[Cite as *Triangle Properties, Inc. v. Homewood Corp.*, 2013-Ohio-3926.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Triangle Properties, Inc.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-933 (C.P.C. No. 08CVH-02-2469)
Homewood Corporation,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 12, 2013

Zeiger, Tigges & Little LLP, John W. Zeiger and *Bradley T. Ferrell*, for appellee.

David A. Dye Co., LPA, and *David A. Dye*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Homewood Corporation ("Homewood") is appealing from a $1,360,000 judgment obtained against it by Triangle Properties, Inc. ("Triangle").

{¶ 2} Triangle entered into a contract with two homebuilders, Homewood and M/I Homes of Central Ohio, LLC ("M/I Homes") to develop lots upon which the homebuilders could erect single-family dwellings. Apparently, M/I Homes performed its obligations under the contract to the satisfaction of Triangle, because Triangle sued only Homewood in a lawsuit for an alleged breach of contract and significant damages.

{¶ 3} The lawsuit eventually came on for a jury-waived trial before a magistrate over a period of days in June, July, and August 2010. The magistrate rendered a detailed

decision on February 25, 2011. Homewood objected to several portions of the magistrate's decision, but the trial court judge assigned to the case overruled the objections and adopted the findings of fact and conclusions of law contained in the magistrate's decision. This appeal then ensued.

Assignments of Error

{¶ 4} Homewood assigns 12 errors for our consideration:

> 1. THE TRIAL COURT ERRED IN GRANTING $1,360,000 IN "LIQUIDATED DAMAGES" TO APPELLEE, BECAUSE BY DOING SO, THE COURT APPLIED THE CONTRACTUAL DAMAGES PROVISION AS A PENALTY.
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> 2. THE TRIAL COURT ERRED WHEN IT FAILED TO APPLY SET-OFFS TO WHICH APPELLANT WAS ENTITLED.
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> 3. THE TRIAL COURT ERRED AS A MATTER OF LAW BY ITS INTERPRETATION OF THE CONTRACT THAT IGNORED THE INTENTIONS OF THE PARTIES.
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> 4. THE TRIAL COURT ERRED, IN THAT IN LIEU OF INTERPRETING THE PARTIES' CONTRACT, IT REWROTE THE CONTRACT.
>
> 5. THE TRIAL COURT ERRED BY EXCLUDING ADMISSIBLE EVIDENCE.
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> 6. THE TRIAL COURT ERRED BY INTERPRETING THE CONTRACT TO IMPOSE OBLIGATIONS ON APPELLANT THAT DID NOT EXIST UNDER THE CONTRACT.
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> 7. THE TRIAL COURT ERRED BY FINDING THAT TIME WAS NOT 'OF THE ESSENCE' UNDER THE CONTRACT.
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> 8. THE TRIAL COURT ERRED IN REACHING CONCLUSIONS THAT WERE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.
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> 9. THE TRIAL COURT ERRED BY SHIFTING APPELLEE'S BURDEN OF PROOF TO APPELLANT.

> 10. THE TRIAL COURT ERRED BY GRANTING REFORMATION AS RELIEF FOR A PARTY'S UNILATERAL MISTAKE.
>
> 11. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR LEAVE TO AMEND ITS ANSWER.
>
> 12. THE TRIAL COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF CIVIL RULE 9(C).

{¶ 5} Many of Homewood's arguments overlap, and therefore cannot be neatly categorized under specific assignments of error. For ease of discussion, we will identify specific assignments of error where practical, and discuss other arguments under subject-matter headings.

Background

{¶ 6} Under the April 27, 2005 purchase agreement, Triangle ("Seller") was required to develop raw land into 172 residential lots located in Section II of the Scioto Reserve Expansion Development in Delaware County, Ohio. The contract price for each developed lot was $68,000. The project was divided into two phases. Phase I consisted of 118 lots that were successfully completed by Triangle and purchased by Homewood and M/I ("Buyers"), albeit at different times. Phase II consisted of the remaining 54 lots and is the subject of this litigation.

{¶ 7} In Section 3 of the purchase agreement under the heading "Deposit," the agreement provided in pertinent part as follows:

> Within fifteen (15) days after execution of this Agreement, Buyers shall deposit with Seller a promissory note, in the form attached hereto as Exhibit B (the "Note"), in the amount of $2,924,000.00 to insure closing of the first and second phase of said lots. Deposit shall be reduced to $918,000.00 as security for Buyers' obligations to close on the remaining lots. Amount owed herein will change based on the final number of lots in each phase.

{¶ 8} The purchase agreement contained the following liquidated damages clause in Section 3(d):

> If the purchase and sale of Phase I or Phase II, as the case may be, is not consummated because of Byers' [sic] failure or refusal to perform its obligations hereunder, Seller shall be entitled to all sums due and owing under the Note as liquidated damages which the parties hereto agree is a reasonable and proper amount in light of the circumstances, and which shall be Seller's sole remedy at law and in equity.

{¶ 9} Thereafter, the Buyers executed a Demand Promissory Note for $2,924,000,[1] which served as the deposit under the contract. The Buyers' execution of the note led to a side agreement between Homewood and M/I that a defaulting party would indemnify the non-defaulting party against any claims or liability arising from the default.

{¶ 10} Reading the Deposit section and the Liquidated Damages section in tandem, the amount of liquidated damages for lots that were not sold was set at $17,000 per lot. ($2,924,000 ÷ 172 = $17,000). The Buyers were responsible for executing a reduced substitute promissory note in the appropriate amount after each closing.

{¶ 11} Triangle, Homewood, and M/I amended the purchase agreement a number of times over the course of their dealing. The first three amendments are relevant to this matter. The first amendment extended the time for Triangle to complete certain conditions to close from January 1, until July 15, 2006.

{¶ 12} The second, more substantial amendment took place on August 25, 2006, and included the following terms:

> 1. Section 2 of the Agreement is hereby amended by deleting it in its entirety and replacing it with the following:
>
> "Purchase Price. The purchase price for each developed lot shall be $68,000.00, subject to credits, adjustments and

[1] The Demand Promissory Note spelled out the principal sum of "Two Million, Nine Hundred Twenty-Four Thousand and 00/100 dollars," but the drafter wrote "($924,000.00)" as the numeric amount. At the top of the agreement, the amount is set forth as "$2,924,000." Reading the agreement and the note as a whole it is obvious that $924,000.00 is a typographic error and the written amount and the amount at the top of the note reflect the correct sum for the promissory note.

prorations provided in this Agreement, and shall be paid by wire transfer of immediately available funds at Closing.

2. Section 3 of the Agreement is hereby amended by deleting it in its entirety and replacing it with the following:

"Deposit. Within fifteen (15) days after execution of this Agreement, Buyers shall deposit with Seller a promissory note, in the form attached hereto as Exhibit B (the "Note"), in the amount of $2,924,000.00 to ensure closing of said lots. At each Closing, the deposit shall be reduced by $17,000.00 multiplied by the number of lots purchased by Buyers. The amount owed herein will change based on the number of lots still to be closed. The Note shall be held by Seller and disbursed as follows:

(a) At the first and second Closings, the Note shall be substituted with a new Note in the amount equal to $17,000.00 multiplied by the number of lots to be closed by Buyers in accordance with this Agreement. The Note shall be held by Seller to secure Buyers continuing obligation to purchase the lots. The Note shall be returned to Buyers upon completion of the third Closing.

* * *

(c) If the purchase and sale of lots is not consummated because any condition of closing set forth in Paragraph 5 is not satisfied within the applicable time period, as provided in paragraph 5, and Buyers refuse to waive such condition, the Note shall be returned to Buyers and thereafter neither Buyers nor Seller shall have any further obligation hereunder with respect to any unpurchased lots.

(d) If the purchase and sale of lots is not consummated because of Buyers' failure or refusal to perform its obligations hereunder, Seller shall be entitled to all sums due and owing under the Note as liquidated damages which the parties hereto agree is a reasonable and proper amount in light of the circumstances, and which shall be Seller's sole remedy at law and in equity."

* * *

> 4. Section 11 of the Agreement is hereby amended by deleting it in its entirety and replacing it with the following:
>
> Closing. After the conditions set forth in Paragraphs 5, 6(c) (d) (e) and (f) and 7 have been satisfied, Seller shall give written notice to Buyers. The conditions set forth in Paragraph 6(a) and (b) have been satisfied by Seller. The purchase of the lots will take place at three closings, each a "Closing". Subject to any extensions contained herein, the first Closing of 60 lots in Phase I shall occur on or before August 25, 2006; the second Closing for the remaining 58 lots in Phase I shall occur on or before February 28, 2o07; and the third Closing for 54 lots in Phase II shall occur on or before August 31, 2007. Each Closing will occur at such specific date, time and place as shall be mutually agreed to by Seller and Buyers.
>
> Buyers' obligation to close at any Closing shall be conditioned upon all of Seller's representations and warranties being true and correct as of the scheduled date of such Closing. If Seller fails to completely develop properly pursuant to the Plan prior to each Closing, then Buyers may elect either to (a) terminate this Agreement, subject to Seller's right to extend as set forth below, or (b) waive the requirement and proceed to Closing. If any Closing is delayed through no fault of the Seller, there will be an extension of up to 90 days for Seller to complete its obligations. In the event of such an extension, the date on which Buyers must purchase the affected lots shall be automatically extended by a period equal to such extension.

{¶ 13} The timing of the second amendment coincided with Homewood closing on 30 Phase I lots. It also included a demand promissory note for $1,904,000, which reflected the remaining lots to be purchased by Homewood and M/I.

{¶ 14} The third amendment to the purchase agreement took place on March 7, 2007. It amended the "Closing" section in pertinent part as follows:

> Closing. The conditions set forth in Paragraphs 5, 6 (a) (b) (c) (d) (e) and (f), and 7 have been satisfied. The Buyers

have closed on 60 lots on August 25, 2006 pursuant to the terms of the Agreement. The Buyers have failed to close on 54 of the remaining lots by February 28, 2007 pursuant to the terms of the Agreement. Seller has agreed to extend the time to close the 28 lots to be purchased by Homewood Corporation to March 7, 2007. The lot numbers are set forth on Exhibit A to this Amendment.

Homewood Corporation agrees to purchase its share of the remaining lots, being 27 lots, by no later than August 21, 2007. However, Homewood shall have the option to extend said closing date from August 31, 2007 to June 1, 2008 by paying the Seller interest at the prime rate charged by Huntington National Bank, as said rate may periodically change. Interest would be paid monthly by Homewood on the sum of $1,836,000.00 from August 31, 2007 to June 1, 2008 (27 lots times $68,000.00 per lot).

The Seller has agreed to an extension of time for M/I Homes to close the purchase of the 26 lots, see Exhibit "B" hereto for the lot numbers, from February 28, 2006 to no later than December 1, 2007. M/I's share of the remaining lots, being 27 lots, are to close by M/I by no later than June 1, 2008.

M/I agrees to pay Seller interest at the prime rate charged by Huntington National Bank, as said rate may periodically change, for the aforesaid extensions.

Interest shall accrue on the sum of $1,768,000.00 (26 lots times $68,000.00 per lot) beginning on February 28, 2007 and ending on the date the 26 lots are acquired, such interest being paid monthly in arrears upon invoice from Seller.

Interest shall accrue on the sum of $1,836,000.00 (27 lots times &68,000.00 per lot) beginning on August 31, 2007 and ending on the date the 27 lots are acquired, such interest being paid monthly in arrears upon invoice from Seller.

A substitute deposit Promissory Note shall be deposited by Buyers with Seller at the time of each closing in the amount of $17,000.00, multiplied by the number of lots

> remaining to be closed by Buyers in accordance with this Agreement.

{¶ 15} At the time of the third amendment, 80 lots remained unpurchased. Some of the lots designated as M/I lots were Phase I lots, but Homewood had completed the purchase of all of its Phase I lots. In Phase II, Homewood was obligated to purchase 27 of the lots. In connection with both Phase I and Phase II, M/I was obligated to purchase 53 lots. In conjunction with signing the third amendment on March 7, 2007, Homewood and M/I executed a demand promissory note for $1,360,000 (80 lots x $17,000 = $1,360,000).

{¶ 16} With the acquiescence and, at times, the direction of Homewood, Triangle undertook further site development work to prepare for a closing on either August 21, or August 31, 2007 (depending on how one reads the third amendment). Even after the August 31 date had passed, Homewood, along with M/I, requested that additional work in the form of a punch list and title work be completed.

{¶ 17} Eventually, at some point after October 8, 2007, M/I closed on all of the 53 lots allocated to it under the terms of the third amendment. Homewood failed to close on the 27 lots allocated to it.

{¶ 18} Homewood took the position that Triangle had not completed all lot development by August 21, or even August 31, 2007, as set forth in the third amendment to the contract. Thereafter, Homewood claimed that it was entitled to termination and repudiation because Triangle had failed to timely and satisfactorily fulfill its contractual obligations as the developer. Homewood then notified Triangle that it had no obligation to close on the remaining lots and that Triangle should return the promissory note. No more closings took place between March 7, and October 8, 2007, when Homewood sent a notice of termination to Triangle that it was not going to close on the 27 lots that constituted Homewood's share of the remaining unsold lots. It was established at trial that a nationwide economic downturn had resulted in a devastating impact on new home sales during 2007 and beyond, and that Homewood was carrying too much inventory in the form of real estate for development.

{¶ 19} On February 19, 2008, Triangle filed a complaint against Homewood as the sole defendant. Triangle claimed breach of contract, payment due on the promissory note, and mutual mistake concerning the closing date of either August 21, or August 31, 2007. Triangle further alleged that Homewood was liable for liquidated damages of $1,360,000 under the contract and the promissory note, as well as interest and costs.

{¶ 20} Homewood denied breaching the contract and instead, claimed that Triangle had breached the agreement. Homewood denied that any money was due pursuant to the promissory note. Homewood answered that even if it did breach, its damages were contractually limited to $17,000 per unsold lot. Homewood maintained that it was entitled to a set-off in an amount equal to the purchase price paid for the 53 lots that comprised M/I's share of the remaining 80 lots. Homewood further asserted that "[Triangle was] was not entitled to recover 'liquidated damages' attributable to lots, some of which have already been purchased in accordance with the Agreement, and others regarding which there exists no expectation that they will not be purchased under the terms of the Agreement." Answer, at ¶ 18. Homewood also asserted defenses of bad faith, waiver and estoppel, failure to join a necessary party, and failure to mitigate damages.

Standard of Review

{¶ 21} In construing the terms of a written contract, our primary objective is to give effect to the intent of the parties, which is presumed to rest in the language they have chosen to employ. " 'Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument.' " *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, ¶ 29, quoting *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph two of the syllabus. Where the terms are clear and unambiguous, a court need not go beyond the plain language of the instrument to determine the rights and obligations of the parties. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53 (1989). Where possible, a court must construe the agreement to give effect to every provision in the agreement. *In re All*

Kelly & Ferraro at ¶ 29. Moreover, the construction of a written contract is a question of law, which we review de novo. *Id.* at ¶ 28.

Joint promises and Separate promises

{¶ 22} Initially, we must decide whether Homewood and M/I promised separately to purchase their respective shares of the 80 lots or whether they promised a single undivided performance to pay the entire purchase price for all of the remaining lots. The Supreme Court of Ohio has quoted Corbin on Contracts to explain, "[t]he question whether two or more promisors have promised a single undivided performance, or have each promised a limited and separate performance, is wholly a problem of interpretation." *Id.* at ¶ 27, quoting 9 Corbin on Contracts, 625 Section 926 (Interim Ed.2002). "Therefore, although a promise by two or more promisors generally suggests that the same performance, and not separate performances, will be rendered, the parties' intent controls." *Id.*, citing 2 Restatement of the Law 2d, Contracts, Section 288(1), at 407 (1981).

{¶ 23} In this case, Homewood and M/I originally were designated the "Buyers" and as the "Buyers," initially promised a single performance, namely, the purchase of all 172 lots. However, the third amendment specified that Homewood agreed to purchase "its share" of the remaining 80 lots, and the Seller granted an extension for M/I to close on the purchase of its share of the Phase I and Phase II lots. In the third amendment, the deposit in the form of the promissory note reflected the sum equal to all of the remaining unsold lots, $1,360,000. Thus, the parties altered the joint nature of the original promise to create separate obligations for each purchaser to buy certain individual lots. Nonetheless, the promissory note remained a joint obligation.

{¶ 24} The liquidated damages provision in the third amendment required that "[a] substitute Promissory Note shall be deposited by Buyers with Seller at the time of each closing in the amount of $17,000.00, multiplied by the number of lots remaining to be closed by Buyers in accordance with this Agreement."

{¶ 25} In sum, Homewood and M/I jointly promised full performance for all of the lots. They were jointly responsible for purchasing all of the lots, and if one party

breached, the performance of the other party would normally inure to the benefit of the breaching party. *See* 2 Restatement, Section 288 at 407-08. The third amendment changed the joint and several obligation to one in which Homewood was responsible to purchase 27 of the remaining 80 lots, and M/I was responsible to purchase 53 lots, 27 Phase I lots and 26 Phase II lots. The language of the promissory note was not altered and remained a joint obligation.

Homewood's Motion to Amend its Answer

{¶ 26} After Triangle moved for partial summary judgment, Homewood responded that requiring Homewood to pay the full $1,360,000 in liquidated damages amounted to a penalty. Triangle replied that Homewood failed to plead penalty as an affirmative defense. Homewood then sought leave to amend its answer to add penalty as an affirmative defense. Homewood filed its motion to amend approximately one year after its original answer. The trial court denied the motion on the grounds of undue delay and undue prejudice to Triangle. In its eleventh assignment of error, Homewood argues this was prejudicial error by the trial court.

{¶ 27} "Civ.R. 8(C) provides that, in a pleading to a preceding pleading, 'a party shall set forth affirmatively * * * any * * * matter constituting an avoidance or affirmative defense.' * * * That a provision for liquidated damages constitutes a penalty rather than a valid liquidated damages provision is an affirmative defense." *UAP-Columbus JV326132 v. O. Valeria Stores, Inc.* , 10th Dist. No. 07AP-614, 2008-Ohio-588, ¶ 12.

{¶ 28} An affirmative defense may also be raised in an amended pleading. *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6 (1984). Civ.R. 15(A) provides that a party may amend a pleading to which no response is permitted within 28 days after it is filed or with leave of court. A motion for leave to amend a pleading should be granted freely when justice so requires. *Id*. While the decision of whether to grant a motion for leave to amend a pleading is within the discretion of the trial court, such discretion is tempered by the instruction in the civil rules for courts to exercise it liberally in favor of amendment. *Weber v. Oriana House Inc.*, 9th Dist. No. 17162 (Oct. 25, 1995). A motion for leave to

amend should be granted absent a finding of bad faith, undue delay, or undue prejudice to the opposing party. *Hoover* at 6.

{¶ 29} "Prejudice to an opposing party is the most critical factor to be considered in determining whether to grant leave to amend. Timeliness of the request is another factor to consider, but delay, in itself, should not operate to preclude an amendment." (Citations omitted.) *CommuniCare, Inc. v. Wood Cty. Bd. of Commrs.*, 161 Ohio App.3d 84, 89-90, 2005-Ohio-2348 (6th Dist.).

{¶ 30} With this standard in mind, we find that the trial court abused its discretion in denying Homewood leave to amend. At the time Homewood filed its original answer, M/I had not closed on its remaining lots. Thus, the demand for liquidated damages in the amount of $1,360,000 was accurate insofar as there remained 80 unsold lots. However, both parties knew that M/I might continue purchasing lots, and Homewood's fifth defense reflected that possibility:

> Defendant is entitled to a set-off against any damages owed to Plaintiff (if any) in an amount equal to the purchase price paid by M/I for each lot actually purchased by M/I Homes pursuant to the Agreement, after the date the last Note was executed (i.e. Plaintiff is not entitled to recover "liquidated damages" attributable to lots, some of which have already been purchased in accordance with the Agreement, and others regarding which there exists no expectation that they will not be purchases under the terms of the Agreement).

Answer, at ¶ 18.

{¶ 31} Given this language in Homewood's answer, we can find no undue prejudice to Triangle if Homewood were permitted to raise the defense of penalty. Homewood pleaded the essence of a penalty defense in its fifth defense, even though it did not use the talismanic term "penalty." Therefore, Triangle was fully on notice that Homewood was alleging that Triangle should not be allowed to claim damages for lots sold to M/I under the contract, and cannot be unduly prejudiced by allowing the motion to amend.

{¶ 32} Triangle did not apprise Homewood of the M/I closings, and therefore, Homewood was not aware of the appropriateness of a penalty defense until depositions

were taken in January 2009. Homewood filed its motion to amend in March 2009, and trial did not begin until June 2010. We cannot find undue delay when more than one year remained before trial. Accordingly, it was error for the trial court to deny Homewood's leave to amend its answer to assert a penalty defense. Therefore, Homewood is not barred from arguing that the liquidated damages clause constituted a penalty as applied by the magistrate.

Liquidated Damages

{¶ 33} In its first assignment of error, Homewood contests the size of the damage award for its alleged breach. Since M/I eventually paid the full purchase price for the 53 lots that it committed to buy, Homewood contends that Triangle's damages should be limited to the 27 lots that comprised Homewood's share, or $459,000 ($17,000 per lot x 27 lots = $459,000) or, in other words, the liquidated damages amount for the lots that remained unsold after Homewood's alleged breach.

{¶ 34} Homewood construes the liquidated damages provision of the agreement as a series of provisions contained in the contract documents. In the original contract, Section 3(d) states: "Seller shall be entitled to all sums due and owing under the Note as liquidated damages." The second amendment states: "Seller shall be entitled to all sums due and owing under the Note as liquidated damages which the parties hereto agree is a reasonable and proper amount in light of the circumstances, and which shall be Seller's sole remedy at law and in equity." The second amendment also states that: "At each Closing, the deposit shall be reduced by $17,000 multiplied by the number of lots purchased by the Buyers. The amount owed herein will change based on the number of lots still to be closed." Under the third amendment, the agreement states: "A substitute deposit Promissory Note shall be deposited by Buyers with Seller at the time of each closing in the amount of $17,000.00, multiplied by the number of lots remaining to be closed by Buyers in accordance with this Agreement." Thus, under Homewood's interpretation of the contract, $1,360,000 in liquidated damages should not only have been reduced, it is grossly disproportionate to $459,000 in actual damages deemed a reasonable and proper amount based on the amount owed after M/I purchased its lots.

{¶ 35} Triangle and the magistrate interpreted the contract differently. Triangle argues that the plain language of the contract entitled it to "all sums due and owing" under the note. Triangle asserts that the amount due and owing under the note is not $459,000, but $1,360,000, the face amount of the note and the amount due and owing at the time of the alleged breach.

{¶ 36} The agreement provides that at closing, the promissory note shall be reduced to $17,000 per lot that has not closed. The Buyers were responsible for executing a new note. Apparently, M/I closed on its lots after October 8, 2007. Thus, at the time Homewood repudiated the contract, none of the 80 remaining lots had been purchased. Nor is there any evidence that the promissory note was reduced to $459,000 at the time M/I closed on its lots. Rather, at the August date scheduled for closing, and at the October 8, 2007 repudiation date, 54 lots remained unsold and Homewood and M/I remained jointly and severally liable for $1,360,000 due under the promissory note.

{¶ 37} Homewood argues that the liquidated damages clause, as interpreted by the court, is a penalty. In Ohio, clauses in contracts providing for reasonable liquidated damages are recognized as valid and enforceable. *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 28 (1984). 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.*, citing *Sheffield-King Milling Co. v. Domestic Science Baking Co.*, 95 Ohio St. 180 (1917).

{¶ 38} A liquidated damages clause will not be enforced if it is so disproportionate to anticipated damages that it amounts to a penalty. *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 380 (1993); *Samson Sales, Inc.* A liquidated damages clause is enforceable and not 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." *Lake Ridge Academy* at 382. In *Royal Indemn. Co. v.*

Baker Protective Servs., Inc., 33 Ohio App.3d 184 (2d Dist.1986), a case interpreting *Samson*, the court determined that absent some overwhelming public policy, such as the concept of unconscionability, which was not present in the case, Ohio courts have held that the concept of freedom of contract is fundamental to our society. As such, the parties to a contract should have complete freedom to create whatever relationship they desire.

{¶ 39} "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." *Samson Sales, Inc.* at 28-29. Determining whether stipulated damages are punitive or liquidated is not always easy. "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." *Kurtz v. W. Property, L.L.C.*, 10th Dist. No. 10AP-1099, 2011-Ohio-6726, ¶ 31.

{¶ 40} *Kurtz* involved a contract to purchase approximately 164 acres of real property that was to be completed in phases. The parties' original agreement called for a letter of credit in the amount of the purchase price for the remaining phases at the closing of Phase I. In the event of a default, the seller could draw on the entire amount due as liquidated damages and as seller's sole remedy at law and in equity. *Id*. at ¶ 3.

{¶ 41} Later, the parties amended the agreement to provide that the letter of credit was to be five percent of the purchase price of Phases II and III, and at the closing of Phase II, the amount of security should be reduced to five percent of the purchase price of Phase III. In lieu of a letter of credit, the buyer could choose to deliver the security to the seller in cash at the closing of Phase I. *Id*. at ¶ 4.

{¶ 42} After the closing of Phase I, and in accordance with the amendment, the buyer tendered $111,375 in cash as security for Phase II and $111,349.30 as security for Phase III. The buyer elected not to close on Phase III and to forfeit the $111,349.30 as liquidated damages despite an agreed upon purchase price of more than $2.2 million for the remaining acreage. The seller filed suit seeking, among other things, to have the

liquidated damages clause declared unenforceable and invalid as a matter of law because it was *too low*.

{¶ 43} This court held that the sole remedy language in the agreement limited the seller's remedy to the cash security. Under the first part of the tripartite test stated above, this court determined that damages were not easily quantifiable, although the contract price was easily ascertained. However, due to fluctuations in the fair market value of real estate, the fair market value was uncertain with regard to a closing that was to take place two and one-half years into the future. *Id*. at ¶ 32.

{¶ 44} The second prong of the *Samson Sales, Inc.* test requires that liquidated damages must bear a reasonable, not necessarily exact, relation to actual damages. The court could not ascertain the fair market value of the Phase III property at the time of the breach, and compare it to the five percent liquidated amount of damages. However, in addition to the five percent security amount, the seller retained the land which he remained free to resell. Finally, under the third prong, the parties intended that the five percent security constitute the seller's sole remedy.

{¶ 45} Applying the principles set forth above to this case, it is apparent that Homewood and Triangle were sophisticated business entities negotiating at arms length, with many years of experience in home building and real estate development. Here, as in *Kurtz*, the uncertainty in the housing market and the extended period of performance during the life of the agreement, made calculation and proof of damages difficult. The contract price of the lots, however, was easily ascertained at $68,000 per lot.

{¶ 46} The proper measure of damages for a breach of a real estate contract is the difference between the original contract price and the fair-market value of the property at the time of the breach. *Kaufman v. Byers*, 159 Ohio App.3d 238, 250, 2004-Ohio-6346, ¶ 39 (6th Dist.). It has been held that when the sale of real estate after a breach of contract is made within a reasonable time and at the highest price obtainable after the breach, it is evidence of the market value on the date of the breach. *Roesch v. Bray*, 46 Ohio App.3d 49, 50 (6th Dist.1988).

{¶ 47} Assuming the price paid by M/I for its lots was the fair-market value of the remaining Homewood lots, Triangle's damages for that portion of the 80 lots would be zero. However, given the sharp decline in the real estate market at the time, it is not known whether $68,000 per lot was even close to what the lots would bring on the open market. Therefore, the parties agreed that "all sums due and owing under the Note" was "a reasonable and proper amount in light of the circumstances," and was to "be Seller's sole remedy at law and in equity."

{¶ 48} The phrase "all sums due and owing" is susceptible of more than one interpretation. The trial court and Triangle took the position that the phrase simply meant the face amount of the note. Homewood argues that in referring to the deposit, the phrase in the second amendment that "the amount owed herein will change based on the number of lots still to be closed" means that the amount of liquidated damages must be adjusted based on the number of lots that failed to close. We agree that the liquidated damages provision must be read together with the provision to adjust the amount of the note based on the number of lots that had not closed. This is true in light of the changes to the obligations of the parties in the third amendment which imposed separate obligations on Homewood and M/I to purchase 27 lots and 53 lots, respectively.

{¶ 49} The contract documents reveal that originally the parties intended that Homewood and M/I would be jointly and severally liable as "Buyers" for any breach. Homewood and M/I entered into the agreement knowing this. Otherwise, there would have been no need for a side deal between Homewood and M/I for indemnification. But the parties agreed to adjust the liquidated damages after each closing to reflect an amount of $17,000 per lot for every lot that failed to close. Otherwise, Triangle would receive a windfall if some, but not all of the lots closed. In the event of a Buyers' breach, Triangle would then have the choice whether to sue Homewood, M/I, or both for the liquidated damages. The parties were in the best position to know what their expectations were, and what damages would be attendant on the failure of the undertaking. *Sheffield-King Milling Co.* at 185.

{¶ 50} Homewood argues that "all sums due and owing under the Note" refers to the amount of $17,000 times the number of unsold lots, and that is the most reasonable interpretation of liquidated damages under the agreement. Homewood contends that under the trial court's interpretation of the contract, the face amount of the promissory note was the measure of damages regardless of how many lots were closed, as long as a replacement note was not prepared and substituted. However, at the time of the alleged breach, all 80 lots had not closed and therefore the sum of $1,360,000 was not unreasonable and actually in accordance with Triangle's interpretation of the liquidated damages provision. Therefore, according to Triangle, the amount of liquidated damages was not a penalty.

{¶ 51} We disagree. By holding that Homewood is obligated to pay the full, face amount of the note, Homewood is being required to pay Triangle not only the liquidated damages for the 27 lots Homewood was responsible for purchasing, but an additional $17,000 per lot for each of the lots for which M/I paid the full purchase price. Effectively, Triangle is receiving a windfall of an additional $17,000 per lot for the lots that already sold for $68,000 each. This result runs contrary to established legal principles as to the recovery of damages for breach of contract. It is also contrary to the statements in the agreement that liquidated damages are to be set at $17,000 per unsold lot. The provision that the promissory note was to be reduced by $17,000 per lot that closed adds further credence to Homewood's interpretation that it is only liable for the 23 lots upon which it failed to close.

{¶ 52} Although a party damaged by the acts of another is entitled to be made whole, the injured party should not receive a windfall; in other words, the damages awarded should not place the injured party in a better position than that party would have enjoyed had the wrongful conduct not occurred. *Collini v. Cincinnati*, 87 Ohio App.3d 553, 556 (1st Dist.1993); *MCI Worldcom Network Servs., Inc. v. W.M. Brode Co.*, 413 F.Supp.2d. 868, 871 (N.D.Ohio 2005).

{¶ 53} We find that Triangle's interpretation places form over substance, disregards the intentions of the parties, and creates a penalty. In a hypothetical situation

in which all but one of the lots closed, Triangle would still receive the full $1,360,000 in liquidated damages, clearly a windfall and clearly a penalty.

{¶ 54} Nor can Homewood be faulted for failing to execute a new promissory note at the time M/I closed on its lots. Homewood was not a party to the closings with M/I, and contends that it did not receive notice of the closings. Therefore, under the second and third prongs of the test to determine if liquidated damages are a penalty, we find the contract to be unreasonable in that it creates a windfall of $901,000 for Triangle. As a matter of law, the interpretation espoused by Homewood does not create an unfair penalty, it gives fuller effect to the contract as a whole, and it better reflects the expressed intentions of the parties to limit liquidated damages to $17,000 per unsold lot, which in this case amounts to $459,000.

Setoff

{¶ 55} In its second assignment of error, Homewood asserts that it is entitled to a setoff against any payments made by M/I, its co-obligor on the promissory note. Homewood cites no authority in support of this assertion. Homewood contends that the amount Triangle obtained from M/I should be subtracted from the amount of liquidated damages.

{¶ 56} Under Ohio law, a setoff "is that right which exists between two parties, each of whom under an independent contract owes a definite amount to the other, to setoff their respective debts by way of mutual deduction." *Witham v. S. Side Bldg. & Loan Assn. of Lima*, 133 Ohio St. 560, 561 (1938). Setoff is a doctrine that allows entities who owe money to each other to cancel out or apply their mutual debts against each other thereby avoiding the "absurdity of making A pay B when B owes A." *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995). "[A] right of setoff is a remedy that has long been recognized and enforced in the commercial world at large, as well as under every one of the nation's bankruptcy acts." *Covington v. Univ. Hosp. of Cleveland*, 149 Ohio App.3d 479, 483, 2002-Ohio-4761 (10th Dist.), quoting 5 Collier on Bankruptcy (15 Ed.Rev 2001), at ¶ 553.02[1]. The rule allows parties that owe mutual debts to state the accounts

between them, subtract one from the other, and pay only the balance. *In re Pineview Care Ctr., Inc.*, 142 B.R. 677, 684 (Bankr.N.J. 1992).

{¶ 57} Here, Homewood and M/I did not owe definite amounts to each other. Homewood has not established any right to set-off as it is defined in Ohio.

Mitigation

{¶ 58} Mitigation is not proper when there is a valid liquidated damages clause. *Lake Ridge Academy* at 385. "A valid liquidated damages clause contemplates the nonbreaching party's inability to identify and mitigate its damages." *Id.* Therefore, had the liquidated damages provision been enforceable, Triangle would have been under no obligation to mitigate its damages.

{¶ 59} However, Triangle did actually close on 53 of the 80 unsold lots at the full contract price. Therefore, the damages of $17,000 per unsold lot were, in a sense, actually mitigated when Triangle closed on 53 lots for the full contract price.

Discrepancy in closing dates

{¶ 60} In its third and sixth assignments of error, Homewood disagrees with the trial court's finding that Homewood and Triangle intended the Phase II completion date in the third amendment to be August 31, 2007. The disputed language in the third amendment is as follows:

> Homewood Corporation agrees to purchase its share of the remaining lots, being 27 lots, by no later than August **21**, 2007. However, Homewood shall have the option to extend said closing date from August **31**, 2007 to June 1, 2008 by paying the Seller interest at the prime rate charged by Huntington National Bank, as said rate may periodically change. Interest would be paid monthly by Homewood on the sum of $1,836,000 from August **31**, 2007 to June 1, 2008 (27 lots times $68,000.00 per lot).

(Emphasis added.)

{¶ 61} As can be seen from the quoted language itself, the provision appears internally inconsistent. The magistrate found this language ambiguous regarding the closing date, and concluded the reference to August 21, 2007 was a typographical error and the product of a mutual mistake by the parties. Additionally, as a matter of contract

interpretation, the magistrate concluded that the parties' intention was that the closing date be August 31, 2007. Homewood argues that there was a failure of proof as to mutual mistake, and Triangle bore the burden of proving mutual mistake. Regardless of the burden of proof, the magistrate found Homewood's president was not a persuasive witness on this point. Also, the date of August 31, 2007 was used four separate times throughout the documents to reference the same occurrence. We find no error in the trial court's resolution of this issue purely as a matter of interpretation without the need to examine extrinsic evidence. The single reference to August 21, 2007 was a typographical error.

Breach

{¶ 62} In its fourth assignment of error, Homewood argues the trial court effectively rewrote the contract in order to find that Triangle completed Phase II in a timely manner. As stated above, Homewood believed it did not need to honor the contract because Triangle breached by failing to complete development by August 21, or August 31, 2007.

{¶ 63} There was conflicting testimony as to whether Triangle was required to complete its work prior to August 31, 2007 or whether it was sufficient to have the work completed by August 31, 2007. The magistrate credited testimony that a closing could take place on the same day that the work was complete, but ultimately decided that the issue did not need resolution given that Homewood was unprepared to close on August 31. Homewood did not provide Triangle with its selection of Phase II lots until September 7, 2008.

{¶ 64} In particular, Homewood takes issue with the findings that the overwhelming amount of the work identified in the Minimum Development Standards was completed in a timely matter. The approval by government authorities in Delaware County, the punch list, and the conveying of green space and park area to the Scioto Reserve Homeowner's Association were points of contention.

{¶ 65} Under the agreement, the development work was to be accepted and approved by the "Authorities." "Authorities" were defined as the governmental

authorities having jurisdiction over the development of the subdivision. Homewood argues that full acceptance and approval of the sanitary sewers means approval by the county commissioners, and not the Delaware County Sanitary Engineer. Finding the terms "acceptance and approval" and "Authorities" to be ambiguous, the magistrate looked to the parties' course of dealing with Phase I of the development. There, Homewood closed on its lots with the same letter from the Delaware County Sanitary Engineer that it now claims is insufficient. We find no error in the magistrate's findings and conclusions in regard to sanitary sewers and the other minimum development standards. The evidence shows that Triangle substantially complied with the terms of the contract, and that it was Homewood that breached when it repudiated the contract on October 8, 2007.

Lack of Written Notice

{¶ 66} The magistrate found that Triangle did not give a written notice of completion on August 31, 2007 as required by Section 4 of the agreement. Instead, a voicemail was left with Homewood on the morning of August 31. This was the only example of nonperformance on the part of Triangle found by the magistrate. Despite this failure, the magistrate found that Triangle made a good-faith effort to comply with the terms of the agreement and that it substantially complied with its contract obligations.

{¶ 67} Originally, Triangle was required to provide notice of completion of certain conditions prior to closing, but the third amendment dispensed with that requirement, stating that those conditions had been satisfied. Even if written notice was required, this court has stated, "Where there is evidence of actual notice, a technical deviation from a contractual notice requirement will not bar the action for breach of contract brought against a party that had actual notice." *Stonehenge Land Co. v. Beazer Homes Invests., L.L.C.*, 177 Ohio App.3d 7, 18, 2008-Ohio-148 (10th Dist.).

{¶ 68} Triangle's failure to provide written notice did not excuse Homewood from performing under the contract.

Conditions Precedent

{¶ 69} The magistrate did not allow Homewood to introduce evidence that Triangle had failed to meet a condition precedent because Homewood had not specifically denied compliance in its answer as required by Civ.R. 9(C).

{¶ 70} Civ.R. 9(C) provides:

> In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

{¶ 71} "The effect of the failure to deny conditions precedent in the manner provided by Civ. R. 9(C) is that they are deemed admitted." *R.S. Fling & Partners, Inc. v. Cent. Natl. Bank*, 10th Dist. No. 77AP-605 (Dec. 6, 1977); *Lewis v. Wal-mart, Inc.*, 10th Dist. No. 93AP-121 (Aug. 12, 1997). Therefore, Homewood was unable to present evidence that its performance was excused by the failure of any of the conditions precedent outlined in the agreement.

{¶ 72} Homewood argues that even if it could not assert the failure of conditions precedent as an affirmative defense, such failure could be used to show that Homewood had an affirmative right to terminate the contract by not waiving its right to demand timely performance. If the provision for timely performance is a promise, Triangle's failure to perform constitutes a breach, whereas if the provision is a condition precedent, then Homewood is deemed to have admitted the condition had been fulfilled. *Corey v. Big Run Indus. Park, L.L.C.*, 10th Dist. No. 09AP-176, 2009-Ohio-5129, ¶ 18-19.

{¶ 73} This argument repackages the same contention that Triangle failed to complete its work in a timely manner by not fulfilling conditions precedent. The facts as developed at trial are encapsulated by the detailed findings in the magistrate's decision of February 25, 2011. The magistrate found substantial compliance with the overwhelming amount of work identified in the Minimum Development Standards such as approval by Delaware County authorities. "As was very evident by the parties' course of performance for over two years under the Purchase Agreement, as amended, timing was frequently

delayed and not consistently 'of the essence', despite this boilerplate requirement being included in the Purchase Agreement, as amended." Magistrate's Decision, at 19-20. Here, Triangle had substantially completed its work by the scheduled closing date of August 31, 2007, and Homewood was properly precluded from claiming that Triangle had not satisfied the conditions precedent identified in the contract.

Estoppel and Waiver

{¶ 74} As an alternative basis of its decision, the magistrate held that Homewood was equitably estopped from refusing to purchase its share of the lots given its post August 31, 2007 conduct. The magistrate concluded that Triangle relied on that conduct and representations to its detriment. After the completion date had come and gone, Triangle undertook further site development work with the acquiescence and, at times, the direction of Homewood and M/I, to prepare for closing.

{¶ 75} To establish a case for application of equitable estoppel, Triangle was required to show that Homewood made a factual misrepresentation, that was misleading, and that induced actual reliance made in good faith that caused detriment to Triangle. *Hoeppner v. Jess Howard Elec. Co.*, 150 Ohio App.3d 216, 2002-Ohio-6167 (10th Dist.).

{¶ 76} With respect to detrimental reliance, Homewood argues that the decision is internally inconsistent because the $7,500 of punch list work undertaken by Triangle is described as de minimus in connection with whether Triangle substantially performed, but is described as considerable expense as reliance on Homewood's conduct in terms of equitable estoppel.

{¶ 77} We agree with Homewood that in the overall context of the purchase agreement in excess of $10 million, $7,500 is de minimus. However, in terms of whether Homewood indicated it was proceeding to a closing, participating in two walkthroughs of the property, creation of the punch list, and giving no indication that Triangle's work was deficient was an inducement for Triangle to continue to work toward closing and to expect Homewood to purchase its share of the lots.

{¶ 78} Homewood failed to object to the magistrate's decision that Homewood waived its right to assert non-performance by Triangle as the basis for its repudiation.

Therefore, Homewood may not argue on appeal something it failed to object to before the trial court.

Grading of the Lots

{¶ 79} In its eighth assignment of error, Homewood argues the trial court's finding that Triangle graded the lots in accordance with the plan was against the manifest weight of the evidence. When a civil judgment is challenged on the basis of manifest weight of the evidence, we must examine the record to see whether the trial court's judgment is supported by some competent, credible evidence going to all the essential elements of the case. *C. E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978).

{¶ 80} We have reviewed the trial record, and under this standard, there was some evidence that Triangle properly graded the lots in accordance with the standards set forth in the plan.

Evidentiary Rulings

{¶ 81} Homewood argues the trial court erred in excluding certain testimony of Homewood's witness, Keith Pecinovsky, regarding the grading of the lots on the grounds that it was outside the scope of the direct examination. Even if Mr. Peckinovsky had been allowed to testify on re-direct, the proffered testimony would not have affected the remaining evidence leading to the finding by the trial court that Triangle graded the lots properly.

{¶ 82} Homewood argues that the trial court erred in excluding certain evidence about representations and warranties that Homewood allegedly did not satisfy. Under the second amendment, these representations and warranties were properly categorized by the magistrate as conditions precedent and therefore deemed admitted under Civ.R. 9(C).

Reformation

{¶ 83} Homewood devotes a large portion of its brief to the argument that Triangle could not meet its burden of proof on its claim for reformation. As discussed previously, using general principles of contract interpretation, the magistrate found the discrepancy in the closing dates was a simple typographical error. Moreover, given the substantial

compliance by Triangle of its obligations, the issue of reformation of the closing date from August 21, to August 31, 2007 is of little to no significance.

Disposition

{¶ 84} In conclusion, Homewood's first, third, and eleventh assignments of error are sustained. Homewood should have been allowed to assert a penalty defense. The liquidated damages clause operated as an impermissible penalty under the interpretation espoused by the trial court, but was enforceable under the interpretation espoused by Homewood. We agree with Homewood's interpretation of the intent of the parties to pay $17,000 per unsold lot as liquidated damages. Homewood breached the agreement, and Triangle substantially performed under the agreement. Triangle is not entitled to a windfall of $17,000 x 53 lots sold to M/I. Homewood's remaining assignments of error are overruled. The judgment of the trial court is affirmed in part and reversed in part. We reverse the judgment of the trial court entering judgment in favor of Triangle for $1,360,000, plus prejudgment interest, and enter judgment in favor of Triangle for $459,000, plus prejudgment interest. We remand the matter to the Franklin County Court of Common Pleas for computation of prejudgment interest.

Judgment affirmed in part and reversed in part; case remanded.

DORRIAN and McCORMAC, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of Ohio Constitution, Article IV, Section 6(C).