

## Solidifying Liquidated Damages With Specific Performance

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Over the years, Florida courts have considered and approved contractual liquidated damages in the context of property development or construction cases. Typically, these types of cases are fact intensive and largely dependent upon the specific contractual provisions at issue as well as the respective court's opinion as to the reasonableness of the amount of liquidated damages sought. Also, Florida courts have considered and enforced the equitable remedy of specific performance in the context of such cases involving repurchase rights. For instance, in 2005 the First District Court of Appeal clarified that a fixed price purchase option of limited duration in a land sale contract is enforceable. *See Sandpiper Development and Construction, Inc. v. Rosemary Beach Land Company*, 907 So.2d 684 (Fla. 1<sup>st</sup> DCA 2005).<sup>i</sup>

For the first time (that we know of), a Florida court has considered and approved contractual liquidated damages and the equitable remedy of specific performance based on the breach of a purchase agreement and a related Declaration of Covenants for failing and refusing to build or meet a deadline. On August 1, 2018, the Northern District Court of Florida entered an Order [Dkt. 231] on summary judgment in the case styled *EBSCO Gulf Coast Development, Inc. v. Camillo K. Salas, III, et al.*, Case No. 3:15-cv-586/MCR/EMT, providing a well-reasoned and thoughtful discussion regarding the enforcement of liquidated damages and specific performance.

### Forming the Mold

In *EBSCO*, a developer claimed that the lot owner breached the purchase agreement and other related governing documents by failing to begin construction of a home on an empty lot within the agreed contractual time period, thus entitling the developer to sue for liquidated damages and seek specific performance to repurchase the lot. The liquidated damages provision at issue in *EBSCO* required the lot owner to pay approximately 0.0274% of the original sale price (or approximately \$370) for each day it failed to build past the construction completion deadline.<sup>ii</sup> The lot owner could have stopped the accrual of liquidated damages by simply commencing construction at any time.

In the context of real estate deposit forfeiture cases, this amount of liquidated damages would be enforceable as a matter of law.<sup>iii</sup> Accordingly, any contention that it is the cumulative total of the liquidated damages, and not the per diem rate, that should be the focus of the analysis was unpersuasive. The only reason additional damages continued to accrue, and the only reason why the cumulative total of the liquidated damages grew to more than \$530,000 in the *EBSCO* case, is because the lot owner continued to breach the deadline for 6 years. The lot owner cannot gain an advantage from its own decision to continue breaching its contract in an effort to drive up the cumulative damages to such an amount that the Court might eventually deem them unreasonable.<sup>iv</sup>

### Solidifying the Mold

In *EBSCO*, the Court recognized that under Florida law, “[i]t is well settled that ... 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.”<sup>v</sup> A liquidated damages provision in a contract is enforceable so long as (1) damages as a result of the breach were not readily ascertainable at the time of the contract and (2) the sum stipulated is not grossly disproportionate to any damages that might reasonably be expected to flow from the breach, otherwise it is a penalty and unenforceable.<sup>vi</sup> The Court also recognized that Florida courts enforce liquidated damages clauses pertaining to delays in construction.<sup>vii</sup>

Applying Florida law, the *EBSCO* Court found that the liquidated damages provisions found in the purchase agreement do not constitute a penalty and, thus, are enforceable. The Court determined that damages were not readily ascertainable at the time the parties entered into the contract, because, the contract was entered into in 2009 and the parties could not predict what the real estate market in the development would look like in 2015, let alone 2011.<sup>viii</sup> Also, the Court reasoned that: (1) the liquidated damages were not grossly disproportionate to any damages that might reasonably be expected to flow from the breach; (2) the purchase agreement specified liquidated damages in the amount of approximately 1% (.83-percent) of the purchase price per month, or approximately \$11,205, for each month the lot owner was in breach of the construction completion deadlines; (3) the parties in this case negotiated for the purchase and sale of a lot in a luxury community; (4) both sides are clearly sophisticated and were represented by counsel; and (5) the lot remained untouched for almost six years while the developer sold properties to other owners who have complied with the construction deadlines, and thus, the lot owner could not take advantage of his own wrongdoing to avoid responsibility thereunder.

The *EBSCO* Court further found that the developer was not precluded from seeking both liquidated damages and equitable relief: “Although the right to repurchase and the liquidated damages flow from the same act, i.e. failing to comply with the construction commencement deadlines, they remedy separate and distinct harms.”<sup>ix</sup> The liquidated damages provisions remedy the damage caused to the developer because residential lots within the development are more valuable and marketable when they are surrounded by fully constructed homes rather than vacant lots or ongoing construction projects.<sup>x</sup> Accordingly, the Court reasoned that the developer’s right to repurchase seeks to ensure that the lot does not remain with the lot owner, who has made no effort to commence construction, and is sold to a buyer who will comply with the construction deadlines. Additionally, case law also supports the Court’s conclusion that the liquidated damages provisions may be enforced in conjunction with the developer’s right to repurchase the lot.<sup>xi</sup>

## **Casting the Mold**

The governing contractual documents must contain a clear and concise liquidated damages provision. In order to ensure that the liquidated damages clause will be enforceable, drafting attorneys should follow the following guidelines: (1) damages must be reasonably estimated, (2) damages must be uncertain at the time of contract formation, and (3) damages must be related to the harm incurred by the breach and they cannot constitute a penalty. It is important not to be greedy when estimating what amount of damages will be “reasonable.” Historically, in the context of real estate sale contracts, liquidated damages of 10% of the contract price or less have been deemed reasonable. Also, the liquidated damages clause should include an express acknowledgement by the parties that if a specific breach occurs (such as failing to meet a deadline): (1) it will be difficult to ascertain specific or actual damages; (2) liquidated damages are appropriate in this situation; (3) the liquidated damages set forth in the agreement are reasonably

calculated to reimburse the other party for failing to meet such deadline; (4) the damages are not a penalty; and (5) the non-breaching party may also pursue equitable actions that are consistent with enforcing the liquidated damages, such as foreclosing on a claim of lien for liquidated damages, or bringing an equitable action for specific performance to enforce a right to repurchase the property.

Real estate transactional attorneys should take care in forming their client's liquidated damages and specific performance provisions. The strength of your liquidated damages and specific performance provisions will be directly proportional to the strength of your client's future claim for an award or enforcement of the same. You know the old saying, "measure twice, cut once?" In this instance, "draft twice, execute once."

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<sup>i</sup> In *Sandpiper*, the Court opined, "[t]he purpose of the option here is legitimate, the duration is of a reasonably short period, and the price alone does not invalidate the overarching legitimate rationale to control the pace of development of the community." *Sandpiper* at 687.

<sup>ii</sup> See, e.g., *Hutchinson v. Tompkins*, 259 So. 2d 129, 132 (Fla. 1972) (explaining that liquidated damages provisions are particularly well suited for real estate contracts because "[t]he land sale market in Florida fluctuates from year to year and season to season").

<sup>iii</sup> See, e.g., *Hot Developers, Inc. v. Willow Lake Estates, Inc.*, 950 So. 2d 537, 541 (Fla. 4th DCA 2007) (enforcing deposit forfeiture of \$550,000, which constituted 9.65% of the total contract price); *Dade Nat'l Development Corp. v. Southeast Investments of Palm Beach County, Inc.*, 471 So. 2d 113, 116-17 (Fla. 4th DCA 1985) (enforcing deposit forfeiture of 11.82% of the contract price); *Bloom v. Chandler*, 530 So. 2d 341 (Fla. 4th DCA 1988) (enforcing deposit forfeiture of 22% of the contract price); *Hooper v. Breneman*, 417 So. 2d 315, 317 (Fla. 5th DCA 1982) (enforcing forfeiture of 13.3% of the contract price); *Johnson v. Wortzel*, 517 So. 2d 42, 43 (Fla. 3d DCA 1987) (enforcing forfeiture of 18.2% of the contract price); *Beatty v. Flannery*, 49 So. 2d 81, 82 (Fla. 1950) (enforcing deposit forfeiture of 10% of contract price).

<sup>iv</sup> See *Waters v. Key Colony East, Inc.*, 345 So. 2d 367, 368 (Fla. 3d DCA 1977) ("A party to a contract cannot take advantage of his own wrongdoing to avoid responsibility thereunder").

<sup>v</sup> Order [Dkt. 231], page 29 of 47, citing *Lefemine v. Baron*, 573 So. 2d 326, 328 (Fla. 1991).

<sup>vi</sup> Order [Dkt. 231], page 29 of 47, citing *Secrist v. Nat'l Serv. Indus.*, 395 So. 2d 1280, 1282 (Fla. 2d DCA 1981) (if the liquidated damages provision calls for an amount that is excessive or unreasonable; i.e. a penalty, the provision is unenforceable).

<sup>vii</sup> Order [Dkt. 231], page 30-31 of 47, citing *Osceola Cty. v. Bumble Bee Const., Inc.*, 479 So. 2d 310, 311 (Fla. 5<sup>th</sup> DCA 1985) (where contract provided liquidated damages in the amount of \$250 for each day past the deadline for construction completion, court found (1) such damages were appropriate because Osceola County lost revenue due to its inability to attract tourists even though the exact monetary loss could not be ascertained at the time the contract was entered into and (2) such damages were not excessive under the circumstances); see also *Gables v. Choate*, 792 So. 2d 520, 521 (Fla. 3d DCA 2001) (Purchaser of a \$700,000 condominium brought an action against the developer to enforce a liquidated damages clause incorporated in a closing agreement for failing to complete the condominium by May 1, 1996. Trial court awarded plaintiff \$126,654.68 for the construction delays. Florida's Third District Court of Appeal found the liquidated damages clause enforceable on the grounds that (1) the parties in this case negotiated for the purchase and

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sale of a luxury residence, (2) both sides were sophisticated and represented by counsel, and (3) damages could not be determined at time of closing.)

<sup>viii</sup> Order [Dkt. 231], page 34 of 47, citing *Hutchison v. Tompkins*, 259 So. 2d at 132 (“The land sale market in Florida fluctuates from year to year and season to season, and it is generally impossible to say at the time a contract for sale is drawn what vendor's loss (if any) will be should the contract be breached....”).

<sup>ix</sup> Order [Dkt. 231], page 36 of 47

<sup>x</sup> Order [Dkt. 231], page 36-37 of 47.

<sup>xi</sup> Order [Dkt. 231], page 37-38 of 47, citing *Mineo v. Lakeside Village of Davie, LLC*, 983 So. 2d 20 (Fla. 4th DCA 2008), Florida’s Fourth District Court of Appeal upheld a liquidated damages provision in a contract for the sale of real property, which entitled the seller to seek specific performance of the contract for the original purchase price plus an interest rate of up to eighteen percent per year to compensate the Seller for its delay damages.