

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 14, 2003**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-1722  
STATE OF WISCONSIN**

**Cir. Ct. No. 01-CV-143**

**IN COURT OF APPEALS  
DISTRICT II**

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**JOSEPH CAMMARATA AND PATRICIA A. CAMMARATA,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**PHEASANT RUN PARTNERSHIP, ERIC M. LENTZ AND  
KATHERINE S. LENTZ, A/K/A KATHERINE M. LENTZ,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Joseph Cammarata and Patricia A. Cammarata appeal from the summary judgment entered against them. The issue on appeal is whether a stipulated damages clause can be enforced against the respondents, Pheasant Run Partnership, Eric M. Lentz and Katherine S. Lentz (“Pheasant

Run”). We agree with the circuit court that the clause was unreasonable, and consequently we affirm.

¶2 The Cammaratas and Pheasant Run entered into a contract for the construction and purchase of a condominium. An amendment to the contract contained a stipulated damages clause which provided a \$200 per day penalty against Pheasant Run for a delay in the completion of the condominium, and the same penalty against the Cammaratas for a delay in closing on the condominium. The condominium was not completed on time, and the Cammaratas sued Pheasant Run seeking to enforce the stipulated damages clause. The Cammaratas did not allege or seek to recover actual damages. Eventually, Pheasant Run brought a motion for summary judgment arguing that the penalty provided was unreasonable. The circuit court agreed and granted summary judgment to Pheasant Run.

¶3 Our review of the circuit court’s grant of summary judgment is de novo, and we use the same methodology as the circuit court. *See M&I First Nat’l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology is well known, and we need not repeat it here. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97.

¶4 The Cammaratas argue that the stipulated damages clause was reasonable and therefore enforceable. The test used to determine the validity of a stipulated damages clause is whether the clause is reasonable under the totality of the circumstances. *Wassenaar v. Panos*, 111 Wis. 2d 518, 526, 331 N.W.2d 357 (1983). “The reasonableness test strikes a balance between the two competing sets of policies by ensuring that the court respects the parties’ bargain but prevents

abuse.” *Id.* at 529. The courts should consider several factors to determine whether a particular clause is reasonable: “(1) Did the parties intend to provide for damages or for a penalty? (2) Is the injury caused by the breach one that is difficult or incapable of accurate estimation at the time of contract? and (3) Are the stipulated damages a reasonable forecast of the harm caused by the breach?” *Id.* at 529-30.

¶5 The circuit court concluded that the clause here was not reasonable because the stipulated damages amount of \$200 per day, which the court noted came to \$6200 per month, did not bear any relation to any potential future damages. The deposition testimony of the Cammaratas established that neither Joseph nor Patricia knew from where the \$200 per day figure was derived. It is evident from this testimony that the figure does not represent an attempt by the parties to reasonably forecast future damages.

¶6 Joseph submitted an affidavit in opposition to the motion for summary judgment. In that affidavit Joseph stated that they had suffered actual damages because their home decreased in value. There is nothing in the affidavit, however, which indicates that the stipulated damages amount was based on this anticipated loss. The fact that the Cammaratas may ultimately have suffered damages does not make the stipulated damages clause enforceable. The amount of stipulated damages must be reasonably related to anticipated damages. *See id.* The deposition testimony showed that the damages figure was not based on anticipated damages of any sort. Because the stipulated damages were not a reasonable forecast of anticipated damages, we agree with the circuit court’s conclusion that the clause was not reasonable. Since the Cammaratas only sought the amount of the stipulated damages and did not allege actual damages, the circuit

court properly granted Pheasant Run's motion for summary judgment. For the reasons stated, we affirm the judgment of the circuit court.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

