IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10075

Summary Calendar

BB/NAPERVILLE LP., ET AL.,

Plaintiffs-Appellants,

v.

LARRY WORCHELL, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CV-827-AH)

(August 26, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

BB/Naperville L.P., BB/Olympia Fields L.P., and BB/Morrow L.P. (collectively, "Appellants") appeal from the district court's grant of summary judgment to Larry Worchell, Laura Worchell, Michael Epsteen, Maxine Sonnenburg and Irving Karpman

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

(collectively, "Appellees") in a suit concerning the enforceability of an alleged liquidated damages clause in a contract between Appellants and Appellees. Finding no error, we affirm.

I. BACKGROUND

Appellees are the partners in 2nd and Vermont Associates, Ltd. ("Appellees' Partnership"), a California general partnership. On June 7, 1990, Appellees' Partnership purchased three tracts of real propertySQthe Olympia Fields and Naperville properties in Illinois, and the Morrow property in Georgia (collectively, "the property")SQfrom Appellants, each of which is a Texas limited partnership. Appellees' Partnership acquired the property subject to existing indebtedness and liens on the property. Prior to closing the sale, Appellants required the Appellees to sign an Indemnity Agreement (the "Agreement").

Paragraph No. 1 of the Agreement required Appellees to perform all pre-existing secured loan obligations for the property. Appellees agreed to indemnify and hold harmless Appellants from

> any and all claims, actions, proceedings, costs, expenses, damages and liabilities, including but not limited to attorneys' fees, arising out of, connected with, or resulting from Purchaser's failure to perform all obligations of the borrower under such loan documents when due.

The Agreement was to remain in force until the loans were paid in full or until Appellants were released from the loan obligations by the lenders.

Paragraph No. 2 of the Agreement required Appellees to use their "best efforts" to assume all three outstanding loans with the consent of the lenders or to obtain replacement loans and pay off the three existing loans. Paragraph No. 2 further provided that if the existing loans were not assumed or replaced within nine months of June 7, 1990, the date of execution of the Agreement, Appellees would transfer $60,000 to an escrow agent, and if neither alternative was completed within one year, the $60,000 would be delivered to Appellants.

The loans on the Naperville and Morrow properties were assumed on July 20, 1990, and May 31, 1991, respectively. However, due to various financing obstacles, the Olympia Fields loan was not replaced until February 24, 1992, more than eight months after the agreed deadline for assuming or replacing the loans.

Appellants brought suit in Texas state court on March 29, 1993. Appellees removed the case to the United States District Court for the Northern District of Texas. The case was then transferred by consent to a magistrate judge for further proceedings and entry of judgment.

Appellants contend that Paragraph No. 2 of the Agreement is a consensual, negotiated provision for liquidated damages. They allege that because Appellees did not assume or replace the Olympia Fields loan until after the deadline, Appellants are entitled to judgment against Appellees in the amount of $60,000.

Appellants moved for summary judgment, and Appellees filed a cross-motion for summary judgment on the grounds that the provision in Paragraph No. 2 is not a liquidated damages provision, but an unenforceable penalty, which is void as a matter of law. The district court granted Appellees' cross-motion for summary judgment and dismissed Appellants' motion with prejudice, with costs taxed to Appellants. Appellants filed a timely notice of appeal.

II. STANDARD OF REVIEW

We review a summary judgment de novo, applying the same criteria used by the district court. Conkling v. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the facts drawing all inferences in the light most favorable to the nonmoving party, Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1272 (5th Cir. 1994), but if the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue of material fact to be resolved at trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III. ANALYSIS

The question of whether a contract provision operates as an enforceable liquidated damages clause or as an unenforceable penalty is a question of law for the court to decide. Phillips v. Phillips, 820 S.W.2d 785, 788 (Tex. 1991). In making its decision, the court should consider the provision "in light of the circumstances as the parties perceived them at the formation of the contract." Advance Tank & Constr. Co. v. City of DeSoto, 737 F. Supp. 383, 384 (N.D. Tex. 1990). Further, the agreement to liquidate damages must be express, and in the absence of an express agreement for liquidated damages, a court cannot make one for the parties. Birdwell v. Ferrell, 746 S.W.2d 338, 341 (Tex. App.SQAustin 1988, no writ). Whenever there is a doubt as to whether a clause is a liquidated damages provision or a penalty, the clause should be declared a penalty. Scurlock v. Lovvorn, 410 S.W.2d 525, 532 (Tex. Civ. App.SQDallas 1966, no writ).

Under Texas law, a liquidated damages provision will be enforced by the court only when both prongs of a two-part test are met. First, the harm caused by the breach must be "incapable or difficult of estimation," and second, the amount of liquidated damages must be "a reasonable forecast of just compensation." Phillips, 820 S.W.2d at 788. We conclude that the Agreement does not comport with the second requirement and therefore need not consider whether it satisfies the first.

The specified damages provision of the Agreement is not a reasonable forecast of just compensation for two reasons. Under

Texas law, a contractual provision does not provide a reasonable forecast of just compensation where it fails to exclude further liability for actual damages. See Robert G. Beneke & Co. v. Cole, 550 S.W.2d 321, 322 (Tex. Civ. App.SQDallas 1977, no writ) (refusing to enforce a specified damages clause that "fail[ed] to exclude further liability for any actual damages proved"); see also Birdwell, 746 S.W.2d at 340-41 (stating that "the intent that the [specified] sum be in lieu of other damages must be evident"). Paragraph No. 2 of the Agreement fails to exclude further liability for actual damages and does not limit Appellants to recovery of the alleged liquidated damages set forth in Paragraph No. 2. There is no intent expressed in the Agreement that the alleged liquidated damages be in lieu of actual damages. Nor does the Agreement prohibit Appellants from making indemnity claims in addition to the specified sum of $60,000. Indeed, a representative of the Appellants opined in deposition that the Appellants could claim the alleged liquidated damages pursuant to Paragraph No. 2, and claim any additional actual damages pursuant to the indemnification provision in Paragraph No. 1. This possibility leads us to conclude that Paragraph No. 2 of the Agreement is an unenforceable penalty provision under Texas law.

Moreover, Texas courts have long held that a contract that provides the same reparation for the breach of any of its covenants "would be unreasonable and a violation of the principle of just compensation." Stewart v. Basey, 245 S.W.2d 484, 487

(Tex. 1952). That principle is applicable in the instant case. The Agreement concerns the assumption of three separate loans by the Appellees. Paragraph No. 2 provides for the same amount of specified damages to be paid by the Appellees regardless of whether they fail to meet the deadlines as to one, two, or all three loans. This failure to distinguish between lesser and greater breaches of the Agreement would lead a Texas court to conclude that Paragraph No. 2 is an unenforceable penalty clause. See Krenek v. Wang Lab., Inc., 583 S.W.2d 454, 457 (Tex. Civ. App.SQWaco 1979, no writ) (invalidating a specified damages clause that provided for a single measure of damages for any breach of a contract containing both major and minor covenants).

We find no error in the magistrate judge's conclusion that Paragraph No. 2 is an unenforceable penalty clause. Appellants do not attack the magistrate judge's determination that they suffered no actual damages, so we do not reexamine this finding. Summary judgment for the Appellees was appropriate.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.