

LIQUIDATED DAMAGES IN FLORIDA PURCHASE AND SALE AGREEMENTS



ARTHUR J. MENOR is the Managing Partner of the West Palm Beach office of Shutts & Bowen LLP, and Chairman of the Real Estate Leasing Practice Group.

A nationally recognized real estate lawyer, Art has over 38 years of experience in all facets of commercial real estate, focusing on commercial leasing and the acquisition and disposition of commercial real estate. He advises landlords and tenants in various aspects of the leasing process and also counsels developers, investors, and lenders. As a seasoned veteran, Art has worked on real estate projects of all sizes and has mastered his craft in improving the lease drafting and negotiation processes, including using technology to build and customize high-quality leasing documents in a cost-effective manner.

Art has consistently been recognized by his peers, rating services, and the community. He is a fellow of the American College of Real Estate Lawyers, which recognizes distinguished, nationally-known lawyers for their outstanding legal ability, and high standards of professional and ethical conduct in the practice of real estate law. He is one of seven Most Distinguished Attorneys in the 2015 South Florida Legal Guide and is the only attorney listed as its Top Lawyer in commercial leasing.

The author wishes to acknowledge the substantial contributions to this article made by his colleagues, Alfred A. LaSorte and Seth L. Coleman.

.....

This article is submitted as part of the ongoing project of the ACREL Acquisitions Committee to answer the following 13 questions related to the liquidated damages remedy in commercial purchase and sale agreements under the law of various states. Here are the answers to the questions as discerned through research of Florida law.

1. May the seller choose specific performance instead of liquidated damages (so that liquidated damages are not an exclusive remedy)?

Under Florida law, assuming there is no provision in a contract to purchase real property providing differently, upon a breach of the contract by the buyer, the seller generally has two alternative remedies: 1) he may sue to compel specific performance and, as an incident to such relief, may be awarded damages for the injuries he has suffered, or 2) he may retain the property and sue for breach of contract. *Frank Silvestri, Inc. v. Hilltop Developers, Inc.*, 418 So. 2d 1201, 1203 (Fla. 5th DCA 1982); *Clements v. Leonard*, 70 So. 2d 840, 843 (Fla. 1954). The specific performance remedy is available to the seller because

money damages do not adequately compensate a seller burdened with ownership following the buyer's default. Specific performance is uniquely capable of rectifying the breach of such a contract. *Bell v. Alsip*, 435 So. 2d 840, 842 (Fla. 4th DCA 1983).

If the contract provides a liquidated damages remedy to the seller, Florida courts allow the seller to choose specific performance instead of liquidated damages unless the parties intend liquidated damages to be the exclusive remedy. If the terms of the contract clearly show that liquidated damages is intended to be the exclusive remedy than the seller may not pursue specific performance. *Dillard Homes, Inc. v. Carroll*, 152 So. 2d 738 (Fla. 3d DCA 1963). A Florida court reviewing a contract that provides that the seller is entitled to liquidated damages and thereafter the contract is terminated, would likely find that liquidated damages is the seller's sole remedy even in the absence of language expressly providing that liquidated damages is the sole remedy.

Further, a contract may provide for liquidated damages in the event of a breach, while also providing

the alternative remedy of specific performance without rendering the liquidated damages provision unenforceable. *Mineo v. Lakeside Village of Davie, LLC*, 983 So. 2d 20 (Fla. 4th DCA 2008) citing *Lefemine v. Baron*, 573 So. 2d 326, 328 (Fla. 1991). *San Francisco Distribution Center, LLC v. Stonemason Partners, LP*, 183 So.3d 391 (Fla. 3d DCA 2014).

2. May the seller choose actual damages instead of liquidated damages (so that liquidated damages are not an exclusive remedy)?

A contract provision that provides the seller the option of receiving the deposit as liquidated damages or suing for actual damages renders the liquidated damages provision unenforceable. In *Lefemine*, the Florida Supreme Court said: “The reason why the forfeiture clause must fail in this case is that the option granted to Baron either to choose liquidated damages or to sue for actual damages indicates an intent to penalize the defaulting buyer and negates the intent to liquidate damages in the event of a breach.” The purpose of the liquidated damages provision within an agreement is to fix the seller’s damages recovery at an agreed amount. In Florida, the mere existence of an option to sue for actual damages will render a liquidated damages provision in an agreement an unenforceable penalty provision. *Lefemine, supra*.

3. If the seller may choose liquidated damages or actual damages, may it have both?

As provided in the answer to Question 2 above, a seller may not choose between actual and liquidated damages, therefore, the seller cannot have both.

4. If the seller may choose liquidated damages or actual damages, but not both, when must it decide?

In Florida, a seller may not choose between liquidated damages or actual damages. See the answers to Questions 2 and 3 above. In *Lefemine*, the court also found the liquidated damages clause to be unenforceable because the clause, as written, would have allowed the seller to exercise its option after

the actual damages were known: “if the actual damages are less than the liquidated sum,...the seller will take the deposit...” *Lefemine, supra*, at 330.

5. Is there an applicable statute addressing liquidated damages clauses?

There is no Florida statute that addresses liquidated damages in contracts for the sale of commercial real estate.

6. What is the test for a valid liquidated damages clause?

As more fully discussed in *Carey, Liquidated Damages in a Real Estate PSA: a Closer Look, The Practical Real Estate Lawyer*, January 2019, the traditional test to determine the validity of a liquidated damages clause has three prongs: (1) intent (the parties must intend to provide for damages and not a penalty); (2) uncertainty (as to the amount of damages that will result from the breach); and (3) reasonableness (the sum stipulated must be a reasonable pre-estimate of the probable loss). In Florida, courts have consistently only discussed the second and third prongs.

In *Hyman v. Cohen*, 73 So. 2d 393 (Fla. 1954), the Florida Supreme Court established a two-prong test to determine if a liquidated damages clause is enforceable or if it will be stricken as a penalty clause. First, the damages consequent upon a breach must not be readily ascertainable at the time the contract is entered into (i.e., the uncertainty prong of the traditional test); second, the sum stipulated to be forfeited must not be so grossly disproportionate to any damages that might reasonably be expected to follow from a breach as to show that the parties could have intended only to induce full performance, rather than to liquidate their damages (i.e., the reasonableness prong with a bit of a conflation with the intent prong of the traditional test). *Hyman*.

Even though the Florida courts have repeatedly stated that the test for enforceability of a liquidated damages provision is a two-prong test, the second prong of the Florida test seems to include the both the first and third prongs of the traditional test. In any case, Florida courts use the Florida two-prong

test, in addition to the plain reading of the contract, to ascertain whether it was the intent of the parties to liquidate damages (which is permissible) or to induce performance (which is not). Thus, the first prong of intent from the traditional test seems to be the touchstone of the Florida law enforceability analysis even though it is not expressly stated to be a separate part of the test.

7. Who has the burden of proof?

No Florida cases were found that directly answered this question. However, in most of the cases the buyer was seeking to invalidate the liquidated damages provision and as the plaintiff had the burden of proof. In addition, in the decision in *Lewis v. Belknap*, 69 So. 2d 212 (Fla. 1957) the court stated that where two mature people are dealing with each other at arm's length, then the deposit amount is presumptively liquidated damages and not a penalty which would lead to the conclusion that the buyer has the burden of proof in rebutting this presumption. Finally, in *Valenti v. Coral Reef Shopping Center, Inc.*, 316 So. 2d 589 (Fla. 3d DCA 1975), the lower court was found in error for requiring the seller to show that the subject properties depreciated in value since the signing of the contracts which implicitly shows that the buyer rather than the seller has the burden of proof.

8. As of when is "reasonableness" tested?

Whether a liquidated damages provision meets the tests to be enforceable is determined as of the date the contract is entered into, not a later date, such as the date that damages are suffered as a result of the breach. *Hyman*, at 401; *Lefemine*, supra. The amount stipulated in the contract to be liquidated damages must be reasonable under the circumstances at the time of execution of the contract, "since the land sale market in Florida fluctuates from year to year and it is generally impossible to say at the time a contract for sale is drawn what the vendor's loss will be should the contract be breached by the purchasers." *Valenti*.

9. What percentage of the purchase price is likely acceptable as liquidated damages?

Florida courts have consistently held that liquidated damages provisions for 10 percent of the purchase price of the property are acceptable, with some decisions upholding percentages as high as 22 percent under appropriate facts. *Kirkland v. Ocean Key Associates, Ltd.*, No. 07-10030-CIV, 2007 WL 3343083 at *2 (S.D. Fla. Nov. 8, 2007) (10 percent held reasonable); *Hot Developers, Inc. v. Willow Lake Estates, Inc.*, 950 So. 2d 537, 541-42 (Fla. 4th DCA 2007) (9.65 percent upheld as liquidated damages and discussing ranges from 4.85 percent to 22 percent held to be reasonable); *Bloom v. Chandler*, 530 So. 2d 341 (Fla. 4th DCA 1988) (upholding a liquidated damages clause under which the sellers retained a \$49,500 deposit as liquidated damages on a contract for \$225,000 or 22 percent of the purchase price); *Hooper v. Breneman*, 417 So.2d 315, 318 (Fla. 5th DCA 1982) (upholding a liquidated damages provision calling for forfeiture of 13.3 percent of the purchase price); *Ivanov v. Sobel*, 654 So. 2d 991 (Fla. 3d DCA 1995) (10 percent held not to be grossly disproportionate); *Johnson v. Wortzel*, 517 So.2d 42 (Fla. 3d DCA 1987) (18.2 percent was not sufficient enough to shock the conscience of the court).

10. Are actual damages relevant for liquidated damages and, in particular, will liquidated damages be allowed when there are no actual damages?

The amount of actual damages, if any, is irrelevant to the enforceability of a liquidated damages provision in a real estate contract in Florida. In fact, in one case it was found that the lack of actual damages could not be used as a defense to enforcement of a liquidated damages provision with the court ignoring the fact that the party enforcing the provision had actually profited by selling the subject property to a third party for a higher price than the contracted price. *San Francisco Distribution Center*. In reaching this conclusion the court noted that the real estate market fluctuates from year to year and even from season to season. Since the validity of a liquidated damages provision is measured on the

date the contract is made, and at that time future market conditions are unknowable, the seller's ultimate future actual damages are irrelevant. See also, Valenti.

11. Is mitigation relevant for liquidated damages?

No Florida cases were found that addressed this issue. However, because the validity of a liquidated damages remedy is not contingent upon the ultimate amount of actual damages incurred, if any, the concept of mitigation of damages should be irrelevant. Courts in other jurisdictions support this view. See, *NPS, LLC v. Minihane*, 886 N.E.2d 670, 675 (Mass. 2008) (when parties agree in advance to a sum certain that represents a reasonable estimate of potential damages, they exchange the opportunity to determine actual damages after a breach, including possible mitigation, for the "peace of mind and certainty of result" afforded by a liquidated damages clause.)

12. Is a "Shotgun" liquidated damages clause enforceable?

No Florida cases were found dealing with a seller attempting to retain a deposit as liquidated damages for a buyer's default other than in failing to close. However, in a lawsuit regarding a breach of a lease, the Florida Supreme Court stated, "where an agreement is to pay the same sum for a partial as for a total breach or is to secure the performance of covenants of widely varying importance for any of which the sum is excessive, it will be regarded as a penalty." *Stenor, Inc. v. Lester*, 58 So.2d 673 (Fla. 1951) citing *Greenblatt v. McCall*, 67 Fla. 165, 64 So. 748 (Fla. 1914) and *Smith v. Newell*, 34 Fla. 165, 20 So. 249 (Fla. 1896).

13. Does a liquidated damages clause preclude the recovery of attorneys' fees by the seller?

There are two scenarios in which the recovery of attorneys' fees in addition to liquidated damages could be attempted: (1) the recovery of attorneys' fees incurred by the seller in preparing and negotiating the contract with the defaulting purchaser prior to the date of default; and, (2) the recovery

of attorneys' fees incurred in litigation to retain (or recover) the liquidated damages.

As to the first scenario, if the seller is entitled to and obtains liquidated damages for the buyer's default, then, as discussed in the answer to Question 2, the seller will likely not be entitled to recover any additional amount of actual damages for that breach, including attorneys' fees incurred by the seller in the underlying transaction or a subsequent sale of the property to another buyer. *Lefemine, supra*. A Florida court would likely refuse to allow a seller to recover, in addition to retaining the deposit as liquidated damages, the attorneys' fees incurred by the seller in preparing for, negotiating, documenting, and closing the sale to the defaulting buyer or a sale to a replacement buyer, as those costs are viewed as part of the seller's damages that have been liquidated.

On the other hand, as to the second scenario, attorneys' fees incurred in litigation to recover (or retain) the liquidated damages would likely be recoverable, so long as such fees were permitted by contract or statute. If the agreement between the parties includes a clause giving the prevailing party the right to attorneys' fees and costs for any litigation associated with the contract, then the prevailing party would likely be entitled to recover those fees and costs in addition to the liquidated damages.

Although no Florida case was found in which a buyer argued that retention of the deposit as liquidated damages precluded the seller from recovering attorneys' fees in the action to claim the deposit, there is at least one Florida case where the recovery of fees was expressly permitted in an action in which the deposit was awarded to the seller as liquidated damages. *Erwin v. Scholfield*, 416 So. 2d 478 (Fla. 5th DCA 1982). Although it was not an issue in the appeal, attorneys' fees were also awarded to the seller in *San Francisco Distribution*. Attorneys' fees incurred in litigation to retain the deposit do not flow from a breach of the buyer's obligation to purchase, but rather from the buyer's resistance to the payment to (or retention by) the seller of the liquidated damages, and are awarded under a separate clause within the contract. 🍀