[Cite as *Kurtz v. W. Property, L.L.C.*, 2011-Ohio-6726.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lloyd Kurtz,	:	
Plaintiff-Appellant,	:	
		No. 10AP-1099
v.	:	(C.P.C. No. 09CVH07-11132)
Western Property, L.L.C.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 27, 2011

Brunner Quinn, and *Patrick M. Quinn*, for appellant.

Bricker & Eckler, LLP, *Christopher L. McCloskey*, *Vladimir P. Belo*, and *Francisco E. Luttecke*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Plaintiff-appellant, Lloyd Kurtz, appeals from the August 24, 2010 judgment entry of the Franklin County Court of Common Pleas granting the motion of defendant-appellee, Western Property, L.L.C., for judgment on the pleadings, and the October 19, 2010 judgment entry granting judgment for appellee on its counterclaim for attorney fees. For the following reasons, we affirm.

{¶2} On September 27, 2002, appellant entered into an agreement ("agreement") with Dominion Homes, Inc. ("Dominion"), pursuant to which Dominion agreed to purchase from appellant approximately 164 acres of real estate located in

Franklin and Madison counties. The agreement was subsequently amended four times. The agreement ultimately provided for the sale and purchase of the real estate to occur in three separate phases. In Phase I, Dominion was to purchase not less than 55 acres at a cost of $40,000 per acre. In Phase II, Dominion was to purchase not less than 55 acres at a cost of $40,500 per acre. In Phase III, Dominion was to purchase the remainder of the 164 acres at a cost of $41,500 per acre. The agreement required the closing on each phase to occur within one year of the closing on the prior phase.

{¶3} Section 4 of the originally executed agreement provided, in relevant part, as follows:

> Additional Security. In the event that Buyer closes the purchase of Phase I, Buyer agrees to deliver to Seller at such closing, as security for Buyer's obligation to purchase the remaining Phases, a letter of credit or bond in the amount of the purchase price of such remaining Phases (the "Security"). * * * At the closing of Phase II, the Security shall be replaced by successor Security in the amount of the purchase price of Phase III. If for any reason, through no default of Seller, Buyer fails to close on Phase II or Phase III as required hereunder, Seller shall have the right to draw on the Security for the entire amount due thereunder. * * * In the event that Seller draws upon the Security, the amount drawn by Seller shall constitute liquidated damages, which the parties hereto agree is a reasonable and proper amount in light of the circumstances, and which amount shall be Seller's sole remedy at law and in equity for Buyer's failure to close.

{¶4} The fourth amendment to the agreement, executed on January 27, 2007, amended Section 4, as follows:

> Section 4 is amended to provide that (i) the amount of the letter of credit or bond to be delivered at the closing of Phase I (the "Security") shall be 5% of the purchase price of Phases II and III, and (ii) at the closing of Phase II the amount of the Security shall be reduced to be 5% of the purchase price of Phase III. In lieu of a letter of credit or bond, Buyer may elect to deliver the amount of the Security to Seller in cash at the closing of Phase I.

{¶5} The fourth amendment expressly provided that all other terms and conditions of the agreement remained unchanged.

{¶6} In addition, Section 19 of the originally executed agreement, which remained unchanged throughout the amendment process, provided, in pertinent part, that "[i]n any action brought to enforce this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and other expenses incurred in connection with such action."

{¶7} On March 30, 2007, Dominion assigned all its right, title, and interest as the buyer under the agreement to appellee. Pursuant to the assignment, appellant and appellee closed on Phase I on August 24, 2007. At the closing, in accordance with the fourth amendment to Section 4 of the agreement, appellee delivered to appellant $111,375 as security for Phase II and $111,349.30 as security for Phase III, which amounts represented five percent of the purchase price of those two phases. The parties closed on Phase II on August 22, 2008. On June 26, 2009, appellee sent a letter to appellant indicating that it had elected not to close on the purchase of Phase III and that it forfeited the $111,349.30 to appellant as liquidated damages pursuant to Section 4 of the agreement.

{¶8} On July 24, 2009, appellant filed a three-count complaint against appellee. In Count 1, appellant requested a declaratory judgment that appellee had breached the agreement by refusing to complete the purchase of Phase III; that such breach precluded appellee from enforcing the attorney fee provision in Section 19; that the liquidated damages clause in Section 4 did not apply to limit or restrict appellee's legal or equitable remedies; and that the liquidated damages clause in Section 4 was invalid and unenforceable as a matter of law. In Count 2, appellant alleged that appellee had

materially breached the agreement by failing to close on the purchase of Phase III. In Count 3, appellant sought specific performance of the agreement. In his prayer for relief, appellant requested a declaratory judgment, compensatory damages on the breach of contract claim, or, in the alternative, an order directing appellee to fulfill its obligations under the agreement by completing the purchase of Phase III, and an award of attorney fees pursuant to Section 19 of the agreement.

{¶9} Appellee filed an answer and counterclaim on August 20, 2009. In its answer, appellee denied that it breached the agreement. In its counterclaim, appellee sought a declaratory judgment that the agreement applied to the litigation and that appellee could enforce the fee-shifting provision if it prevailed in the litigation.

{¶10} On the same day, appellee filed a Civ.R. 12(C) motion for judgment on the pleadings, arguing that appellant's exclusive remedy under the agreement was set forth in the liquidated damages provision in Section 4 of the agreement. Appellant timely opposed the motion, arguing that the liquidated damages clause was unenforceable as a matter of law or, alternatively, that it did not apply by its own terms.

{¶11} By decision and entry filed July 9, 2010, the trial court granted appellee's motion for judgment on the pleadings. The court concluded that the liquidated damages provision contained in Section 4 of the agreement applied to the facts of the case and that the provision was enforceable as a matter of law. Thereafter, in a judgment entry filed August 24, 2010, the trial court dismissed appellant's claims with prejudice and set appellee's counterclaim for attorney fees for trial. Following a September 15, 2010 bench trial, the trial court, on October 19, 2010, filed a judgment entry finding that the fee-shifting provision contained in Section 19 of the agreement was enforceable against appellant.

Having so found, the court awarded appellee the attorney fees it incurred in defending appellant's lawsuit.

{¶12} Appellant timely appeals, advancing three assignments of error for our review:

> I. The trial court erred in enforcing the liquidated damages provision in the Agreement because that provision is, on its own terms, inapplicable to this action.
>
> II. The trial court erred in enforcing the liquidated damages provision where actual damages are neither uncertain in amount nor difficult to prove, and there is no evidence that the actual damages are proportionate to the stipulated amount.
>
> III. The trial court erred in awarding attorney's fees pursuant to a fee-shifting provision in the Agreement when Western raised only a claim for declaratory judgment, and Western materially breached the Agreement.

{¶13} Appellant's first and second assignments of error challenge the trial court's decision to grant appellee's motion for judgment on the pleadings. Accordingly, we shall first set forth the applicable standard of review.

{¶14} Civ.R. 12(C) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "Civ.R. 12(C) motions are specifically for resolving questions of law." *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 1996-Ohio-459. In reviewing a trial court's decision to grant such a motion, this court conducts a de novo review of the legal issues without deference to the trial court's determination. *Fontbank, Inc. v. CompuServe, Inc.* (2000), 138 Ohio App.3d 801, 807. Determination of a motion for judgment on the pleadings is restricted solely to the allegations in the pleadings, as well as any material incorporated by reference or attached as exhibits to those pleadings. *Curtis v Ohio Adult*

Parole Auth., 10th Dist No. 04AP-1214, 2006-Ohio-15, ¶24, citing *Drozeck v. Lawyers Title Ins. Corp.* (2000), 140 Ohio App.3d 816, 820.

{¶15} In deciding a Civ.R. 12(C) motion, the court "is required to construe as true all the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party." *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581, 2001-Ohio-1287. Dismissal of a complaint is appropriate under Civ.R. 12(C) if the court finds beyond doubt that the plaintiff can prove no set of facts in support of its claims that would entitle it to relief. *Midwest Pride* at 570. Thus, a court may grant a Civ.R. 12(C) motion only if no material facts are disputed and the pleadings demonstrate that the movant is entitled to judgment as a matter of law. Id.

{¶16} Appellant contends in his first assignment of error that the trial court erred in enforcing the liquidated damages provision of the agreement, as it is, on its own terms, inapplicable to the facts of the case. Appellant concedes that, at the closing on Phase I, appellee, in accordance with the amendment to Section 4 of the agreement, elected to deliver to appellant $111,349.30 in cash, which constituted five percent of the purchase price for Phase III, rather than providing a bond or letter of credit. Appellant further concedes that he accepted, and has retained, the cash security. Appellant contends, however, that the liquidated damages provision granted him the right, but not the obligation, to draw on the security, and that only in the event he chose to draw on the security could the liquidated damages provision have been invoked. Appellant maintains that "drawing" on the security required him to take some "affirmative action" and that his passive acceptance of the cash security at the closing on Phase I did not constitute such "affirmative action." Appellant contends that, because he never exercised the option of

"drawing" on the security, the liquidated damages provision was never invoked, and he was free to pursue his breach of contract action. We disagree.

{¶17} The parties' briefs present no specific authority controlling the issue sub judice, and our research confirms the absence of precise case law. However, we are persuaded by the following argument advanced by appellee. The amendment to Section 4 of the agreement altered not only the amount of the security required—from the entire purchase price to five percent of the purchase price of Phases II and III—but also the tender in which the security could be provided. The amendment permitted appellee, at its discretion, to provide the security via a letter of credit or bond, both of which would require a "draw," or in cash. Appellee exercised its option to post the security in cash at the closing on Phase I. The additional step of drawing upon a bond or letter of credit was obviated by appellee's delivery of the cash. Contrary to appellant's assertion, his acceptance and retention of the cash constituted an "affirmative action" to "draw on" the security, triggering the liquidated damages provision.

{¶18} Appellant further contends that the agreement provides him discretion to either employ the liquidated damages provision in Section 4 or file a breach of contract action seeking actual damages in court. However, under the plain language of the agreement, the liquidated damages provision is the only remedy available to appellant. As noted above, Section 4 provides that the security is appellant's "sole remedy at law and in equity for [appellee's] failure to close."

{¶19} This "sole remedy" language is crucial, as another provision of the agreement demonstrates that the parties could have negotiated for alternative remedies beyond liquidated damages. Section 3 of the agreement, which addresses the earnest money deposit, provides that, "if for any reason, through no default of Seller, Buyer fails to

close on any Phase * * * the Deposit shall be retained by Seller, which retention shall not in any way prejudice the rights of Seller in any action for damages or specific performance." The agreement thus handled the earnest money deposit and the security very differently. Unlike the earnest money deposit, once the security was accepted and retained, it constituted appellant's "sole remedy at law and in equity."

{¶20} In support of his contention that he was not limited to the liquidated damages provision in Section 4, appellant relies on *Williams v. Kondziela*, 11th Dist. No. 2002-L-190, 2004-Ohio-2077, and *Arena v. Heather* (Oct. 17, 1983), 5th Dist. No. 6112. Neither case aids appellant.

{¶21} In *Williams,* the parties entered into a contract for the sale of real property. The contract included a liquidated damages provision, which stated in relevant part that, if the buyer refused to perform the contract, " 'Seller may, in lieu of other remedies available to him, declare this Agreement null and void as to Buyer, and, at his option, all monies paid on account hereof not in excess of 15% of the agreed purchase price herein shall be forfeited to Seller as fixed, stipulated and liquidated damages without proof of loss.' " Id. at ¶14. When the buyer did not close on the transaction, the seller sold the property to another buyer and then sued the original buyer for breach of contract. The original buyer argued that the seller was limited to the liquidated damages amount specified in the contract. The court disagreed, based upon the discretionary language of the liquidated damages provision. The court explained:

> The liquidated damages provision in question states that the seller *may, in lieu of other remedies available,* accept damages for default in an amount not exceeding fifteen percent of the agreed purchase price. The term "may" implies the exercise of discretion. Consequently, the seller is not required to accept 15% of the agreed purchase price as damages in the event of default. Rather, a seller may use the

> liquidated damages provision as a mechanism for compensation in the event that he or she does not want to pursue other remedies. The provision does not foreclose the possibility of the seller pursuing alternate remedies.
>
> In the current case, appellant failed to close the transaction. After waiting for approximately ten months after the established date of closing, appellee, in his discretion, filed a complaint for breach of contract. Appellee did so in lieu of utilizing the liquidated damages provision in the purchase agreement. The liquidated damages provision did not preclude appellee from moving forward with his complaint for breach of contract. Rather, the liquidated damages provision was merely a stipulated remedy available to the seller at his option that, if utilized, would preclude alternate remedies. Pursuant to the plain language of the contract, appellee was not manacled to liquidated damages in the event of default.

(Emphasis sic.) Id. at ¶16-17.

{¶22} In *Arena,* the parties entered into a real estate purchase contract which included a liquidated damages provision identical to the one in *Williams.* When the buyers defaulted on the contract, the sellers sued for breach of contract. The buyers claimed that the liquidated damages provision constituted the exclusive remedy for the sellers. The court disagreed, finding that the provision gave the sellers the option of invoking the liquidated damages clause or pursuing their other available remedies. The court determined that the sellers' decision to file a breach of contract action and collect their actual damages was permissible pursuant to the "in lieu of" language in the liquidated damages provision.

{¶23} The "in lieu of" language integral to the courts' decisions in *Williams* and *Arena* is conspicuously absent from the agreement in the instant case. Here, the parties made no reservation as to the security being forfeited "in lieu of" other contract remedies. To the contrary, Section 4 of the agreement contemplates the liquidated damages as the "sole" remedy available in the event appellee did not close on Phase III of the agreement.

{¶24} In short, appellant invoked the liquidated damages remedy by accepting and retaining the cash security. Further, had the parties intended that appellant had the option of invoking the liquidated damages clause or pursuing actual damages, they would have indicated as much in the agreement. Thus, the trial court did not err in concluding that the liquidated damages clause applied to this action. Appellant's first assignment of error is overruled.

{¶25} Appellant's second assignment of error contends the trial court erred in concluding that the liquidated damages provision of the parties' agreement was valid and enforceable. We disagree.

{¶26} "As a general rule, parties are free to enter into contracts that contain provisions which apportion damages in the event of default. 'The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint. Responsibility for the exercise, however improvident, of that right is one of the roots of its preservation.' " *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 381, quoting *Blount v. Smith* (1967), 12 Ohio St.2d 41, 47

{¶27} In *Samson Sales, Inc. v. Honeywell, Inc.* (1984), 12 Ohio St.3d 27, the Supreme Court of Ohio set forth the law governing liquidated damages clauses in contracts: "While some jurisdictions have rejected such contract provisions on policy grounds, clauses in contracts providing for reasonable liquidated damages are recognized in Ohio as valid and enforceable. * * * However, reasonable compensation for actual damages is the legitimate objective of such liquidated damage provisions and where the amount specified is manifestly inequitable and unrealistic, courts will ordinarily regard it as a penalty." Id. at 28. "Whether a particular sum specified in a contract is

intended as a penalty or as liquidated damages depends upon the operative facts and circumstances surrounding each particular case." Id. at 28-29.

{¶28} The *Samson Sales* court then set forth the following three-part test for evaluating the enforceability of a liquidated damages provision: "Where the parties have agreed on the amount of damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amounts so fixed should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof." Id. at syllabus.[1] "The tripartite test of *Samson Sales* is stated in the conjunctive, and, hence, all three elements must be met." *Zurich-Am. Ins. Co. v. Citadel Alarm, Inc.* (May 8, 1986), 8th Dist. No. 50499.

{¶29} As noted by the trial court, it bears emphasis that a challenge to a liquidated damages provision requires the court to "step back and examine it in light of what the

[1] Appellee asserts that we need not apply the *Samson Sales* test to the facts of this case. Appellee maintains that the test applies only where the breaching party attempts to avoid the consequences of a liquidated damages provision on grounds that the liquidated damages are too high and, therefore, constitute a penalty designed to coerce performance of the contract. In *Samson Sales*, the court considered a situation in which a burglar alarm, installed by the defendant, failed to transmit a signal. As a result, the plaintiff alleged losses of $68,303 for merchandise stolen from the plaintiff's pawn shop. The defendant claimed that its liability was limited to the $50 amount set forth in the liquidated damages provision of the parties' contract. The court concluded that "by way of analysis, the nominal amount set forth in the contract between [the parties] has the nature and appearance of a penalty." Id. at 29. Contrary to appellee's assertion, the *Samson Sales* court did not suggest that a liquidated damages provision may only be deemed an unenforceable penalty if it disproportionately punishes the breaching party. Indeed, the Supreme Court implicitly held to the contrary when it found the provision at issue penalized the non-breaching party. The Supreme Court arrived at this conclusion only after setting forth and then applying the three-part test noted above. Although it is ordinarily the breaching party who contests the validity of a liquidated damages provision, the *Samson Sales* case demonstrates that a non-breaching party may contest such a provision. The trial court in the instant case noted that a non-breaching party's challenge to

parties knew at the time the contract was formed and in light of an estimate of the actual damages caused by the breach. If the provision was reasonable at the time of formation and bears a reasonable (not necessarily exact) relation to actual damages, the provision will be enforced." *Lake Ridge Academy* at 382, citing 3 Restatement of the Law 2d, Contracts (1981), 157, Section 356(1).

{¶30} With regard to the first prong of the *Samson Sales* test, appellant contends that the trial court erred in concluding that his actual damages would be uncertain as to amount and difficult to prove. Appellant contends that his damages are easily quantifiable and constitute the difference between the contract price and the fair market value of Phase III at the time of breach. However, as noted by the trial court, although the contract price is easily ascertainable, the fair market value of real estate fluctuates, in some cases dramatically, and these fluctuations, based upon numerous independent variables, are unpredictable.

{¶31} Difficulties inherent in assessing the fair market value of property due to the volatility of the real estate market have been the impetus for Ohio courts giving effect to liquidated damages provisions in real estate transactions. In *Norpac Realty Co. v. Schackne* (1923), 107 Ohio St. 425, the Supreme Court of Ohio enforced a liquidated damages provision in a land sale contract. The Supreme Court noted the general principle that " '[i]f the sum to be paid is uncertain at the time and may vary with circumstances, the parties may fix the same by agreement and it will be regarded as liquidated damages.' " Id. at 427, quoting *Knox Rock Blasting Co. v. Grafton Stone Co.*, 64 Ohio St. 361, 366. The Supreme Court applied the principle to the case before it,

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a liquidated damages clause presents a somewhat unusual circumstance. The court nonetheless proceeded to apply the *Samson Sales* test; we agree with the trial court that the test is applicable.

stating: "Measured by this definition it is manifest that it was impossible for the parties to fix with any degree of certainty what the values of the property might be at a later period, and * * * they were legally permitted to stipulate the damages in advance." Id. In *Adams v. Coleman* (July 7, 1977), 8th Dist. No. 36319, the parties entered into a real estate contract which contained a liquidated damages provision. The court enforced the provision, stating: "In the case at bar, the damages which would result from a breach would have been very difficult to determine at the time the contract was executed. A breach could have occurred at any time within the eighteen-month period. It would have been impossible to predict the fair market value of the property over the extended period of time during which the contract could have been breached." Id.

{¶32} In the instant case, the trial court noted that the amendment to Section 4 of the agreement, which set the security amount at five percent of the purchase price, was executed on January 27, 2007, with closing on Phase III to occur two and one-half years later, on August 22, 2009. We agree with the trial court that, at the time the agreement was amended, the parties could not have predicted with any certainty what the fair market value of the Phase III property would be at an unknown time up to two and one-half years in the future.

{¶33} The vast majority of the cases upon which appellant relies in support of his contention that his damages are easily quantifiable are readily distinguishable because they did not involve the sale of real estate. *Beatley v. Schwartz*, 10th Dist. No. 03AP-911, 2004-Ohio-2945, involved the breach of a residential apartment lease. *Am. Financial Leasing & Servs. Co. v. Miller* (1974), 41 Ohio App.2d 69, involved the breach of an equipment lease. *Easton Telecom Servs., L.L.C. v. Creedom Internet Group, Inc.* (N.D.Ohio, 2002), 216 F.Supp.2d 695, involved the breach of a contract for

telecommunications services. *Abbruzzese v. Miller* (Sept. 26, 1996), 10th Dist. No. 96APE03-265 involved the breach of a construction contract.

{¶34} *Hayzer v. Bedecs* (8th Dist. 1929), 7 Ohio Law Abs. 420, the case cited by appellant that did involve a real estate transaction, is also distinguishable. In *Hayzer,* the real estate contract involved the exchange of two properties, not the sale of one property. In a property exchange, concerns regarding market fluctuations are absent, as the value of both properties will be similarly affected. Such is not the case in a traditional real estate transaction, as here, involving the sale of one property for a set amount.

{¶35} Regarding the second prong of the *Samson Sales* test, appellant contends the trial court improperly analyzed the proportionality requirement.[2] More specifically, appellant contends that, because the court granted appellee's motion for judgment on the pleadings, there was no evidence demonstrating whether the liquidated damages were proportionate to actual damages.

{¶36} The second prong of the *Samson Sales* test requires that the "contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties." Id. at 29. Liquidated damages must bear "a reasonable (not necessarily exact) relation to actual damages." *Lake Ridge Academy* at 382.

{¶37} Appellant contends that the history of the agreement suggests that the liquidated damages are disproportionate to actual damages. Appellant notes that, under the originally executed agreement, the liquidated damages were set at 100 percent of the purchase price and that the amendment to Section 4 of the agreement reduced the

[2] Appellant does not challenge the trial court's determination regarding the other aspects of the second prong of the *Samson Sales* test; i.e., that the agreement was neither unconscionable nor unreasonable.

liquidated damages to five percent of the purchase price. Appellant argues that there is no indication on the face of the agreement itself, or anywhere else in the pleadings, why this five-percent figure is a reasonable estimation of his actual damages or what justification exists for such a substantial decrease. Appellant maintains that the question of whether the reduction to five percent represents a conscious estimation by the parties cannot be resolved on a motion for judgment on the pleadings. We cannot agree with appellant's contention.

{¶38} The parties included language in Section 4 of the originally executed agreement that the amount of the security "is a reasonable and proper amount in light of the circumstances." As noted above, this language carried forward throughout the amendment process. As stated in *Sheffield-King Milling Co. v. Domestic Science Baking Co.* (1917), 95 Ohio St. 180:

> "The parties themselves best know what their expectations are in regard to the advantages of their undertaking and the damages attendant on its failure, and when they have mutually agreed on the amount of such damages in good faith and without illegality, it is as much the duty of the court to enforce that agreement as it is the other provisions of the contract."

Id. at 185, quoting *Doan v. Rogan* (1909), 79 Ohio St. 372, 388, quoting *Dwinel v. Brown* (Sup.Ct.Me.1867), 54 Me. 468.

{¶39} Thus, when the amendment to Section 4 of the agreement was executed, the parties considered and agreed that five percent of the purchase price was a reasonable amount of liquidated damages. Appellant's acquiescence in the amendment, which, as noted above, incorporated the language that the security amount was "reasonable and proper in light of the circumstances," constitutes evidence that the liquidated damages were both reasonable and proportionate to his actual damages.

Appellant may not now disavow the liquidated damages provision in pursuit of a more favorable outcome that was not bargained for when the amendment to Section 4 was executed.

{¶40} We also note that appellant's complaint contains no factual allegation that the five-percent amount is disproportionate to his actual damages and no factual allegation as to the amount of his actual damages for the trial court to accept as true in determining whether the liquidated damages were so manifestly disproportionate in amount as to justify the conclusion that the agreement did not express the true intention of the parties.

{¶41} It is true that we do not know from the pleadings the fair market value of the Phase III property at the time of breach and, therefore, cannot calculate appellant's actual damages to compare to the five-percent amount. However, we do know from the face of the agreement itself that the amendment to the five-percent liquidated damages amount was preceded and accompanied by amendments to (1) increase the deposit amount required of appellee as buyer to extend the contingency period, and (2) increase the purchase price of the property. The contingency period deposit amount, which the parties agreed was non-refundable and in most cases not credited[3] against the purchase price, was increased from $25,000 per six-month extension to as much as $200,000 for subsequent extensions. The purchase price for the 54.7 acres of the Phase III property was increased from $35,000 per acre to $41,500 per acre. Contrary to what appellant suggests, it is reasonable that the increases in the contingency period deposit amounts

[3] A deposit of $25,000 per extension period was required for the first and second extension periods (Exhibit A, Clause 7); $200,000 for the third extension period and $50,000 for the fourth extension period (Exhibit C, Clause 2); $30,000 per extension period for the fifth and sixth extension periods (Exhibit D, Clause 1); and $15,000 for the seventh extension period (Exhibit E, Clause 2). All deposits were non-refundable and,

and the purchase price resulted from negotiations between the parties and provide a justification for a decrease in the amount of liquidated damages from the entire amount to five percent of the purchase price. Finally, we note that, in addition to retaining the five-percent security amount, appellant also retains the 54.7 acres of land which he is free to re-sell. Considering the contract as a whole, as we are required to do, we cannot say that the five-percent amount is so manifestly disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties.

{¶42} Appellant does not challenge the trial court's conclusion regarding the third prong of the *Samson Sales* test; i.e., that the agreement is consistent with the conclusion that the parties intended that the five-percent security already in appellant's possession constitute appellant's sole remedy for appellee's failure to close on Phase III.

{¶43} For the foregoing reasons, the trial court did not err in concluding that the liquidated damages provision of the parties' agreement was valid and enforceable as a matter of law. Accordingly, appellant's second assignment of error is overruled.

{¶44} Under the third assignment of error, appellant asserts that the trial court erred in its determination that Section 19 of the agreement, in particular the attorney fee-shifting provision, was enforceable against appellant. Appellant's argument is two pronged. First, appellant argues that the provision cannot be enforced pursuant to a declaratory judgment. Second, appellant argues that the entire provision is unenforceable because appellee materially breached the agreement.

{¶45} It is necessary to consider whether a contractual provision is enforceable before considering whether the means of enforcement were proper. We will therefore

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except in the case of the deposits for the third and seventh extension periods, not credited against the purchase price.

address appellant's second argument first (i.e., that Section 19 is unenforceable because appellee materially breached the agreement).

{¶46} Section 19 of the agreement states in part: "In any action brought to enforce this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and other expenses incurred in connection with such action."

{¶47} As noted earlier, appellee filed a counterclaim seeking a declaration that it can enforce the fee-shifting provision of the agreement if it prevailed in the litigation. After the trial court granted appellee's motion for judgment on the pleadings, the court set appellee's counterclaim for a hearing. No witnesses testified at the hearing, and the parties stipulated to the amount of attorney fees appellee incurred. Appellee requested that it be awarded those fees in accordance with Section 19 of the agreement. In response, appellant raised the arguments now asserted on appeal.

{¶48} Following argument by counsel for both parties, the trial court stated, in relevant part:

> The pertinent language of paragraph 19 is clear and unambiguous in any action which includes this one brought to enforce the Agreement and defining the obligations of the parties is certainly a method of enforcing the Agreement. The prevailing party shall be entitled to reasonable attorney fees and other expenses incurred in connection with such action. That is a very--just the language is express and clear.
>
> The Court does not need to make a determination as to whether the breach is material. I would tend to say more likely than not it is, but I don't have to reach that because the remedy provided by the express agreement of the parties covers that breach and therefore * * * the provisions of paragraph 19 which I quoted a few moments ago, remain undisturbed.
>
> * * *

> [T]he Court hereby finds that the request for attorney fees is granted.

(Sept. 15, 2010, Tr. 46-47.)

{¶49} We find unavailing appellant's contention that appellee's material breach of the agreement by failing to complete the purchase of Phase III excused him from any further obligation under the agreement, including the obligation to pay appellee's attorney fees. In support of his argument, appellant cites several cases that set forth general contract principles regarding the definition of "material breach," and the effect such has on the non-breaching party's further obligations under the contract. None of these cases, however, involve a contractual fee-shifting provision; accordingly, they are not analogous, and we are not persuaded that they control. Moreover, as appellee points out, appellant's argument requires the court to read the term "non-breaching party" into the fee-shifting provision. However, the agreement does not state that only a non-breaching party is entitled to recover attorney fees. Under the clear language of the fee-shifting provision, the right to recover attorney fees is not contingent upon which party breaches or the nature of the breach. Rather, the only condition precedent to recovery of attorney fees is a determination as to the prevailing party. Further, there is no dispute that appellee was the "prevailing party" in the action instituted by appellant. Thus, pursuant to the express terms of the agreement, appellee, as the "prevailing party," was entitled to an award of attorney fees pursuant to the fee-shifting provision in Section 19 of the agreement regardless of whether it materially breached the agreement.

{¶50} Having determined that Section 19 of the agreement is enforceable against appellant, we consider whether the means of enforcement was proper. Appellant claims that the attorney fee award is prohibited because of the nature of the relief sought in

appellee's counterclaim—a declaratory judgment. To that end, appellant advances two arguments: (1) that monetary judgments are prohibited in declaratory judgment actions, and (2) that R.C. 2721.16 prohibits an award of attorney fees in declaratory judgment actions.

{¶51} At the outset, we note that appellant's claim that monetary judgments are precluded in declaratory judgment actions does not find support under Ohio case law. See *Jeppe v. Blue Cross of Northeast Ohio* (1980), 67 Ohio App.2d 87, 92 ("[w]hile there is no express statutory provision for the granting of a money judgment in a declaratory judgment action, such relief may be granted so long as it is prayed for and warranted by the proof"). See also *Rose v. Natl. Mut. Ins. Co*. (1999), 134 Ohio App.3d 229, 244 ("[w]hile a declaratory judgment declares only the 'rights, status, and other legal relations' of the parties, R.C. 2721.02, a money judgment must be rendered when the prayer for relief contains an express request for a money judgment or contains an expression that could be construed as such"); *Peoples Rights Org., Inc. v. Montgomery* (2001), 142 Ohio App.3d 443, 504 ("[a] party may also pray for monetary relief, should it be granted a declaratory judgment in its favor").

{¶52} With respect to appellant's second argument, R.C. 2721.16(A)(1) provides in part that, absent an express exclusion, "[a] court of record shall not award attorney's fees to any party on a claim or proceeding for declaratory relief." By way of background, R.C. 2721.16 was enacted in response to the Supreme Court of Ohio's decision in *Motorists Mut. Ins. Co. v. Brandenburg*, 72 Ohio St.3d 157, 1995-Ohio-281. Under the provisions of former R.C. 2721.09, "attorney fees could be granted by the trial court in declaratory judgment actions whenever 'necessary and proper,' yet those requirements were often interpreted loosely." *Goodrich Corp. v. Commercial Union Ins. Co.,* 9th Dist.

No. 23585, 2008-Ohio-3200, ¶88. In *Brandenburg,* "the Ohio Supreme Court * * * held that former R.C. 2721.09 provided a trial court with statutory authority 'to assess attorney fees based on a declaratory judgment issued by the court' and that the trial court had full discretion to award such fees." *Goodrich* at ¶88. However, "[e]ffective September 24, 1999, in explicit response to the *Brandenburg* decision, the Ohio General Assembly amended R.C. 2721.09 and enacted R.C. 2721.16 to place a limitation on attorney fees that can be recovered in declaratory judgment actions." Id. at ¶89.

{¶53} In enacting R.C. 2721.16, the General Assembly expressly stated that its intention was to both supersede the effect of the holding in *Brandenburg* pertaining to the court's construction of the "whenever necessary or proper" and "further relief" language under R.C. 2721.09, and to perpetuate adherence to the so-called "American Rule," which requires that each party involved in litigation pay his or her own attorney fees. See *Ohio Farmers Ins., Co. v. Coup* (May 22, 2000), 6th Dist. No. S-00-005, citing the legislative history of R.C. 2721.16. One of the well-recognized exceptions to the "American Rule" allows for the recovery of attorney fees if the parties contract to shift fees. *McConnell v. Hunt Sports Ent.* (1999), 132 Ohio App.3d 657, 699, citing *Pegan v. Crawmer*, 79 Ohio St.3d 155, 156, 1997-Ohio-176. Further, under Ohio law, "attorney fees are allowable as 'damages' in breach-of-contract cases where the parties have bargained for this result and the breaching party's wrongful conduct has led to the legal fees being incurred." *Westfield Cos. v. O.K.L. Can Line,* 155 Ohio App.3d 747, 2003-Ohio-7151, ¶28.

{¶54} In *Ashwood Home Owners' Assn. v. Reitor,* 12th Dist. No. CA2003-06-142, 2004-Ohio-3536, the plaintiff, Ashwood Homeowners' Association ("Association"), commenced a declaratory judgment action against the defendant, a resident and member

of the Association. The Association sought a declaratory judgment, pursuant to R.C. 2721.03, that the defendant was in violation of provisions of the "Declaration of Covenants, Conditions, Restrictions, and Reservations of Easements for Ashwood Home Owners' Association" (the "Homeowners' Declaration"). Pursuant to Article VII, Section 7.4.4 of the Homeowners' Declaration, the Association was entitled to "any cost associated with the enforcement of this Declaration or the Rules and Regulations of the Association, including but not limited to, attorney fees, witness fees and court costs." The trial court granted summary judgment in favor of the Association, finding that the defendant had violated a restrictive covenant under the Homeowners' Declaration. The trial court also granted the Association's motion for attorney fees.

{¶55} On appeal, the defendant argued that the trial court erred in granting attorney fees to the Association on the basis that attorney fees are precluded pursuant to R.C. 2721.16 because declaratory relief was sought. The court rejected the defendant's contention, holding that R.C. 2721.16 did not preclude the award of attorney fees because the action involved the enforcement of restrictive covenants (i.e., not a claim for declaratory relief), and thus the Association was entitled to recover attorney fees pursuant to Article VII, Section 7.4.4 of the Homeowners' Declaration.

{¶56} Similarly, in the instant case, the parties entered into an agreement providing in part: "In any action brought to enforce this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and other expenses incurred in connection with such action." By virtue of the trial court's grant of appellee's motion for judgment on the pleadings, appellee, as the prevailing party, was entitled to the award of fees based upon the terms of the fee-shifting provision. As in *Ashwood,* the record indicates that the trial court did not treat the source of the obligation as a claim for declaratory relief.

Rather, the court awarded attorney fees based upon the "clear and unambiguous" language of the agreement allowing for fees "in any action * * * brought to enforce the Agreement."

{¶57} Further, appellant was clearly on notice of the issues before the court at the hearing on the counterclaim, and both sides were afforded the opportunity to argue as to the propriety of an award. As noted, prior to the hearing on the request for attorney fees, the parties entered into a stipulation that the amount of fees requested was reasonable. Here, the language of the parties' agreement made clear their intent for attorney fees to be awarded in any action to enforce the agreement (and we note that appellant, in fact, had similarly requested an award of attorney fees under Section 19 of the agreement in his complaint seeking declaratory judgment and claims for breach of contract). Under these circumstances, the trial court did not abuse its discretion in awarding appellee attorney fees pursuant to the fee-shifting provision of the agreement, nor was the award of fees in derogation of R.C. 2721.16. *Ashwood*.

{¶58} Based upon foregoing, appellant's third assignment of error is without merit and is overruled.

{¶59} For the foregoing reasons, appellant's three assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas are hereby affirmed.

Judgments affirmed.

SADLER, J., concurs.
DORRIAN, J., concurs in part and dissents in part.

DORRIAN, J., concurring in part and dissenting in part.

{¶60} As to the first and second assignments of error, I concur with the majority decision. As to the third assignment of error, although I agree with the majority's decision that appellee, as the "prevailing party" was entitled to an award of attorney fees, I dissent from the majority's decision that the attorney fees could be awarded pursuant to a declaratory judgment action.

{¶61} Appellee's prayer for relief requested: (1) "a declaration that Section 19 of the Agreement, including the fee-shifting provision is valid and applicable"; (2) "a declaration that Western may enforce Section 19 of the Agreement, including the fee-shifting provisions"; and (3) that "the Court * * * grant Western its attorneys' fees, costs, and expenses related with this litigation."

{¶62} R.C. 2721.02 allows courts to declare "rights, status and other legal relations." R.C. 2721.03 allows persons to have questions of construction or validity arising under contract determined and as such a declaration of rights, status and other legal relations under the contract. R.C. 2721.04 allows a contract to be construed by a declaratory judgment order. It is clear, pursuant to these three statutes, that the trial court could address appellee's first and second requests in its prayer for relief and declare that Section 19 was valid and enforceable and that appellee may enforce it, including the fee-shifting provision contained therein. Therefore, I focus my discussion on whether R.C. 2721.16 barred the trial court from addressing appellee's third request in its prayer for relief by actually granting appellee its attorney fees, costs, and expenses related with this litigation.

{¶63} R.C. 2721.16 provides that "[a] court of record shall not award attorney's fees to any party *on a claim or proceeding for declaratory relief* under this chapter" unless

one of three statutory exceptions apply. (Emphasis added.) There is no dispute that none of the statutory exceptions apply in this case.

{¶64} In *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, ¶12, the Supreme Court of Ohio set forth the following statement regarding statutory interpretation:

> When analyzing a statute, our primary goal is to apply the legislative intent manifested in the words of the statute. See *State ex rel Herman v. Klopfleish* (1995), 72 Ohio St.3d 581, 584, 651 N.E.2d 995. Statutes that are plain and unambiguous must be applied as written without further interpretation. See *Lake Hosp. Sys. v. Ohio Ins. Guar. Assn.* (1994), 69 Ohio St.3d 521, 524, 634 N.E.2d 611. In construing the terms of a particular statute, words must be given their usual, normal, and/or customary meanings. See *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees* (1995), 72 Ohio St.3d 62, 65, 647 N.E.2d 486, citing R.C. 1.42.

{¶65} Appellee requested attorney fees "related with this litigation." The attorney fees requested by appellee, although related to the same litigation, can be divided into different categories of work: (1) attorney fees incurred in answering appellant's complaint/ declaratory judgment action and filing the Civ.R. 12(C) motion for judgment on the pleadings; and (2) attorney fees incurred in filing the counterclaim/declaratory judgment action and preparing for and attending the hearing related thereto. I would find that the plain and unambiguous language of R.C. 2721.16 precludes the trial court from awarding attorney fees related to both categories of attorney fees because such fees would be awarded "on a claim or proceeding for declaratory relief."

{¶66} The General Assembly enacted R.C. 2721.16 in 1999. The uncodified language of R.C. 2721.16 provides:

> SECTION 3. The General Assembly hereby declares that, in enacting section 2721.16 of the Revised Code * * * it is the intent of the General Assembly to do all of the following:

> (A) To supersede the effect of the holding in *Motorists Mut. Ins. Co. v. Brandenburg* (1995), 72 Ohio St.3d 157, and in its progeny, including *Landis v. Grange Mut. Ins. Co.* (1998), 82 Ohio St.3d 339, 342-343, that the "whenever necessary or proper" and "further relief" language in section 2721.09 of the Revised Code, as it existed prior to the effective date of this act, reflected the General Assembly's conferral of authority upon an Ohio trial court to award "attorney's fees based on a declaratory judgment issued by the court";
>
> (B) To recognize the dissent's accurate construction in *Brandenburg* of the "whenever necessary or proper" and "further relief" language in section 2721.09 of the Revised Code, as it existed prior to the effective date of this act;
>
> (C) To recognize the holding of the Ohio Supreme Court in *Sorin v. Bd. of Edn.* (1976), 46 Ohio St.2d 177, and its progeny that Ohio follows the "American Rule" under which an award of attorney fees to a prevailing party in a civil action or proceeding generally must be based on an express authorization of the General Assembly;
>
> (D) To recognize, consistent with the "American Rule," that authority to grant an award of attorney's fees in connection with an action or proceeding in which declaratory relief is sought under Chapter 2721. of the Revised Code must be expressly conferred by the General Assembly upon the courts of this state and has not been so conferred prior to the effective date of this act.

{¶67} In *Motorists Mut. Ins. Co. v. Brandenburg*, 72 Ohio St.3d 157, 1995-Ohio-281, the plaintiff was injured in an automobile accident and submitted a claim for uninsured motorists coverage to his insurer. The insurer filed a declaratory judgment action seeking a determination that it was not obligated to provide coverage under the policy. In his counterclaim, the plaintiff asserted he was entitled to attorney fees and punitive damages as a result of the declaratory judgment action filed by the insurer. Upon the parties' cross-motions for summary judgment, the trial court concluded that the plaintiff was entitled to coverage under the policy. In a subsequent order, the trial court granted the insurer's motion to strike the counterclaim, determining that the plaintiff would

be entitled to attorney fees if he eventually prevailed on the issue of coverage. Ultimately, appellant prevailed and, upon motion, the trial court awarded the plaintiff his attorney fees. The court of appeals reversed the trial court's judgment, finding that the trial court had no authority to award attorney fees to the plaintiff. More specifically, the court of appeals determined that attorney fees could be granted to an insured only in instances where the insurer's conduct was unreasonably burdensome or vexatious or where the insurer had wrongfully refused to defend the insured. The court of appeals did not decide whether R.C. 2721.09 was the proper vehicle to grant an insured attorney fees.

{¶68} On appeal, the plaintiff asserted that regardless of the specific duties imposed upon an insurer and irrespective of the insurer's conduct, a trial court, as incidental to a declaration of an insurer's obligations to its insured, had the discretion under R.C. 2721.09 to permit recovery of attorney fees by the insured. At the time *Brandenburg* was decided, R.C. 2721.09 provided, in pertinent part, that "[w]henever necessary or proper, further relief based on a declaratory judgment or decree previously granted may be given. The application therefore shall be by petition to a court having jurisdiction to grant the relief." The Supreme Court of Ohio reversed the court of appeals and agreed with the plaintiff, holding that R.C. 2721.09 provided the trial court with statutory authority "to assess attorney fees based on a declaratory judgment issued by the court." *Brandenburg* at 160. The court reasoned:

> By its clear terms, the intent of R.C. 2721.09, affording further relief in declaratory judgment actions, is to provide a trial court with the authority to enforce its declaration of right. * * * Nowhere in R.C. Chapter 2721 is there any provision which narrows the broad authority conferred by R.C. 2721.09. Moreover, R.C. 2721.09 does not place any legal significance on the insurer's conduct nor is the operation of the section conditioned on which party actually prevails in the underlying action. Rather, the only limitation placed on the trial court is

> that the relief must be "necessary or proper." Hence, this court should not create a blanket limitation precluding an award of attorney fees based upon conduct of a party and/or who wins or who loses. This is even more apparent give the requirement under R.C. 2721.13 that "[s]ections 2721.01 to 2721.15, inclusive, of the Revised Code are remedial, and shall be liberally construed and administered."

Id. at 159-60.

{¶69} As noted in the uncodified language, R.C. 2721.16 was enacted to supersede the effect of *Brandenburg.* It was also intended to acknowledge the dissent in *Brandenburg.* The dissent focused on the majority's interpretation of R.C. 2721.09 as the basis of its holding that attorney fees were proper. Justice Cook stated that "[t]he 'further relief' in [R.C. 2721.09] and similar declaratory judgment statutes from other states allows a court to grant consequential or incidental relief such as a money judgment, injunction, specific performance, mandamus, and accounting; relief that is remedial in nature, not punitive." Id. at 161. She further averred that "[t]he intent of the statute affording further relief in declaratory judgment actions is to grant the trial court the power to enforce its declaration of right," which, she found, promoted "the judicial economy of implementing the declaration of rights without the necessity of filing a separate action." Id.

{¶70} As noted by the majority, the General Assembly also intended to perpetuate adherence to the so-called "American Rule," which requires that each party involved in litigation pay his or her own attorney fees.

{¶71} The unique facts of the case before us create tension between the General Assembly's intentions in enacting R.C. 2721.16. On one hand, the General Assembly intended to supersede the *Brandenberg* decision, which like the present case involved a request for attorney fees made in response to a complaint/declaratory judgment action. R.C. 2721.16 now clearly prohibits an award of attorney fees under

these circumstances. However, on the other hand, the General Assembly also intended to recognize Justice Cook's dissent in *Brandenberg* and her construction of the "whenever necessary or proper" and "further relief" language in R.C. 2721.09. Unlike *Brandenberg*, the present case involved a fee-shifting agreement. The trial court here awarded attorney fees to enforce its declaration of right as to the counterclaim/declaratory judgment action that the fee-shifting provision is valid and applicable and that appellee may enforce it. In so doing, the court promoted "the judicial economy of implementing the declaration of rights without the necessity of filing a separate action." As Justice Cook noted, this is precisely the intent of the "further relief" language in R.C. 2721.09. I also agree that one of the well-recognized exceptions to the "American Rule" allows for the recovery of attorney fees if the parties contract to shift fees. *McConnell v. Hunt Sports Ent.* (1999), 132 Ohio App.3d 657, 699, citing *Pegan v. Crawmer* (1997), 79 Ohio St.3d 155, 156.

{¶72} Nevertheless, I believe that R.C. 2721.16 requires appellee to file a separate action in order to obtain an actual award of attorney fees, but do so acknowledging that such a result would be contrary to the goal of promoting judicial economy articulated in Justice Cook's *Brandenburg* dissent. However, I cannot ignore the plain and unambiguous language of R.C. 2721.16 prohibiting a court from awarding attorney fees on a claim or proceeding for declaratory relief unless certain exceptions apply. Further, I cannot ignore that, in enacting those exceptions to the general prohibition on awarding attorney fees in declaratory relief claims, the General Assembly did not include an exception for contractual attorney fee-shifting. With this in mind, I would find that the trial court erred when it awarded attorney fees to appellee pursuant to the declaratory judgment action.

{¶73} For these reasons, I would overrule appellant's first and second assignments of error and overrule in part and sustain in part appellant's third assignment of error.

_____