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THE ISSUE:

Are liquidated damages clauses enforceable?

THE FACTS:

Most purchase and sale contracts involving the purchase and sale of a yacht provide that in the event the buyer breaches the agreement and fails to consummate the contract, the seller and broker(s) are entitled to retain the buyer's deposit as agreed and liquidated damages. An example of the aforementioned language in a purchase and sale contract is as follows:

"In the event the closing is not consummated due to the non-performance of buyer, including but not limited to a failure of buyer to pay monies due or execute all documents necessary to be executed by buyer for completion of the purchase by the closing date, all deposit funds paid prior to closing shall be retained by the seller and the broker(s) as liquidated and agreed damages, and the parties shall be relieved of all obligations under this agreement."

The question is whether or not this language is enforceable?

THE LAW:

"It is well settled that in Florida the parties to a contract may stipulate in advance to an amount to be paid or retained as liquidated damages in the event of a breach." *Lefemine v. Baron*, 573 So. 2d 326, 328 (Fla. 1991), citing *Poinsettia Dairy Prods. V. Wessel Co.*, 123 Fla. 120, 166 So. 306 (1936); *Southern Menhaden Co. v. How*, 71 So. 1000 (1916). "In Florida, "[l]iquidated damages arising from breach of contract are appropriate when (1) damages from breach of contract are not readily ascertainable, and (2) the sum stipulated is not grossly disproportionate to the damages

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reasonably expected to flow from the breach." (*Double AA Int'l Inv. Group, Inc. v. Swire Pac. Holdings, Inc.*, 2009 U.S. Dist. LEXIS 116720 (S.D. Fla. Dec. 14, 2009), citing *Resnick v. Uccello Immobilien GMBH, Inc.*, 227 F.3d 1347, 1350 (11th Cir. 2000) (citing *MCA Television Ltd. v. Public Interest Corp.*, 171 F. 3d 1265, 1271 (11th Cir. 1999); *Hyman v. Cohen*, 73 So. 2d 393, 401 (Fla. 1954) (en banc.))) (emphasis added). Additionally, the courts have ruled that in order for a liquidated damages clause to be enforceable, verses being construed as a penalty clause, the contract cannot provide for the existence of an option to either bring an action at law for actual damages or to retain the liquidated damages amount. *Lefemine v. Baron*, 573 So. 2d 326, 328 (Fla. 1991) Liquidated damages must be the sole remedy.

THE DISCUSSION:

In order for the damages resulting from the breach of contract to be considered not readily ascertainable, the parties, at the time of contract signing, must have no way of knowing what damages may be suffered in the event of a default. For example, where one party fails to consummate the purchase of a yacht, damages considered not readily ascertainable at the time of contract signing could include the payment of additional crew salaries, insurance, dockage, and maintenance, in addition to all costs associated with re-marketing and selling the yacht.

Additionally, the sum stipulated as the liquidated damages amount cannot be grossly disproportionate to the amount of damages reasonably expected to flow from the breach. For example, a $500,000.00 liquidated damages clause would most likely be considered grossly disproportionate to the damages reasonably expected to flow from the breach, by a Buyer, of an un-crewed fifty foot yacht valued at $1,000,000.00 and docked in back of the Seller's house. In *Lefemine v. Baron*, the Supreme Court of Florida determined that a liquidated damages provision calling for the forfeiture of a ten percent (10%) deposit for a buyer's failure to consummate the purchase of a residential home was not unconscionable as "...[t]he deposit represented *only ten percent of the purchase price* and half of this had to be paid to the broker." *Lefemine*, 573 So. 2d at 328. (emphasis added). Additionally, the court reasoned that payment of the ten percent (10%) deposit amount as liquidated damages was "...not so grossly disproportionate to any damages that might reasonably be expected to follow from a breach of contract so as to show that the parties intended only to induce full performance." *Id.*

Finally, where a contract provides an option to either bring an action at law for actual damages or to retain the agreed liquidated damages amount, the liquidated damages clause may be construed as a penalty clause rather than an enforceable liquidated damages clause. An example of a liquidated damages clause that has been construed as a penalty clause rather than an enforceable liquidated damages clause is as follows:

"If buyer fails to perform this contract within the time specified, the deposit paid by buyer may be retained by or for the account of seller as consideration for the execution of this agreement and in full settlement of any claims for damages, and all obligations under this contract or seller at his option may proceed at law or in equity to enforce his legal rights under this contract." Lefemine, 573 So. 2d at 329.

The court reasoned that the existence of the option destroys the character of the forfeiture as agreed damages and shows that the parties did not have the mutual intention to fix their damages at the stipulated amount in the event of a breach. *Id.*

THE ANSWER:

Yes, provided that, (1) damages from breach of contract are not readily ascertainable, (2) the sum stipulated is not grossly disproportionate to the damages reasonably expected to flow from the breach, and (3) the contract does not provide for an option to either bring an action at law for actual damages or to retain the agreed liquidated damages amount.

**The information offered in this column is summary in nature and should not be considered a legal opinion.*

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