Cuesport Properties v. Critical Developments

10. Cuesport Properties, LLC, sold a commercial condominium unit in Anne Arundel County to Critical Developments, LLC. After the sale Cuesport Properties had to build a demising wall between the sold property unit and next unit. They had 30 days for completion of the wall. If they failed to do so, they would have to pay liquidated damages in the amount of $126 par day until completion. The wall was finished on time, but construction was performed without a building permit, and the wall did not comply with the Anne Arundel County code. After 5 months, Critical Developments arranged for the wall to be modified, so as to comport with the code. Already 260 days elapsed from the date of the contractual deadline for completion of the demising wall. Critical Developments thereafter brought an action in the Circuit Court for in Anne Arundel County against Cuesport Properties for breach of contract. Court awarded liquidated damages for the 260 days that had elapsed from the date of the contractual deadline until the date that modification of the wall was completed. After this Cuesport Properties appeal the decision in Court of Special Appeals of Maryland.

1. In their appeal Cuesport Properties were raising three issues:
a) Whether the circuit court was wrong in explaining the per diem damages provision as a lawful liquidated provision as a lawful liquidated damages clause instead of unlawful penalty.
b) Whether the circuit court was wrong in awarding damages, based on aper diem damages provision in the agreement of sale.
c) Whether the circuit court was wrong in failing to take equitable consideration into account, when it awarded damages for each of 260 days.

2. Appellant court affirm that language at issue is a valid liquidated damages provision, that the contract was breached by Cuesport Properties by building a demising wall that did not comply with the county code. The circuit court did take equitable consideration into account in awarding damages, and they did not err in awarding liquidated damages for each of the 260 days.

3. In the agreement, there was a paragraph labeled “Late Performance”, where was written that if Cuesport would not be on time for installation, they shall pay a penalty of $126 per day. 20,000 was to be taken from the sale’s proceeds and placed in escrow to be used for payment of the work required to be performed by Cuesport Properties, as well as any damages that might accrue for failure to complete that work on time and late performance penalty. Any funds that remained after there sums were paid, were to be released to Cuesport Properties.

4. The circuit court concluded that Cuesport's failure to comply with county permit and code requirements in building the demising wall was an implied breach of contract. There was a requirement that the construction be completed consistent with the county code. Court also conclude that "penalty" provision in the agreement

of sale is a liquidated damages clause, and calculated damages for a period of 260 days, running from July 21, 2008, through April 6, 2009, and accordingly awarded Critical Developments $32,760 in damages. Court multiplied the $126 *per diem* rate by 260(elapsed days). It also awarded Critical Developments $10,443.74 in attorneys' fees.

5**.** Cuesport argues that the trial court erred in interpreting the *per diem* damages provision of its agreement of sale, with Critical Developments, as a valid liquidated damages clause rather than as an invalid penalty. They were pointing out that the "Late Performance" clause used the term "penalty," in describing what was to be paid by Cuesport Properties in the event of a failure to complete construction of the demising wall on time.

6. In its decision court brought definition of “liquidated damages” as “specific sum of money expressly stipulated by the parties to a contract as the amount of damages to be recovered by either party for a breach of the agreement by the other." And if the penalty where the amount agreed upon, that is clearly excessive and out of all proportion to the damages that might reasonably have been expected to result from such breach of the contract. Maryland Court uphold a liquidated damages clause as valid, and not a penalty, because it satisfies two primary requirements": (1) "the clause must provide a fair estimate of potential damages at the time the parties entered into the contract"; and (2) "the damages must have been incapable of estimation, or very difficult to estimate, at the time of contracting."

7. Although the word penalty was written in "Late Performance" clause, it is actually, a valid and enforceable liquidated damages clause. The purpose of that provision was to compensate the party owed the duty of prompt performance for expected losses, not to penalize the party that failed to fulfill that duty. The monthly cost that the parties estimated that Critical Developments would incur for Unit 4, at the time of the execution of the contract, was approximately $3,800 per month. When that figure is divided by 30, the average number of days in a month, the daily cost is $126.67, a figure which differs from the stipulated *per diem*"penalty" by less than a dollar. Thus, the amount of liquidated damages — $126*per diem* — was not "grossly excessive and out of all proportion to the damages that might reasonably have been expected to result from" such a breach. On the contrary, the "Late Performance" clause provided "a fair estimate of potential damages at the time the parties entered into the contract."

8. Key element in determining whether a provision is a liquidated damages clause, and not a penalty, is the intention of parties. The parties in the case clearly intended that the provision at issue be a liquidated damages clause is supported by testimony and stimulations into which the parties entered at trial.

9. Court reject the view that a liquidated damages clause is inapplicable when a contractor has completely abandoned a project, because adoption of such a rule

would, "permit a party to limit his liability for liquidated damages by totally abandoning the work and would deny the injured party those damages which were agreed to as fairly measuring damage caused by delay." The rule which we recommend is that, where liquidated damages accumulate over a period of time, those damages may be limited by the court to whatever time is reasonably necessary to comply with contractual demands or, more specifically, as in this case, to complete the work by a substitute contractor or by the non-breaching party's own efforts.