written agreement for the purchase and sale of real estate which provides for liquidated damages or the forfeiture of an earnest money deposit to the seller as the seller's sole and exclusive remedy if a party fails, without legal excuse, to complete the purchase, is valid and enforceable, regardless of whether the other party incurs any actual damages. However, the amount of liquidated damages or amount of earnest money to be forfeited under this subsection may not exceed five percent of the purchase price.
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> (2) For purposes of this section:
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> (a) "Earnest money deposit" means any deposit, deposits, payment, or payments of a part of the purchase price for the property, made in the form of cash, check, promissory note, or other things of value for the purpose of binding the purchaser to the agreement and identified in the agreement as an earnest money deposit, and does not include other deposits or payments made by the purchaser; and
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> (b) "Liquidated damages" means an amount agreed by the parties as the amount of damages to be recovered for a breach of the agreement by the other and identified in the agreement as liquidated damages, and does not include other deposits or payments made by the purchaser.
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> (3) This section does not prohibit, or supersede the common

> law with respect to, liquidated damages or earnest money forfeiture provisions in excess of five percent of the purchase price. A liquidated damages or earnest money forfeiture provision not meeting the requirements of subsection (1) of this section shall be interpreted and enforced without regard to this statute.

The meaning of a statute is a question of law subject to de novo review. City of Olympia v. Drebick, 156 Wn.2d 289, 295, 126 P.3d 802 (2006). The court's objective is to ascertain and carry out the legislature's intent. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the meaning of a statute is plain on its face, then the court must give effect to that plain meaning as the expression of legislative intent. Campbell & Gwinn, 146 Wn.2d at 9-10. It is well established that an unambiguous statute is not subject to the rules of statutory construction. State v. Watson, 146 Wn.2d 949, 955, 52 P.3d 1 (2002).

There is no dispute that the payments of $480,000 exceed five percent of the purchase price. Under the plain and unambiguous language of RCW 64.04.005(3), the common law governs the question of whether the nonrefundable payment provision in the extension agreement is a liquidated damages provision. We also reject the Jerdes' argument that the statute does not apply because the nonrefundable payment provision is not labeled as liquidated damages. The language of RCW 64.04.005 does not impose such a restriction.

In Washington, a provision for liquidated damages will be upheld unless it is a penalty or otherwise unlawful. Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 881, 887, 881 P.2d 1010 (1994) (citing Walter Implement, Inc. v. Focht, 107 Wn.2d 553, 558, 730 P.2d 1340 (1987); Brower Co. v. Garrison, 2 Wn. App. 424, 432, 468

P.2d 469 (1970)). A liquidated damages agreement that is fairly and understandingly entered into by experienced parties, with a view to just compensation for the anticipated loss, should be enforced. Walter Implement, 107 Wn.2d at 558 (citing Wise v. United States, 249 U.S. 361, 39 S. Ct. 303, 63 L. Ed. 647 (1919)). A liquidated damages provision permits parties to allocate risks, lends certainty to the parties' agreements and permit parties to resolve disputes in the event of a breach. Watson v. Ingram, 124 Wn.2d 845, 851, 881 P.2d 247 (1994).

In determining if a liquidated damages provision is enforceable, the court looks to whether the provision is a reasonable prospective estimate of loss. Wallace, 124 Wn.2d at 897. The party seeking to enforce a liquidated damages provision does not need to prove actual damages under the reasonableness test, but courts can consider such damages in evaluating the reasonableness of the damages forecast. Wallace, 124 Wn.2d at 893. The sophistication of the parties is a relevant consideration in determining the fairness of a stipulated damages provision. Wallace, 124 Wn.2d at 896.

In Wallace, the court upheld a liquidated damages provision as a reasonable forecast of damages in the event of breach. The liquidated damages provision in Wallace stated:

> Seller shall retain all payments made to date (earnest money and extension payments), as liquidated damages and not as a penalty, in order to indemnify the Seller against loss as a result of breach of this agreement. It is agreed that damages that result to Seller include: freezing the purchase price at a time when real estate land values were escalating at unprecedented rates; compensating seller for holding the property off the market and losing the time value of its property were the property liquidated and funds

invested; lost opportunity for larger profits; and related costs.

Wallace, 124 Wn.2d at 885. Prior to default, the buyer paid earnest money followed by a series of $15,000 extension payments totaling $260,000 of the $1.5 million dollar purchase price. The expert testimony at trial supported the seller's position that the payments were a reasonable forecast of damages in the event of default. Wallace, 124 Wn.2d 894. The court concluded that:

> Wallace's expertise supports the enforceability of the liquidated damages provision and also highlights the inequity of allowing him to now challenge the provisions as penalties simply because they constitute too large a percentage of the contract price.

Wallace, 124 Wn.2d at 897.

By contrast, a provision in a contract that bears no reasonable relation to actual damages will be construed as a penalty. Walter Implement, 107 Wn.2d at 559 (citing Northwest Collectors, Inc. v. Enders, 74 Wn.2d 585, 594, 446 P.2d 200 (1968)). The reasonableness of the prospective estimate of loss is judged as of the time the contract was entered. Walter Implement, 107 Wn.2d at 559. A penalty is not an attempt to estimate damages in the event of a breach, but is punitive in nature.

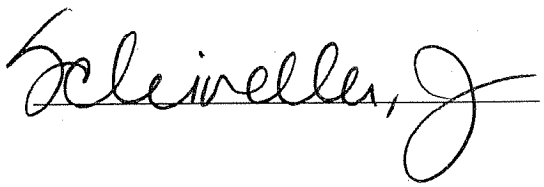
> 'As distinguished from liquidated damages, a penalty is a sum inserted in a contract, not as the measure of compensation for its breach, but rather as a punishment for default, or by way of security for actual damages which may be sustained by reason of nonperformance, and it involves the idea of punishment. . . . Its essence is a payment of money stipulated as in terrorem of the offending party, while the essence of liquidated damages is a genuine covenanted pre-estimate of damages.'

Lind Building Corp. v. Pacific Bellevue Developments, 55 Wn. App. 70, 75, 776 P.2d 977 (1989) (quoting 15 Am. Jur. Damages § 241, at 672 (1938).

In Walter, the court held that courts must look to the intent of the parties in deciding whether a liquidated damages provision is enforceable, "Courts will look to the intention of the parties to make an accurate assessment of the clause's purpose." Walter Implement, 107 Wn.2d at 559. The court concluded that the liquidated damages provision in the equipment lease agreement did not reflect a reasonable forecast of actual harm. Walter Implement, 107 Wn.2d at 561.

Here, there is no evidence of the parties' intent as to the nonrefundable payment provision. The trial court also did not address the question of whether the nonrefundable payment provision is an unenforceable penalty, and there is no evidence that Savchuk agreed to forfeit the $480,000 in payments that he made to purchase the property for $725,000. On the other hand, if the nonrefundable payment provision was an attempt to estimate damages in the event of default, there are also material issues of fact as to the reasonableness of the prospective estimate of potential losses, including fluctuation in the real estate market, the unique position of the parties when drafting the extension agreement, the level of sophistication of the parties, and evidence of actual damages.

We reverse the trial court's decision to dismiss Savchuk's lawsuit and the award of attorney fees, and remand for trial.



WE CONCUR: