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DISTRICT II

July 29, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2015AP453-FT

Ted Polczynski v. Wexford Heights, L.P. (L.C. # 2014CV1848)

Before Neubauer, P.J., Reilly and Stark, JJ.

Ted Polczynski and Built By Ted, LLC (collectively “Built By Ted”) appeal a circuit court judgment granting Wexford Heights, L.P.’s motion to dismiss. Built by Ted had filed suit against Wexford on grounds that the stipulated damages provision in the contracts they entered into was unreasonable and unenforceable. Pursuant to a presubmission conference and this court’s order of March 31, 2015, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2013-14).¹ Upon review of those memoranda and the record, we affirm the judgment of the circuit court.

¹ All references to the Wisconsin Statutes are to the 2013-14 version.

On August 7, 2013, Wexford sold two lots in the Harmony Hills II Subdivision in Menomonee Falls to Built By Ted for \$134,900 each. Both contracts contained the following payment terms, which included a stipulated damages provision:

Buyer agrees to pay to Seller a lot deposit of \$10,000 within 7 days of acceptance and an additional \$1,000 per month due on the first of each month until closing. The lot deposit and monthly payments will be applied towards the purchase price of the lot at closing. In the event the Buyer fails to close for any reason the lot deposit and monthly payments are non-refundable.

The contracts also provided Wexford with the right to sue Built By Ted for actual damages in the event of default.

Pursuant to the contracts, Built By Ted paid the \$10,000 deposits on each lot. In total, it paid Wexford \$28,000 towards the purchase price of the lots before its default. Upon its default, Wexford retained the \$28,000 in payments, put the lots back on the market, and sold one of them to another buyer.

Built By Ted subsequently filed suit against Wexford seeking restitution of the \$28,000. It argued that the stipulated damages provision in the contracts was unreasonable and unenforceable. Wexford responded with a motion to dismiss.

Following a hearing on the matter, the circuit court granted Wexford's motion to dismiss. In doing so, the court determined that the stipulated damages provision was reasonable as a matter of law. This appeal follows.

“A motion to dismiss tests the legal sufficiency of the complaint.” *Ladd v. Uecker*, 2010 WI App 28, ¶7, 323 Wis. 2d 798, 780 N.W.2d 216. On review, we accept as true the facts alleged in the complaint and reasonable inferences from those facts. *Id.* However, we draw

legal conclusions independently. *Id.* When a plaintiff cannot recover under any circumstances, a motion to dismiss should be granted. *Id.*

On appeal, Built By Ted contends that the circuit court erred in dismissing its suit against Wexford. It renews its argument that the stipulated damages provision in the contracts was unreasonable and unenforceable.

The test for determining whether a stipulated damages provision is valid is whether the provision is reasonable under the totality of the circumstances. *Rainbow Country Rentals & Retail, Inc. v. Ameritech Publ'g, Inc.*, 2005 WI 153, ¶28, 286 Wis. 2d 170, 706 N.W.2d 95. We consider: “(1) whether the parties intended to provide for damages or for a penalty; (2) whether the injury caused by the breach would be difficult or incapable of accurate estimation at the time of entering into the contract; and (3) whether the stipulated damages are a reasonable forecast the harm caused by the breach.” *Id.* These factors are not meant to be mechanically applied. *Id.* The facts of the particular case dictate the weight to be given the various factors. *Wassenaar v. Panos*, 111 Wis. 2d 518, 533, 331 N.W.2d 357 (1983).²

As noted, the circuit court determined that the stipulated damages provision was reasonable as a matter of law. Based on the pleadings and contracts, the court found that the parties were two commercial entities who had freely and voluntarily engaged in contract. The court further found the amount at issue—\$28,000—was reasonable. In reaching its conclusion,

² Built By Ted suggests that a determination of reasonableness is inappropriate at the pleadings stage. Like the circuit court, we conclude that there was sufficient information in the pleadings and contracts to make such a determination and rule on Wexford’s motion to dismiss.

the court noted that part of the reason for a stipulated damages provision is to avoid the costly expense of a lawsuit.³

Reviewing the circuit court’s decision, we acknowledge that it did not expressly consider all three of the reasonableness factors listed above. Nonetheless, upon considering the factors ourselves, we are satisfied that it reached the correct conclusion. *See Equity Enters., Inc. v. Milosch*, 2001 WI App 186, ¶21, 247 Wis. 2d 172, 633 N.W.2d 662 (the issue of whether a stipulated damages provision is valid is a question of law).

With respect to the first factor, it is unclear whether the parties intended the provision to provide for damages or for a penalty. Although Wexford suggests the latter in its brief, the contracts themselves do not use such language and explicitly allow Wexford to “request the earnest money as liquidated damages” upon Built By Ted’s default. In any event, this factor is of minimal value in assessing the provision’s reasonableness. *See id.*, ¶22 (the subjective intent of the parties has little bearing on whether a provision is objectively reasonable). Accordingly, we give it little weight.

The second and third factors, ease of ascertainment and reasonable forecast of anticipated damages, are intertwined and use a combined prospective-retrospective approach. *See Wassenaar*, 111 Wis. 2d at 530. The greater the difficulty in estimating or proving actual damages, the more likely the stipulated damages provision will appear reasonable. *Id.* at 530-31.

³ The circuit court’s observation is supported by case law. *See Zimmermann v. Thompson*, 16 Wis. 2d 74, 76, 114 N.W.2d 116 (1962) (noting that the purpose of allowing the seller to elect earnest money as damages is to allow the seller a remedy “without further fuss or bother”).

Where stipulated and actual damages are grossly disproportionate, however, courts usually conclude that the parties' original expectations were unreasonable. *Id.* at 532.

Here, the potential damages caused by a breach of contract would have been difficult for the parties to estimate at the time of contract. Whether both lots would sell after default, when, and for how much were just a few of the variables to consider. As for the reasonable forecast of anticipated damages, it does not appear that the sum of \$28,000 (just over ten percent of the total purchase price) is grossly disproportionate to the harm caused by the breach. Thus, both the second and third factors support a finding of reasonableness.

For these reasons, along with the reasons cited by the circuit court, we are satisfied that the stipulated damages provision was reasonable and enforceable. Accordingly, we conclude that the circuit court properly granted Wexford's motion to dismiss.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is affirmed.

Diane M. Fremgen
Clerk of Court of Appeals