**[Cite as *Carter v. CPR Staffing, Inc.*, 2010-Ohio-6026.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 94671**

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## MILES G. CARTER, ET AL.

PLAINTIFFS-APPELLEES

vs.

## CPR STAFFING, INC., ET AL.

DEFENDANTS-APPELLANTS

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**JUDGMENT:**
**AFFIRMED IN PART AND REVERSED AND REMANDED IN PART**

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Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-680057

**BEFORE:** McMonagle, J., Gallagher, A.J., and Sweeney, J.

**RELEASED AND JOURNALIZED:** December 9, 2010

**ATTORNEYS FOR APPELLANTS**

Rodd A. Sanders
Robert M. Gippin
Roderick Linton Belfance, L.L.P.
1500 One Cascade Plaza
Akron, Ohio 44308-1108

**ATTORNEY FOR APPELLEES**

Barry L. Sweet
22408 Lake Shore Blvd.
Euclid, Ohio 44123

CHRISTINE T. McMONAGLE, J.:

**{¶ 1}** Defendants-appellants CPR Staffing, Inc., and Thomas Klenotic ("tenant") appeal the amount of damages awarded to plaintiffs-appellees Miles and Catherine Carter, d.b.a., Carter Plaza, ("landlord") in this breach of contract case. After reviewing the facts of the case and pertinent law, we affirm in part and reverse and remand in part.

**{¶ 2}** In June of 2007, landlord and tenant entered into a three-year commercial lease of real property at 24747 Lorain Road, North Olmsted, Ohio. According to the lease, the rent was $750 per month for the first year; $800 per month for the second year; and $850 per month for the third year. The lease also provided that tenant pay a $25 per day fee for late rent.

**{¶ 3}** Beginning in July 2008, tenant became delinquent in paying rent and late fees due under the lease. On December 23, 2008, landlord filed suit against tenant for breach of contract. Count 1 claimed $5,816.11 in damages for rent and late fees due between July 1, 2008 and January 1, 2009. Count 2 claimed $26,950 in prospective damages for rent and daily late fees through the expiration of the lease.

**{¶ 4}** On January 1, 2009, tenant abandoned the premises, and landlord exercised the right under Section 7.1(a) of the lease to "[e]nter upon the premises and terminate this Lease * * *."

**{¶ 5}** On September 3, 2009, landlord filed a summary judgment motion, which the court denied on November 10, 2009. However, the court reconsidered its ruling and granted landlord's summary judgment motion on January 14, 2010. The court awarded landlord $32,766.11, which was the amount prayed for in the complaint, plus interest. This amount was calculated by adding the unpaid monthly rents plus late fees through the termination of the lease, in addition to past due water and sewer bills.

**{¶ 6}** Tenant appeals, raising one assignment of error for our review.

**{¶ 7}** "I. The trial court erred in granting appellees' motion for summary judgment."

**{¶ 8}** Although tenant couches his argument as challenging the court's granting summary judgment to landlord, the only disputed issue in this case is the amount of damages. Tenant did not dispute liability at the trial court level, and

tenant does not dispute liability on appeal. Furthermore, tenant does not dispute the $5,816.11 award for unpaid rent and late fees due before landlord terminated the lease. Rather, tenant disputes the validity of the "liquidated damages" provision of the lease, and in the alternative, if the provision is valid, the amount calculated under that provision.

**{¶ 9}** Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, as follows:

**{¶ 10}** "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274."

**{¶ 11}** Additionally, we review breach of contract claims under a de novo standard. *Latina v. Woodpath Dev. Co.* (1991), 57 Ohio St.3d 212, 214, 567 N.E.2d 262. To succeed on a breach of contract claim, a plaintiff must prove the

existence of a contract, plaintiff's performance under the contract, the opposing party's breach, and resulting damages. See *On Line Logistics, Inc. v. Amerisource Corp*., Cuyahoga App. No. 82056, 2003-Ohio-5381, ¶39.

**{¶ 12}** Generally, "[m]oney damages awarded in a breach of contract action are designed to place the aggrieved party in the same position it would have been in had the contract not been violated." *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.,* 105 Ohio St.3d 476, 481, 2005-Ohio-2974, 829 N.E.2d 298 (internal citations omitted).

**{¶ 13}** A damage award for breach of a commercial lease "is limited to only those damages arising from the breach which could not, by reasonable effort on [the lessor's] part without undue risk or expense, have been averted or reduced." *F. Ent., Inc. v. Kentucky Fried Chicken Corp*. (1976), 47 Ohio St.2d 154, 156, 351 N.E.2d 121. The Ohio Supreme Court further explained this measure of damages in *Dennis v. Morgan* (2000), 89 Ohio St.3d 417, 419, 732 N.E.2d 391, by holding that "[l]essees are potentially liable for rents coming due under the agreement as long as the property remains unrented." Additionally, Ohio courts have held that damage awards pertaining to future rent may be discounted to present value. See *Encore Mgt., Inc. v. Lakeview Realty, Inc*. (Mar. 31, 1994), Cuyahoga App. Nos. 64784 and 65284.

**{¶ 14}** A landlord's right to future rent is not unfettered, however, as landlords in commercial leases "owe a duty to mitigate their damages caused by a

breaching tenant." *Frenchtown Square Partnership v. Lemstone, Inc*., 99 Ohio St.3d 254, 2003-Ohio-3648, 791 N.E.2d 417, ¶20.

**{¶ 15}** In lieu of actual damages, parties to a contract may agree to liquidated damages, which is "[a]n amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches." Black's Law Dictionary (7 Ed. 1999), 395.

**{¶ 16}** Liquidated damages clauses in contracts are enforceable if they meet various conditions; otherwise, they are unenforceable as penalties for non-performance. The Ohio Supreme Court's decision in *Samson Sales, Inc. v. Honeywell, Inc*. (1984), 12 Ohio St.3d 27, 465 N.E.2d 392, outlines the enforceability test for liquidated damages provisions. First, the amount of actual damages must be uncertain and difficult to prove. Second, the amount of stipulated damages must be reasonable and proportionate to the contract as a whole. Third, the parties' intent to stipulate to damages must be clear and unambiguous. See, also, *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 613 N.E.2d 183.

**{¶ 17}** In this case, when tenant defaulted, landlord exercised Section 7.1(a) of the lease, the pertinent parts of which state as follows:

**{¶ 18}** "Default. If Tenant shall * * * default * * * Landlord * * * may * * * [e]nter upon the premises and terminate this Lease, in which event the obligations of Tenant hereunder shall cease without prejudice, however, to the right of Landlord to recover from Tenant * * * as liquidated damages, a sum equal to any

deficiency between the then rental value of the premises for the unexpired portion of the term and the rent provided for that period discounted at four percent (4%) per annum to present net worth * * *."

**{¶ 19}** The trial court did not calculate damages according to the terms of this clause. The parties do not dispute that $5,816.11 was properly awarded for unpaid rent and late fees before the lease was terminated. But, because landlord had no right to collect late fees after the lease was terminated in January of 2009, the trial court erred in awarding $12,750 for late fees after that date.

**{¶ 20}** Further, the "liquidated damages" clause is a valid liquidated damages provision only if, through no fault of the landlord, the property remained unrented during the term of the lease, in which case, all future rents should be discounted to present value as provided by the lease.

**{¶ 21}** The clause is invalid as a penalty, however, if the property was re-rented by the landlord during the term of the lease (in which case the damages should be reduced by the mitigation afforded by re-renting), or if it is found that the landlord made no effort whatsoever to "avert or reduce" the damage by re-renting.

**{¶ 22}** Accordingly, the matter should be remanded to the trial court to determine what amount, if any, is additionally owed to landlord as a result of the breach.

**{¶ 23}** Tenant's assignment of error is sustained in part. We affirm the court's granting summary judgment to landlord regarding liability. We reverse the

$32,766.11 damage award and remand this case to the trial court to determine, as set forth above, what amount, if any, in addition to the $5,816.11 for past rents and late fees, is owed to landlord as a result of the breach.

It is ordered that the parties share equally in the 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 Court of Common Pleas 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.

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS.
JAMES J. SWEENEY, J., CONCURS IN JUDGMENT ONLY
WITH SEPARATE OPINION.

JAMES J. SWEENEY, J., CONCURRING IN JUDGMENT ONLY:

**{¶ 24}** I concur in judgment only and write separately to address the trial court's determination of damages. Section 7.1(a) of the lease in question is neither a liquidated damages clause nor a penalty. Rather, it reserves landlord's right to recover actual damages for future rent, less money received should the property be re-rented, discounted to present value. Section 7.1(a) states in pertinent part: "Landlord to recover from Tenant * * * a sum equal to any deficiency between the then rental value of the premises for the unexpired portion

of the term and the rent provided for that period discounted at four percent (4%) per annum to present worth."

**{¶ 25}** There is uncontradicted evidence in the record that the landlord attempted to re-rent the property, but was unsuccessful. The tenant did not dispute this in the trial court and does not dispute this on appeal. In my opinion, it is improper to address this issue on remand.