[Cite as *Kensington Partners, L.P. v. Columbian Mut. Life Ins. Co.*, 2005-Ohio-884.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84549

KENSINGTON PARTNERS, L.P.	:	
	:	JOURNAL ENTRY
Plaintiff-Appellant	:	
	:	and
-vs-	:	
	:	OPINION
COLUMBIAN MUTUAL LIFE INSURANCE COMPANY	:	
	:	
	:	
Defendant-Appellee	:	
	:	

DATE OF ANNOUNCEMENT OF DECISION:	MARCH 3, 2005
CHARACTER OF PROCEEDING:	Civil appeal from Common Pleas Court Case No. CV-396958
JUDGMENT:	Affirmed.
DATE OF JOURNALIZATION:	
APPEARANCE:	
For Plaintiff-Appellant:	ELLEN M. MCCARTHY BRENDA M. JOHNSON Nurenberg Plevin Heller & McCarthy 1370 Ontario Street, 1st Floor Cleveland, Ohio 44113-1792

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PATRICIA ANN BLACKMON, P.J.

{¶ 1} Appellant Kensington Partners, L.P. (Kensington) appeals the trial court's summary judgment in favor of appellee Columbian Mutual Life Insurance Company (Columbian). Kensington assigns the following errors for our review:

{¶ 2} "I. The trial court erred to the prejudice of plaintiff/counterclaim defendant-appellant Kensington Partners, L.P. in granting summary judgment in favor of defendant/ counterclaim plaintiff-appellee Columbian Mutual Life Insurance Company."

{¶ 3} "II. The trial court erred in failing to grant partial summary judgment in favor of appellant."

{¶ 4} Having reviewed the record and pertinent law, we affirm the judgment of the court. The apposite facts follow.

{¶ 5} Kensington is an Ohio limited partnership whose business includes, but is not limited to, real estate development. Columbian is a corporation with its principal place of business in New York. Columbian is in the business of, and among other things, extending loans to commercial borrowers.

{¶ 6} On or about January 18, 1999, Kensington applied to Columbian for a loan in the amount of $1,300,000. The loan contemplated was to be secured by a first lien upon property known as Kensington Square Shopping Center, located in Westlake, Ohio. The agreement contained a two percent loan commitment fee. One half of the commitment fee was due upon execution of the application and the balance due five days after notification of loan approval. Kensington executed the loan application and issued a check to Columbian in the amount of $13,000, along with a $1,000 loan processing fee.

{¶ 7} Thereafter, Columbian extended to Kensington a mortgage loan commitment for a loan in the amount of $1,300,000, which Kensington accepted. The loan commitment contained a New York choice of law provision. Pursuant to the agreement, Kensington issued a second check in the amount of $13,000 which represented the balance of the loan commitment fee. The loan was scheduled to close on or before May 12, 1999, but the closing did not occur.

{¶ 8} On May 17, 1999, Columbian sent Kensington a letter informing Kensington that it was in breach of the loan commitment, and it was terminating its obligation under the loan. Columbian indicated it intended to retain the $26,000 commitment fee and the $1,000 loan processing fee as liquidated damages for services rendered in underwriting the loan application and issuance of a commitment.

{¶ 9} Columbian further specified in the letter that it terminated the loan commitment because Kensington failed to do the following:

> **"(a) in connection with the submission of its application, Kensington failed to disclose the lease default status of two tenants - Club Olympia, Inc. and Eagle Cleaners - who occupied 33 percent of the leasable space in the building upon which the mortgage was sought.**

> **"(B) failure to provide tenant estoppel certificates from no less than 90 percent of the tenants as required by Item 19(14) on page 8 of the loan commitment. 33% of the tenants are in default under their lease terms and 7% of the building is vacant since the former Pella Window and door space has not been re-leased.**
>
> **"(C) Since Columbian Mutual was not informed of the tenant defaults until April 1999, there are unresolved issues regarding the validity of the appraisal and cash flow for the subject property. The appraiser was not provided with information regarding the default status of two of the tenants; especially the long term default status of Club Olympia Inc. existing for at least two years. Also unresolved is whether bankruptcy, reorganization, arrangement, insolvency or liquidation proceedings have been instituted by or against Club Olympia, Inc. or Eagle Cleaners."[1]**

{¶ 10} Finally, Columbian demanded that Kensington pay to it the cost of $7,808. This cost constituted attorney fees incurred by Columbian's lawyers for preparation of the loan agreement.

{¶ 11} On May 25, 1999, Kensington's lawyers responded by requesting Columbian extend the loan. Columbian refused.

{¶ 12} On November 18, 1999, Kensington filed suit against Columbian seeking reimbursement of $27,000 in commitment and loan processing fees paid under the terms of the agreement. Columbian counterclaimed for costs and expenses pursuant to the loan commitment agreement. Thereafter, Columbian sought summary judgment on Kensington's claim and on its counterclaim to recover cost. Kensington filed an opposition to Columbian's motion. The trial court

[1]Affidavit of Christine L. Cawley, Vice President, Investments at Columbian attached to Columbian's Motion for Summary Judgment.

granted summary judgment in favor of Columbian on both counts and awarded to Columbian damages in the amount of $7,808. Kensington now appeals.

{¶ 13} In its first assigned error, Kensington argues the trial court erred in granting summary judgment in favor of Columbian. We disagree.

{¶ 14} We consider an appeal from summary judgment under a de novo standard of review.[2] Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.[3] Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can only reach one conclusion which is adverse to the non-moving party.[4]

{¶ 15} The moving party carries an initial burden of setting forth specific facts which demonstrate his or her entitlement to summary judgment.[5] The movant may satisfy this burden with or without supporting affidavits, and must "point to evidentiary materials of the type listed in Civ.R. 56(E)."[6] If the movant fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will only be appropriate if the non-movant fails to

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[2]*Baiko v. Mays* (2000), 140 Ohio App.3d 1, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35; *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188.

[3]Id. at 192, citing *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704.

[4]*Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327.

[5]*Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107.

[6]Id. at 292.

establish the existence of a genuine issue of material fact.[7] In satisfying its burden, the non-movant "may not rest upon the mere allegations or denials of his pleadings, but his response by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."[8]

{¶ 16} In Kensington's brief in opposition to Columbian's summary judgment and in its brief to this court, Kensington argues that New York law precludes Columbian from both retaining the commitment and loan processing fees pursuant to paragraph 16 of the commitment agreement, and obtaining a judgment for costs pursuant to paragraph 15. For the following reasons, we are unpersuaded by Kensington's argument.

{¶ 17} The Ohio Supreme Court set forth the factors to be considered in determining the validity of a liquidated damages clause.[9] The court held that clauses in contracts providing for reasonable liquidated damages are enforceable so long as reasonable compensation is the legitimate objective of such provisions.[10] The court set forth the specific criteria to be used in evaluating the legitimacy of a liquidated damages clause. The court stated:

> "**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 amount so fixed should be treated as liquidated**

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[7]Id. at 293.

[8]Civ.R. 56(E); See *Dresher*.

[9]*Samson Sales, Inc. v. Honeywell, Inc.*(1984), 12 Ohio St.3d 27.

[10]*Samson,* supra, citing the case of *Jones v. Stevens* (1925), 112 Ohio St. 43.

> **damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficulty 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."**

{¶ 18} In order to determine the legitimacy of a clause, which limits the liability of one party, courts must consider the facts surrounding the contract and whether its goal is to reasonably compensate for the actual damages flowing from a breach of the contract.[11]

{¶ 19} In the case at bar, paragraph 16 containing the liquidated damages clause states:

> **"If borrower has not fulfilled all conditions precedent to closing, this agreement shall terminate and all fees held by lender shall be retained by lender as liquidated damages and lender and borrower shall have no further duties or obligations to each other hereunder."[12]**

{¶ 20} Kensington admits that the facts are not disputed, which presumes the validity of the liquidated damages clause. Kensington, instead attacks the judgment on Columbian's counterclaim for $7,808. However, Kensington's position is belied by the actual and ordinary meaning of the agreement. Paragraph 15 of the loan agreement states in pertinent part as follows:

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[11] *Samson*, supra; *Nationwide Mutual Fire Insurance Co. v. Sonitrol* (1996), 109 Ohio App. 3d 474; *Cad Cam, Inc. v. Underwood* (1987), 36 Ohio App. 3d 90; *Whitmer v. Great Lakes Cary Corp.*, (June 16, 1994) Cuyahoga App. Nos. 64931 and 64932.

[12] Loan Agreement Paragraph 16(a).

> **"The loan is to be made without cost to lender, and borrower's submission of this application shall constitute an undertaking to pay all costs and expenses associated with the loan whether or not this loan closes. The costs and expenses include but are not limited to the fees and expenses of lender's counsel, charges by any consulting environmental engineer, recording and transfer fees and taxes, and all other costs and expenses incurred to satisfy the requirements of this agreement."**

{¶ 21} In construing any written instrument, the primary objective is to ascertain the intent of the parties, and the general rule is that contracts should be construed so as to give effect to the intention of the parties.[13] Contract terms must be given their ordinary meaning, unless such a reading results in manifest absurdity or where some other meaning is clearly evidenced from the face or overall contents of the instrument.[14]

{¶ 22} A plain reading of paragraph 15 of the loan agreement reveals that it is clear and unambiguous. The clause is not subject to myriad interpretations of its meaning. The logical conclusion is that Kensington was obligated to pay these costs whether the contract was breached or not. This undertaking was a separate and distinct obligation from the consequences of Kensington's breach of the loan commitment; an award on one does not preclude an award on the other; therefore, it does not run afoul of New York's law on liquidation.

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[13]*Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53.

[14]*Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, quoted in *Shifrin v. Forest City Enterprises* (1992), 64 Ohio St.3d 635, 638.

{¶ 23} New York courts have enforced contractual provisions providing that lenders retain commitment and loan processing fees when the loan fails to close.[15] This is consistent with Ohio law.[16] Further, as a matter of law, an award of damages should place the injured party in as good a position as it would have been in the absence of the breach.[17] A party injured by a breach has the right to expect to be put in as good a position as he would have been in had the contract been performed.[18]

{¶ 24} Kensington cites several cases to support its position that New York law prohibits actual damages where there is a liquidated damages clause. However, the cases cited are distinguishable from the case at bar. These cases involve liquidated damages and actual damages arising from a single breach of contract. Here, paragraph 16 addresses termination in the event of a failure of conditions precedent to closing, while paragraph 15 provides for Kensington to pay cost regardless of breach of the loan agreement. These are two separate and distinct issues.

{¶ 25} We conclude pursuant to paragraph 16, Columbian was permitted to retain the commitment and loan fees because it is undisputed Kensington failed to satisfy the conditions precedent to the closing of the loan. Further, pursuant to paragraph 15, Kensington's obligation to pay the costs was incurred upon mere submission of the loan application. Consequently, the trial

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[15]*Ford M Development Corp. v. Inland Credit Corp.* (1976) 54 A.D.2d 862, 388 N.Y.S.2d 604.

[16]See *Florence v. Tri-State Savings & Loan Co.*, (April 8, 1974) 1st Dist. No. C-73455; *In re Graham Square, Inc.*, (6th Cir. 1997) 126 F.3d 823,829 .

[17]See *F. Enterprises, Inc. v. Kentucky Fried Chicken Corp.* (1976) 47 Ohio St.2d 154; *Homes by Calkins, Inc. v. Fisher* (1993) 92 Ohio App.3d 262.

[18]Restatement of the Law 2d, Contracts (1981), 102-103, Section 344.

court properly granted summary judgment in favor of Columbian. Accordingly, Kensington's first assigned error is overruled.

{¶ 26} In the second assigned error, Kensington argues the trial court erred in failing to grant partial summary judgment in its favor. We disagree.

{¶ 27} In the exercise of its sound discretion, a court may consider a motion for summary judgment, which has been filed, without express leave of court, after the action has been set for pre-trial or trial.[19] Under Civ.R. 56, the trial court has the discretion of allowing motions after the time allowed for their filing. Since the acceptance of the motion is by the grace of the court, the decision to accept, therefore, is itself by leave of court.[20]

{¶ 28} On March 13, 2000, the trial court held a case management conference where it set a dispositive motion deadline for August 1, 2000, and a trial date for October 31, 2000. The record reveals on August 1, 2000, Columbian filed its motion for summary judgment. Thereafter, on September 1, 2000, Kensington, without leave of court and without an explanation for its late filing, submitted a brief in opposition styled as a cross motion for partial summary judgment as to certain questions of contract interpretation.

{¶ 29} In the instant case, the trial court had established a deadline for filing dispositive motions and had designated a date for trial. Since the deadline for filing dispositive motions had passed and a trial date was set, Kensington was required to obtain leave of court before filing their motion for partial summary judgment. This they failed to do. Pursuant to Civ.R. 56, the trial court

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[19] *Indermill v. United Savings* (1982), 5 Ohio App.3d 243, paragraph one of the syllabus; *Brandyberry v. Owens* (Aug. 16, 1989), Clark App. No. 2542, at 5 citing *Sellers v. Wolff* (Nov. 13, 1985), Greene App. No. 85-CA-30.

[20] *Juergens v. Strang Klubnik & Assocs., Inc.* (1994), 96 Ohio App.3d 223, 234.

had discretion to strike Kensington's motion. Accordingly, Kensington's second assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE,JR., J., and

SEAN C. GALLAGHER, J., DISSENTS.
(SEE ATTACHED DISSENTING OPINION.)

PATRICIA ANN BLACKMON
ADMINISTRATIVE JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COUNTY OF CUYAHOGA

No. 84549

KENSINGTON PARTNERS, L.P.	:	
	:	DISSENTING
Plaintiff-Appellant	:	
	:	OPINION
vs.	:	
	:	
COLUMBIAN MUTUAL LIFE INSURANCE COMPANY	:	
	:	
	:	
Defendant-Appellee	:	
	:	
	:	

DATE MARCH 3, 2005

SEAN C. GALLAGHER, J., DISSENTING:

I respectfully dissent from the majority opinion affirming the trial court's granting of summary judgment in favor of appellee Columbian Mutual Life Insurance Company in the first assignment of error. Although I agree with the majority that there is no material issue of fact in dispute regarding Kensington Partners' breach of the agreement, I would find the liquidated damages clause in paragraph 16(a) of the agreement unenforceable and in conflict with the contract terms in paragraphs 14 and 15 of the agreement. I would reverse the trial court's ruling, award actual damages of $7,808 plus the $1,000 processing fee to Columbian, and require the return of the remaining balance of the $26,000 commitment fee, less damages, to Kensington.

Further, I would concur with the majority's finding and analysis on the second assignment of error.

With respect to the disputed liquidated damages clause, the majority properly noted, "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." *Alexander*, 53 Ohio St.2d 241, paragraph two of the syllabus.

Here, paragraph 14 of the agreement outlines the "commitment fee," which is described as the consideration for the issuance of the agreement. This $26,000 figure, or 2 percent of the loan total, is later transformed into the disputed liquidated damages clause in paragraph 16(a).

A plain reading of the contract language in paragraph 14, however, makes it clear that in the event the loan does not close, the commitment fee is to be refunded less closing expenses and attorney fees. The pertinent language reads:

> **"[I]f lender disapproves any item or matter over which it has discretionary approval under this document and as a result thereof lender does not close this loan * * ***
>
> **"Lender shall refund the commitment fee to Borrower less any closing expenses (as provided in this application/commitment) and attorney's fees incurred by lender (as provided in this application/commitment)."**

Further, the language in paragraph 15 specifies that the borrower shall pay all costs and expenses associated with the loan, whether or not the loan closes. These specific costs and expenses are expressly identified:

> **"The costs and expenses include but are not limited to the fees and expenses of lender's counsel, charges by any consulting environmental engineer, recording and transfer fees and taxes and all other costs and expenses incurred to satisfy the requirements of this agreement * * *"**

Paragraph 16(a), which constitutes the liquidated damages clause, is in apparent conflict with the above sections by mandating the following:

> **"If borrower has not fulfilled all conditions precedent to closing, this agreement shall terminate and all fees held by lender shall be retained by lender as liquidated damages and lender and borrower shall have no further duties or obligations to each other hereunder."**

This clause purports to permit the recovery of both actual and liquidated damages and is thus an unenforceable penalty for a single breach. *Darrow v. Cornell* (1897), 12 A.D. 604; 42 N.Y.S. 1081. By specifying the payment of specific fees and costs in paragraphs 14 and 15 of the agreement, Columbian, which drafted the agreement, is precluded from converting the commitment fee into liquidated damages under paragraph 16(a).

As stated in *Mentor Lagoons, Inc. v. Laity* (May 24, 1985), Lake App. No. 10-184:

> **"Liquidated damages, by definition, are a 'pre-breach' contractual estimation of the actual damages that would probably ensue from a breach of the contract. The parties agree in such a case that the liquidated damages would be paid in the event of a breach. See Black's Law Dictionary, (Special Deluxe 5 Ed. 1979) 353.**
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> **"To allow a party to recover liquidated damages, as stipulated in the contract, and to also prove and recover actual damages allows a double recovery since liquidated damages are a pre-determined amount of what the actual damages will be in case of a breach. If a valid stipulation is made in the contract for payment of liquidated damages, the amount stipulated becomes the measure of recovery. No further recovery may be had by the complaining party. 30 Ohio Jurisprudence 3d (1981), Damages, Section 146.**
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> **"If the stipulation of liquidated damages is a penalty rather than liquidated damages, the party claiming damages may recover only such compensatory damages as he may be able to prove, that is, he is limited to the recovery of actual damages. *Sheffield-King Milling Co. v. Domestic Science Baking Co.* (1917), 95 Ohio St. 180."**

I would reject Columbian's efforts to distinguish between "costs of the loan" and "actual damages." The liquidated damages clause in paragraph 16(a) did not specifically state that it was the price for "keeping the loan open" or compensation for items not outlined in the contract. Columbian was free to pursue so-called "keeping the loan open" compensation as a legitimate cost in recovery as

outlined under paragraphs 14 and 15 of the agreement. I would find the recovery of both actual and liquidated damages under these facts unwarranted, and that Columbian should be limited to the recovery of actual damages.