

Memorandum of Decision on Motion

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THE APPROVAL OF THE COMMITTEE ON OPINIONS**

JAC Travel Limited
v.
Select International Travel & Tours, Inc.

Docket No. HNT-L-540-10

Motion for Judgment

Opposed

Argued: August 19, 2011

Decided: August 19, 2011

The Honorable Peter A. Buchsbaum, J.S.C.

Facts and Procedural Posture:

This motion for judgment arises from a breach of a Stipulation of Settlement Agreement (the "Agreement") between defendant corporation, Select International Travel & Tours ("Select") and plaintiff, JAC Travel Limited ("JAC"). In 2007, JAC contracted with Select to sell a series of travel programs which Select ultimately planned to sell to its own clients and customers. A conflict arose regarding the services provided by JAC and the payments due and owing from Select to JAC. As a result, JAC initiated its lawsuit against Select which ultimately led to the settlement agreement that is the cause of this motion.

The Agreement required defendant to make 4 payments of \$6,250.00 to plaintiff on April 1st, June 1st, September 1st and November 1st, 2011 totaling \$25,000.00. (See Stipulation of Settlement, ¶1). The Agreement provides defendant with a grace period of five calendar days and stipulates that with respect to the payment due dates, "time is of the essence." (*Id.* at ¶4). Additionally, the Agreement stipulates that if defendant does not provide payment on the days allotted, or by the end of the grace period, plaintiff may file a Notice of Motion for Judgment seeking the amount of \$34,788.20 together with any amount of attorney's fees and collection costs incurred in the entry and post judgment collection of Judgment.

Defendant made a timely payment on April 1, 2011 of \$6,250.00. Plaintiff did not receive payment on June 1, 2011 nor did it receive payment on or before June 6, 2011, the last date allotted under the grace period. Plaintiff received payment on or before June 14, 2011. As a result, plaintiff has filed this Motion for Judgment for defendant's breach of the Agreement. Plaintiff seeks the \$34,788.20 provided in the Agreement as well as attorney's fees at 30%, less any payments already made pursuant to the Agreement.

Edita Kronic, the sole owner and officer of the defendant corporation, claims the late payment was a result of an oversight. (See Certification of Edita Kronic, ¶2). Kronic claims that she was away on a business trip during the week leading up to June 1, 2011, and was ill from June 1st until June 6th. As a result, she inadvertently missed the payment due date, but sent an overnight certified check in the amount due to plaintiff upon realizing her oversight. Defendant argues that this late payment did not cause plaintiff any material harm, was remedied as soon as it was discovered, and will not occur again. Likewise, defendant argues that granting plaintiff's motion would be unduly burdensome as it would subject defendant to a penalty of more than \$20,000 when the current Agreement only has a remaining balance of \$13,000 due and owing.

Analysis:

Plaintiff's motion for judgment will be **DENIED**. To be sure the plain language of the Agreement stipulates that defendant is obligated to make payments on four specific dates throughout the year, the Agreement specifies that with regard to the payment due dates, "time is of the essence." (See Stipulation of Settlement). Further, the Superior Court has previously stated that a settlement agreement "is a contract which, like all contracts, may be freely entered into and which a court, absent a demonstration of fraud or other compelling circumstances, should honor and enforce as it does other contracts." *Pascarella v. Bruck*, 190 N.J. Super. 118, 124-25 (App. Div. 1983) (quoting *Honeywell v. Bubb*, 130 N.J. Super. 130 (App. Div. 1974)).

Defendant does not claim that the Agreement was fraudulent or entered into under unfair circumstances. Additionally, defendant contracted into the Agreement knowing that any form of late payment would subject defendant to judgment in the amount requested by plaintiff. Despite this knowledge, defendant still failed to make a timely payment.

However, a problem yet remains. The requirement for entry of judgment in the full amount can best be construed as an attempt to estimate liquidated damages in the event of non-compliance with the Time of Essence provisions of the agreement. However, such clauses will not be enforced if they amount to a penalty. *MetLife Capital Financial Corp. v. Washington Avenue Associates*, 159 N.J. 484, 494-495 (1999). Thus, an reasonably large liquidated damage provision will be termed a penalty and rendered unenforceable.

That appears to the case here. Plaintiff seeks \$37,099.66, rather than \$18,750 (of which \$6,250 was tendered) as a result of an 8 day delay in one payment. Plaintiff fails to show that the 8 days cost it anything. Further, the two final payments are not even due yet. Under the circumstances, the approximately \$19,000 extra sought to be imposed by the plaintiff for one late payment was a penalty, rather than a reasonable estimate of damages caused by the delay.

Further, there is no showing of bad faith. True, defendant could have been more careful, but the short delay demonstrates that it rectified the situation as soon as becoming aware of same. Under these circumstances, even assuming that as stated in *MetLife*, the burden is on the defendant and some latitude must be accorded the estimate of damages, the penal nature of the imposition proposed here is so clear that the Court will deny enforcement of the literal terms of the settlement.

In addition, the Court takes into account the covenant of good faith and fair dealing. That covenant exists in every contract, even ones with clear deadlines. *Brunswick Hills Racquet Club v. Route 18 Shopping Center*, 182 N.J. 210 (2005). This case likewise smacks of a "gotcha" approach to contractual relations inconsistent with the covenant. Had the delayed payment occurred a second time, then invocation of Time of the Essence might well have been reasonable and consistent with the covenant. Moreover, in a second incident, the Court might well, under *MetLife*, have determined that the inability to estimate damages with exactitude after two failures might well warrant a reference to the Time of the Essence clause.

However, in this case, the penal nature of the additional \$19,000 and its inconsistency with the covenant of good faith and fair dealing are evident. Judgment will not be entered as requested by plaintiff.

Finally, for the sake of completeness, the Court notes the parties' disagreement concerning *Vermont Marble Co. v. Baltimore Contractors, Inc.*, 520 F.Supp. 922 (D.D.C. 1981) and *Bizno v. Saks*, 175 Cal. App.2d 714, 721 (Cal. D. Ct. App. 1968). These non-binding cases do not address or effect liquidated damage/penalty clause analysis set forth above.

Accordingly, for the foregoing reasons, plaintiff's motion for entry of judgment by reason of breach of settlement is **DENIED.**