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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1781-06T2

RAY CATENA MOTOR CAR CORP.,
d/b/a RAY CATENA MERCEDES-BENZ,

Plaintiff-Appellant,

v.

VICTOR CURTO,

Defendant-Respondent.

Argued October 11, 2007 - Decided November 5, 2007

Before Judges Wefing and Lyons.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-7935-05.

Jed S. Freeman argued the cause for appellant (The Margolis Law Firm LLC, attorneys; Mr. Freeman and Martin G. Margolis, on the brief).

William G. Sanchez argued the cause for respondent (Andril & Espinosa, LLC, attorneys; Mr. Sanchez, on the brief).

PER CURIAM

Plaintiff Ray Catena Motor Car Corp. appeals from an order denying its motion to award it $150 for each day that defendant

Victor Curto failed to remove the following lettering on the rear window of his new Mercedes: "I GOT ROYALLY SCREWED BY RAY CATENA." Because we find the $150 per day sum is liquidated damages as opposed to an unenforceable penalty, we reverse and remand.

The following factual and procedural history is relevant to our consideration of the issues advanced on appeal. Defendant owned a used 2001 Mercedes-Benz S430 (2001 Mercedes). The certificate of title issued by the New Jersey Motor Vehicle Commission for that vehicle bore a flood and salvage notation. In September 2005, defendant and plaintiff entered into a contract by which plaintiff sold a new 2006 Mercedes-Benz S350 (2006 Mercedes) to a leasing company and defendant entered into a lease with the leasing company to lease the vehicle. As part of this transaction, defendant traded in his 2001 Mercedes for $23,000, and he signed an agreement in which he certified that "the frame on the trade-in vehicle has never sustained any damage or been repaired. All air bags are of original equipment and have never been deployed. Also, that the vehicle has never been in a flood or had its emission control system tampered with or altered."

Defendant took possession of the new 2006 Mercedes on September 7, 2005, at which time plaintiff took possession of the old 2001 Mercedes. Sometime thereafter, plaintiff learned

that the title on the 2001 Mercedes carried salvage and flood notations.

On November 3, 2005, plaintiff filed a complaint against defendant alleging breach of contract, breach of the covenant of good faith and fair dealing, breach of express warranty, fraud, equitable estoppel, promissory estoppel, and consumer fraud. Sometime thereafter, plaintiff filed, and the trial court granted, a summary judgment motion with respect to the breach of express warranty count of the complaint. The judgment on the breach of warranty did not provide, however, for any specific monetary damages.

After entry of the summary judgment, plaintiff learned that defendant had lettered the rear window of his new 2006 Mercedes with the following: "I GOT ROYALLY SCREWED BY RAY CATENA." The parties then, with retained counsel, negotiated and entered into a settlement agreement regarding their differences. The settlement agreement provided that defendant would pay the sum of $12,000 in satisfaction of the breach of express warranty claim and would, within two days of the execution of the agreement, remove the lettering on the back window of his new car. The parties' settlement agreement provided that "failure to remove the lettering . . . shall subject [defendant] to an additional payment of $150 per day to be added to the Settlement Amount for each day the lettering remains in violation to this

Agreement." The parties agreed, and counsel stipulated at oral argument, that the lettering was to be removed by July 31, 2006. In addition to this settlement agreement, a consent order memorializing the terms of the settlement was also entered by the trial court.

Because the lettering was not removed by July 31, plaintiff filed an application to enforce its rights and have damages awarded for each day that the lettering remained. Opposition to this motion was filed and the court heard oral arguments. The court declined to award plaintiff $3150 in damages for the twenty-one additional days after July 31 that defendant maintained the lettering on his car. The court concluded that the $150 per day was an impermissible penalty and, hence, unenforceable. This appeal ensued. On appeal, plaintiff argues that the trial court erred by refusing to enforce the liquidated damage clause in the parties' settlement agreement.

"The decision whether a stipulated damage clause is enforceable is a question of law for the court." Wasserman's Inc. v. Twp. of Middletown, 137 N.J. 238, 257 (1994). We have noted the legal distinction between liquidated or stipulated damages and a penalty in Westmont Country Club v. Kameny, 82 N.J. Super. 200 (App. Div. 1964), when we said:

> Liquidated damages is the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at

> by a good faith effort to estimate in advance the actual damage that will probably ensue from the breach, is legally recoverable as agreed damages if the breach occurs. A penalty is the sum a party agrees to pay in the event of a breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach.
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> [Westmont Country Club, supra, 82 N.J. Super. at 205.]

New Jersey courts will enforce liquidated damage provisions in contracts provided they are consistent with the principle of reasonableness. Wasserman's, supra, 137 N.J. 238, 250. A liquidated damage clause is considered reasonable if the set amount is a "reasonable forecast" of just compensation for the harm that is caused by the breach, and the harm is one that is very difficult or impossible to accurately estimate. Ibid. (quoting Westmont Country Club, supra, 82 N.J. Super. at 206).

The rationale for this distinction is the courts' recognition of the competing interests involved in determining whether a liquidated damage clause should be enforced. The competing view points are summarized in the Restatement (Second) of Contracts:

> The enforcement of such provisions for liquidated damages saves the time of courts, juries, parties and witnesses and reduces the expense of litigation. This is especially important if the amount in controversy is small. However, the parties to a contract are not free to provide a

> penalty for its breach. The central object behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on grounds of public policy.
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> [Restatement (Second) of Contracts § 356 comment a (1981).]

In New Jersey, the party challenging a liquidated damage clause must establish that its application amounts to a penalty. Wasserman's, supra, 137 N.J. at 252-53. In determining the reasonableness and therefore the enforceability of a liquidated damage clause, the New Jersey Supreme Court has found that the following four factors must be analyzed and considered: (1) the difficulty in assessing damages; (2) the intention of the parties; (3) the actual damages sustained; and (4) the bargaining powers of the parties. Metlife Capital Fin. Corp. v. Wash. Ave. Assocs. L.P., 159 N.J. 484, 495 (1999) (citing Wasserman's, supra, 137 N.J. 250-54).

The uncertainty or difficulty in assessing damages is not an independent test, but "an element of the reasonableness of a liquidated damages clause." Wasserman's, supra, 137 N.J. at 250. In the instant case, it is quite difficult to assess damages. Defendant, who presumably drove his vehicle throughout various parts of New Jersey with the derogatory statement regarding plaintiff, may well have influenced potential car

buyers to avoid purchasing a car from plaintiff. The difficulty of measuring such damages is readily apparent. How would plaintiff have proven which buyers did not come into his dealership? The sum of $150 was arrived at after extensive negotiations between counsel and their respective clients, evincing their intentions to compensate plaintiff for its losses. The agreement appeared on its face to be a good faith estimate of a daily loss to plaintiff should defendant continue to drive his vehicle with the disparaging statement.

As noted, the actual damages sustained would be difficult, if not impossible, to definitively quantify in this situation. The Restatement notes that "[t]he greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty . . ., the easier it is to show that the amount fixed is reasonable." Restatement (Second) Contracts § 356 comment b (1981). That is the exact situation presented in this case. It is difficult to prove that a loss has occurred and the quantum of any such loss is likewise difficult to prove with requisite certainty.

Lastly, we note that there is nothing to indicate that either of the parties, acting under the advice of counsel, had a greater bargaining power than the other. Each of these factors supports the reasonableness of the sum arrived at in the settlement.

Accordingly, we are satisfied that the $150 sum arrived at by the parties in the settlement agreement, given the facts and circumstances of this case, constitutes enforceable liquidated damages as opposed to a penalty. Therefore, we reverse and remand the matter for entry of judgment in plaintiff's favor in the amount of $3150.

Reversed and remanded.