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LIQUIDATED DAMAGES IN PURCHASE AND SALE AGREEMENTS: CONNECTICUT

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CONNECTICUT [1]

Connecticut enjoys a long history of judicial consideration of liquidated damages clauses, dating back to the 1817 case of Riley v. Hartford Ins. Co., where the Connecticut Supreme Court stated that "….it is in the nature of liquidated damages, to prevent the necessity of proving them….".[2] While Connecticut courts have differed as to the parity between the construction of residential real estate purchase contracts and commercial real estate purchase contracts generally,[3] it appears that liquidated damages clauses in the context of real estate purchase

contracts, whether residential or commercial, are treated the same under basic principles of contract law, drawing heavily upon cases that do not concern real estate. In Hanson Development Co. v. East Great Plains Shopping Center, Inc.,[4] a case concerning the purchase of commercial real estate, for example, the Connecticut Supreme Court cited to an employment contract case,[5] a sale of goods contract case,[6] and others, as did the Connecticut Supreme Court in HH East Parcel, LLC v. Handy and Harman, Inc.,[7] a commercial real estate purchase contract case. Chandlery at Essex, Inc. v. Schonberger,[8] a commercial real estate purchase contract case in the Connecticut Superior Court, heavily cited Vines v. Orchard Hills, Inc.,[9] a Connecticut Supreme Court case concerning a residential real estate purchase contract. Similarly, residential real estate purchase cases such as Peterson v. McAndrew[10] and Echevarria v. Proto[11] relied upon Norwalk Door Closer Co. v. Eagle Lock & Screw Co.,[12] a case concerning a contract for the sale of goods. As such, this article necessarily considers cases concerning liquidated damages clauses with respect to residential real estate purchase contracts.

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

Connecticut courts have not directly addressed the question of whether a seller may choose specific performance instead of liquidated damages, thereby disrupting the exclusivity of liquidated damages as a remedy. The answer, therefore, must be gleaned from several relevant holdings. For example, in Hanson, the issue of whether the seller could have chosen specific performance instead of liquidated damages was only peripheral; the Court focused its discourse with respect to liquidated damages as to whether intent existed between the parties to liquidate damages when contracting for the relevant property[13]. The seller argued that the trial court abused its discretion in denying the seller its request to amend its counterclaim to seek specific performance in addition to actual damages.[14] The Court, having found a valid liquidated damages clause, concluded that the seller could not seek actual damages.[15] The Court then found that the trial court did not abuse its discretion in refusing to allow amendment of the complaint to add the remedy of specific performance because "[t]here is nothing in the record to indicate why the additional relief was not requested when the counterclaim was first filed. More than eight years passed from the time the complaint was filed to the time when the seller sought to amend its counterclaim and the date set for retrial was rapidly approaching."[16] The Court did not consider the question of whether the seller could otherwise have sought specific performance instead of liquidated damages, if not for the seller's untimeliness. In other words, while the Court emphatically noted that the seller was precluded from seeking actual damages because of the valid liquidated damages clause, it did not make the same point vis-à-vis specific performance.

Some further clarity is provided by the Connecticut Superior Court in Willert v. Russo,[17] which concerns a purchaser's breach of a residential real estate purchase contract where the seller sought both consequential damages and specific performance.[18] Here, the Court rejected the seller's arguments for consequential damages and for specific performance because the language of the contract unambiguously provided for liquidated damages as the seller's sole remedy.[19] The operative language in the contract was as follows:

> If the Buyer fails to perform the provisions hereof, the Seller may deem this Agreement to be at an end, in which event the deposit made by the Buyer hereunder shall be forfeited by the Buyer and retained by the Seller as liquidated damages for Buyers' breach hereof.[20]

The court did not analyze whether, upon principle, the seller could have chosen specific performance if not for the unambiguous contract language when it held:

> The seller's remedy is limited to the liquidated damages as provided in the Contract. It is well established that a vendor may not retain a stipulated sum as liquidated damages and also recover actual damages. *Having contracted*

to accept liquidated damages upon the buyers' breach, he cannot seek further monetary damages nor is he entitled to specific performance.[21]

Accordingly, based upon the holdings in the above-referenced cases and the results reflected in the responses to Question 2 and Question 10, below, it is reasonable to presume that, in Connecticut, where a valid liquidated damages clause affords a seller only one remedy, or where no other remedy is specified, the seller cannot choose a remedy other than liquidated damages pursuant to the contract at issue. If, however, a contract provides for a choice between liquidated damages and some other remedy, the seller may make a choice as to which remedy it would prefer; but, it may not choose both. Further evidence of this conclusion may be found in the matter of Francis T. Zappone Co. v. Plymouth Commons Realty Corp., where the Connecticut Superior Court held valid a clause providing that, in the event of the purchaser's breach, the seller may choose to terminate the contract and then elect either liquidated damages *or other remedies at equity or law*.[22] Question 2, below, provides a further discourse of the Court's findings in Zappone.

In addition, there does not appear to be an extensive analysis of mutuality of remedy under Connecticut law with respect to specific performance, but it is clear that Connecticut courts have not afforded it much favor. In a 1952 Connecticut District Court case concerning sums advanced pursuant to a financing agreement where the defendant claimed that specific performance should not be ordered because there was not mutuality of remedy, the Court stated that "what the defendant fails to realize, or at least to point out to the Court, is that many courts refuse to let the original lack of mutuality deter them from granting specific performance when the party who had no enforceable obligations subsequently performed his otherwise illusory promises." Because the lender advanced to the borrower all that was contemplated when the financing agreement was entered into, the borrower's performance cured the defect of lack of mutuality and rights for specific performance could be validly asserted. In addition, and perhaps most definitively, the Second Circuit, in applying Connecticut law to an arbitration clause, proclaimed the doctrine of mutuality of remedy as "defunct" and "largely dead."

More recently, in Baruno v. Slane, the plaintiffs claimed a right to attorneys' fees under the theory of mutuality of remedy, urging the Court to declare that, in a retainer agreement, provisions for legal fees and interest should be "reciprocal and mutually enforceable even if not so stated therein." The Court declined to do so, stating that such a rule must be left to the appellate courts and legislature. In an earlier iteration of the case, the plaintiffs claimed entitlement to prejudgment interest "under a theory of mutuality of remedy…. [w]ithout offering any authority for or analysis of the claim." The Court, quoting the Connecticut Supreme Court case of Osborne v. Locke Steel Chain Co., as follows: "the alleged inadequacy of one untested remedy neither deprives a contract of mutuality of obligation nor establishes inadequacy of consideration." The Court then quoted Restatement of the Law of Contracts, 2d Ed., § 363, comment c:

It has sometimes been said that there is a requirement of 'mutuality of remedy.' However, the law does not require that the parties have similar remedies in case of breach, and the fact that specific performance or any injunction is not available to one party is not a sufficient reason for refusing it to the other party.

The Court concluded that the existence of a remedy imposed on the plaintiffs did not mandate that the same remedy be imposed on the defendant.

It should be recognized that the authority for the doctrine of mutuality of remedy is quite limited in Connecticut, and the facts of each referenced case considered by noted authority may relate only to the specific circumstances of such referenced case.

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

When both actual damages and liquidated damages are available to a seller pursuant to a contract,

courts in Connecticut will generally allow the seller to choose one remedy or the other remedy, but not both remedies.[23] It is well-settled in Connecticut that "a seller may not retain a stipulated sum as liquidated damages and also recover actual damages."[24] If, however, a contract contains a clause which provides the seller a choice between either liquidated damages or actual damages, the seller may choose one or the other.[25] In Zappone, the operative clause read as follows:

DEFAULT: In the event that the BUYER shall fail to perform any of the obligations and duties as provided in this agreement, then this agreement may, at the option of the SELLER, be terminated and *SELLER shall have the right to elect to either retain any payments made thereunder as liquidated damages* subject to the rights of the Brokers/Agents *or to seek whatever remedy may be available under equity or law to recover damages resulting from BUYER'S default*.[26]

The court did not analyze the clause at length, but merely reiterated that the clause was valid because the seller could choose either one remedy or the other remedy, but not both remedies.[27]

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

Under Connecticut law, it is not permissible for the seller to be afforded both liquidated damages and actual damages if given the opportunity to choose. "[A] seller may not retain a stipulated sum as liquidated damages and also recover actual damages."[28] A seller may, if the contract so provides, have one or the other,[29] but not both.[30]

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

Connecticut courts have not spoken directly to an exact timeframe for choice of damages in the event that both liquidated damages and actual damages are available, but cases reviewed that allowed for such a choice appear to allow for such a choice at various times following the breach. Based upon the Court's decision in Zappone, it appears that the seller may choose the remedies of liquidated damages or actual damages following the time of the breach. As previously noticed above, the relevant clause provided that, in the event of the purchaser's breach, the seller may choose to terminate the contract and then elect either liquidated damages or other remedies at equity or law.[31] The seller was not obligated, by the terms of the clause, to choose any sooner than the time of the breach. If, however, the clause were to provide liquidated damages as the seller's sole remedy, the choice would have been made at the time that the contract was entered into due to the fact that, as previously discussed, a valid liquidated damages clause precludes a seller from seeking actual damages (or, perhaps, another remedy).[32]

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

There does not appear to be an applicable statute addressing liquidated damages clauses in the commercial real estate purchase contract context in Connecticut. There is a statute addressing liquidated damages clauses in personal property sales contracts, however, which reflects the general principles applied in real estate purchase contract case law, as referenced above. Article 2, Section 718 of the Uniform Commercial Code as adopted in the State of Connecticut provides:

Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.[33]

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

Connecticut case law consistently provides that the test for a valid liquidated damages clause requires the establishment of three conditions: "(1) the damage which was to be expected as a result of a breach of the contract was uncertain in amount or difficult

to prove; (2) there was an intent on the part of the parties to liquidate damages in advance; and (3) the amount stipulated was reasonable in the sense that it was not greatly disproportionate to the amount of the damage which, as the parties looked forward, seemed to be the presumable loss which would be sustained by the contractee in the event of a breach of the contract."[34]

As to the first factor, expected damages include those the seller suffered through loss of the bargain, incidental damages, and also "less quantifiable costs arising out of retention of real property beyond the time of the originally contemplated sale."[35] Regarding the second factor's intent requirement, a liquidated damages clause need not expressly refer to "liquidated damages."[36] The provision must simply, upon a factual inquiry, reflect the parties' intention to represent a specific sum that the parties agreed in good faith would constitute damages in the event of a breach.[37] The third factor is discussed in more detail in the response to Question 8, below.

7. Who has the burden of proof?

A breaching party seeking to repudiate a liquidated damages clause bears the burden of proving that the agreed upon sum is excessive to the extent that it is an impermissible penalty.[38]

8. As of when is "reasonableness" tested?

In Zappone, the Connecticut Superior Court drew upon principles expounded in the seminal Connecticut Supreme Court liquidated damages cases Norwalk Door Closer Co. v. Eagle Lock & Screw Co.[39] and Vines v. Orchard Hills, Inc.[40] in stating:

> [W]hen called upon to enforce a presumptively valid liquidated damages clause in a contract, the Court must evaluate not only the apparent reasonableness of the contract when it was entered into, but the reasonableness of the results to which it leads at the time and in the circumstances of its attempted enforcement.[41]

Consequently, a defaulting party may offer evidence showing that a non-willful breach caused either no damages, or damages substantially less than the stipulated sum.[42] It should be noted, however, that when assessing the breaching party's claim of loss, "the trier of fact may not consider changes in the value of the property between the time of breach and the time of trial."[43] The exception as to such change in value is due to the seller being entitled to the benefits attributable to a rising market.[44]

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

"A liquidated damages clause allowing the seller to retain 10 percent of the contract price as earnest money is presumptively a reasonable allocation of the risks associated with default."[45] The presumption is, however, rebuttable.[46]

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

Actual damages are, for the most part, relevant with respect to the determination of liquidated damages. Courts will generally not enforce an otherwise valid liquidated damages provision "upon a finding that no damages whatsoever ensued from the particular breach of contract that actually occurred."[47] Enforcement of a liquidated damages provision where no actual damages were found by a court would result in the unjust enrichment of the non-breaching party.[48] The Connecticut Supreme Court, in Norwalk Door Closer Co. v. Eagle Lock & Screw Co., explained:

> [E]quitable principles will be invoked to deny recovery when the facts make it apparent that no damage has been suffered. The principle is based on justice and fairness. The probable injury that the parties had reason to foresee is a fact that largely determines the question whether they made a genuine pre-estimate of that injury; but the justice and equity of enforcement depend also upon the amount of injury that has actually occurred.[49]

Essentially, the entire premise upon which the contracted sum was based disappears when the anticipated damage does not occur.[50] In such an instance,

enforcement of the liquidated damages clause would be contrary to both justice and the intent of the parties, and the clause would simply become a penalty.[51] Of course, if a liquidated damages clause is found to be a penalty, then the seller is allowed to recover actual damages so long as they can be proven.[52] Conversely, the purchaser may make a restitutionary claim where the seller has been unjustly enriched by the deposit received from the purchaser.[53]

Vines v. Orchard Hills, Inc. is illustrative of how actual damages are considered even where the liquidated damages clause is found to be valid. In Vines, the purchaser defaulted on a real estate transaction and, although the seller was entitled to liquidated damages pursuant to a valid clause within the contract, the purchaser claimed that the seller had suffered no actual damages.[54] The purchaser further claimed that the seller had gained a windfall by later reselling the real estate for double the price, and that the purchaser was therefore entitled to restitution.[55] The Connecticut Supreme Court conducted an extensive analysis of the right of a breaching party to seek restitution, and concluded that "a purchaser whose breach is not willful has a restitutionary claim to recover moneys paid that unjustly enrich his seller."[56] In making the claim, the purchaser is required to prove unjust enrichment, which entails a showing that the damages suffered by the seller are less than the sum received from the purchaser.[57] The Vines Court remanded the case to afford the purchaser the opportunity to demonstrate that the subject real estate could have been resold, at the time of the breach, at a price higher than the contract price so as to remove any losses and compensate for incidental and consequential damages.[58] In the alternative, the purchaser would have an opportunity to prove unconscionability or excuse, thus rendering the liquidated damages clause unenforceable.[59]

The liquidated damages case most cited in reference to the occurrence of no actual damages is Norwalk Door Closer Co. v. Eagle Lock & Screw Co.,[60] which, as discussed above, is not a real estate purchase contract case despite it being cited heavily with respect to real estate purchase contract cases. In Norwalk Door Closer Co., the Connecticut Supreme Court found that the seller manufacturer was "continuing its business without having been harmed, and substantially as it did before the breach," such that it would have been unjust to permit the seller to recover the liquidated damages sum of $100,000.[61] This was because "equitable principles will be invoked to deny recovery when the facts make it apparent that no damage has been suffered."[62]

In Zappone, the relevant clause in the real estate purchase contract permitted a seller, in the event of the purchaser's breach, to elect either liquidated damages or to seek "whatever remedy may be available under equity or law to recover damages resulting from Buyer's default."[63] The Connecticut Superior Court explained that the clause gave the seller the right to choose one or the other, but not both.[64] The particular clause in the contract gave the seller this right, and was therefore not the kind of valid liquidated damages clause that provided only for liquidated damages, thus precluding the recovery of actual damages. Without a clause similar to the one found in Zappone or, in other words, where a contract provision permits the seller only the right to liquidated damages (as opposed to permitting either liquidated damages or another remedy), and where that clause is found to be valid, the seller will not be able to seek actual damages. Clauses within real estate purchase contracts which provide for liquidated damages often do not reference actual damages at all. When they are found to be valid, however, they have an automatic preclusive effect on the seller's right to seek actual damages.[65]

11. Is mitigation relevant for liquidated damages?

Quite simply, "when a contract contains a valid liquidated damages provision, the doctrine of mitigation of damages does not apply."[66] In Zappone, the Connecticut Superior Court cited the following language from 24 Williston on Contracts, 4th Ed. § 65:31, to support the proposition that mitigation does not apply to liquidated damages:

Since the effect of a stipulated damages provision is to substitute a predetermined amount for actual damages sustained by the party entitled to relief, the existence of an enforceable liquidated damages provision has the effect of making the mitigation of damages irrelevant.[67]

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

We have found no case in the State of Connecticut that considers a so-called "shotgun" liquidated damages clause which, as we understand it, is an "overbroad prohibition" present in a liquidated damages clause that renders the clause unenforceable as a penalty.[68] As stated above, courts will generally not enforce an otherwise valid liquidated damages provision upon a finding that no damages whatsoever ensued from the particular breach of contract that actually occurred. Enforcement of a liquidated damages provision where no actual damages were found by a court would result in the unjust enrichment of the non-breaching party.

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

It is unclear whether a liquidated damages clause precludes recovery of attorneys' fees outright because the issue has not been extensively analyzed by controlling authority in Connecticut, though recently the Connecticut Appellate Court, in the 2015 case of Peterson v. McAndrew, awarded the seller attorneys' fees in addition to the seller's recovery pursuant to a liquidated damages clause.[69] The real estate purchase contract at issue in Peterson provided reasonable attorneys' fees to the prevailing party with respect to related litigation but did not explicitly address the relationship between liquidated damages and attorneys' fees. [70] The contract did not specify that the prevailing party must also have been the party seeking to enforce a material provision, but rather in more general terms provided for attorney's fees to the prevailing party in the event that "any litigation" is brought to "enforce any material provision of this Agreement…. ."[71] Here, the Court stated that the case clearly qualified as "any litigation" which sought the enforcement of the liquidated damages clause, a material provision of the contract, on which the defendants prevailed with respect to their claim that it was enforceable in its entirety, as they successfully defended against the plaintiff's claim that they had breached the contract by not delivering good and marketable title as required pursuant to the contract.[72]

Previous to the Peterson holding, however, the Connecticut Superior Court, in the 2009 case of Willert v. Russo, did not allow the seller to recover attorneys' fees, even though attorneys' fees for the prevailing party to an action were provided for in the contract, because:

One of the purposes of providing for liquidated damages is to avoid the delay and expense of litigation. To compensate a party who has pursued a lawsuit where the parties have previously agreed to liquidated damages would undermine the validity of the agreement and defeat the very purpose of stipulating to liquidated damages.[73]

Both the Peterson and Willert cases concerned similar contract provisions, thereby precluding any meaningful distinction between them. By way of comparison, the provision in Peterson which ultimately resulted in the finding against the non-prevailing party with respect to attorneys' fees provided:

SELLER's sole and exclusive remedy shall be the right to terminate this agreement by written notice to BUYER or BUYER's attorney and retain the down payment as reasonable liquidated damages for BUYER's inability or unwillingness to perform.…. Except as otherwise expressly provided herein, in the event of any litigation brought to enforce any material provision of this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees and court costs from the other party.[74]

The provision in Willert, which did not find against the non-prevailing party with respect to attorneys' fees, stated:

If the Buyer fails to perform the provisions hereof, the Seller may deem this Agreement to be at an end, in which event the deposit made by the Buyer hereunder shall be forfeited by the Buyer and retained by the Seller as liquidated damages for Buyers' breach hereof. In the event of Seller's default, Buyer may elect to sue for specific performance or pursue other remedies in law or in equity. In the event that either party hereunder brings an action against the other party for breach of this agreement and prevails in such action, the losing party shall pay the prevailing party's costs and reasonable attorneys' fees, in addition to such other remedies as may be determined by a court of competent jurisdiction.[75]

A nearly identical provision was found in a real estate purchase contract in Parker v. Knauf, where the Connecticut Superior Court held that "[w]here, as in this action, a contract provides for recovery of attorneys' fees by a prevailing party, those fees are recoverable solely as a contract right and not as damages."[76] The Court therefore permitted the seller to retain the liquidated damages deposit in addition to recovering reasonable attorneys' fees.[77]

14. Conclusion

Accordingly, when preparing a real estate purchase contract in Connecticut, a prudent course of action when representing a seller in such a negotiation would be to include a Zappone-styled liquidated damages provision allowing the seller the choice between liquidated damages and another remedy, such as actual damages or, potentially, specific performance. While the several courts of Connecticut are by no means conclusive as to the treatment of such a provision, current authority indicates that a court will respect the agreement between the parties as to the seller's election of remedies (but only with respect to one such remedy).

Given that the election of such remedies would likely take place at the time of the breach and not upon entering into a contract, the ability to have an election allows the non-breaching party to make an election in keeping with the current market rather than requiring the characterization of such remedies immediately upon entering into a contract. Additionally, it is advised that the liquidated damages provision include an award of attorneys' fees and costs (in addition to a separate provision concerning an award of attorneys' fees and costs to the prevailing party to a litigation), as is a severability clause in the event that any such provision would be considered unenforceable by a court.

Notes

1 This article is for informational purposes only and is not intended to be and should not be taken as legal advice. In addition, this article is the statement by the authors only and does not necessarily reflect the views of Shipman & Goodwin LLP, any of its other attorneys, or its clients. The authors are grateful to Jessica Colin-Greene for her research assistance.

2 2 Conn. 368, 372 (1817).

3 See, e.g., Enfield Retail Properties, LLC v. Camel Fitness, Inc., 2016 WL 3003143, at *9 (Conn. Super. Ct. May 16, 2016) (considering "subtle nuance" in case law regarding a lessee's breach of lease for commercial real estate in the liquidated damages context); Holeva v. M & Z Assocs., Inc., 1998 WL 956359, at *5 (Conn. Super. Ct. Nov. 9, 1998) (acknowledging a split among superior courts with regard to whether the Connecticut Unfair Trade Practices Act is "applicable to a single transaction involving real estate" in the same way as it is applicable to commercial real estate transactions).

4 195 Conn. 60 (1985).

5 See Berger v. Shanahan, 142 Conn. 726 (1955).

6 See Norwalk Door Closer Co. v. Eagle Lock & Screw Co., 153 Conn. 681 (1966).

7 287 Conn. 189 (2008).

8 2010 WL 2926212 (Conn. Super. Ct. June 3, 2010), at *1.

9 181 Conn. 501 (1980).

10 160 Conn. App. 180 (2015).

11 2008 WL 4416039, at *1 (Conn. Super. Ct. Sept. 15, 2008).

12 153 Conn. 681 (1966).

13 195 Conn. at 64-65.

14 Id. at 63.

15 Id. at 66.

16 Id. at 67.

17 2009 WL 1532376, at *1 (Conn. Super. Ct. May 4, 2009).

18 Id. at *3.

19 Id. at *4.

20 Id. at *3.

21 Id. at *5 (internal citation omitted; emphasis added).

22 2004 WL 238308, at *40 (Conn. Super. Ct. Jan. 22, 2004), modified on reargument, 2004 WL 1891014 (Conn. Super. Ct. July 28, 2004), aff'd, 99 Conn. App. 175 (2007).

23 See Zappone, 2004 WL 238308, at *40 (finding that the seller could choose between actual and liquidated damages, but could not have both).

24 Hanson, 195 Conn. at 64; see Camp v. Cohn, 151 Conn. 623, 626 (1964) ("If the agreement were construed as imposing a penalty, it would be unenforceable, but the plaintiff would be entitled to recover her actual damages."); Chandlery, 2010 WL 2926212, at *3 (stating same as Hanson and Camp).

25 See Zappone, 2004 WL 238308, at *9, *40.

26 Id. at *9 (emphasis added).

27 Id. at *40.

28 Hanson, 195 Conn. at 64.

29 Zappone, 2004 WL 238308, at *40.

30 Chandlery, 2010 WL 2926212, at *3.

31 Zappone, 2004 WL 238308, at *40.

32 Hanson, 195 Conn. at 64.

33 Conn. Gen. Stat. § 42a-2-718(1) (2019).

34 HH East Parcel, LLC, 287 Conn. at 205 (2008); Hanson, 195 Conn. at 64–65 (1985).

35 Zappone, 2004 WL 238308, at *45 (quoting Vines, 181 Conn. at 512).

36 Hanson, 195 Conn. at 65 (finding intent where the clause was not explicitly characterized as a liquidated damages clause).

37 Id.

38 Chandlery, 2010 WL 2926212, at *4; Zappone, 2004 WL 238308, at *44; see Vines, 181 Conn. at 511 ("the burden of persuasion about the enforceability of the clause naturally rests with its proponent").

39 153 Conn. at 689.

40 181 Conn. at 513.

41 2004 WL 238308, at *42 (internal quotations omitted).

42 Id.

43 Id. at *43.

44 Id. (citing Vines, 181 Conn. at 513-14).

45 Vines, 181 Conn. at 512; Peterson, 160 Conn. App. at 196–97; see also Zappone, 2004 WL 238308, at *45 (stating same and finding valid liquidated damages clause where seller retained less than seven percent of the gross sales price).

46 Vines, 181 Conn. at 512-13 ("The purchaser, despite his default, is free to prove that the contract, or any part thereof, was the product of fraud or mistake or unconscionability…. [or] that his breach in fact caused the seller no damages or damages substantially less than the amount stipulated as liquidated damages"); Chandlery, 2010 WL 2926212, at *4.

47 Vines, 181 Conn. at 511; Peterson, 160 Conn. App. at 196; Chandlery, 2010 WL 2926212, at *4; Echevarria, 2008 WL 4416039, at *1 (Conn. Super. Ct. Sept. 15, 2008).

48 Echevarria, 2008 WL 4416039, at *1.

49 153 Conn. at 688–89 (internal quotations omitted).

50 Id. at 689-90.

51 Id.; Echevarria, 2008 WL 4416039, at *1.

52 Chandlery, 2010 WL 2926212, at *3 (citing Camp v. Cohn, 151 Conn. 623, 626 (1964)).

53 Greene v. Scott, 3 Conn. App. 34, 39 (1984).

54 181 Conn. at 502, 504.

55 Id. at 503–04.

56 Id. at 509.

57 Id. at 510.

58 Id. at 514.

59 Id.

60 153 Conn. 681 (1966).

61 153 Conn. at 690.

62 Id. at 688–89.

63 2004 WL 238308, at *9 (Conn. Super. Ct. Jan. 22, 2004).

64 Id. at *40.

65 See Hanson, 195 Conn. at 64.

66 Zappone, 2004 WL 238308, at *45; see also Camp, 151 Conn. at 626 ("The defendant's claim that the plaintiff is not entitled to recover actual damages because of a failure to mitigate damages by extending the time for the defendant's performance is without merit. The claim would be material only if the agreement provided a penalty and thus permitted the recovery of actual damages.").

67 2004 WL 238308, at *45.

68 Hahn v. Drees, Perugini & Co., 581 N.E.2d 457, 463 (Ind. Ct. App. 1991), holding modified by Dicen v. New Sesco, Inc., 806 N.E.2d 833 (Ind. Ct. App. 2004).

69 160 Conn. App. at 210.

70 Id.

71 Id.

72 Id.

73 Willert v. Russo, 2009 WL 1532376, at *10.

74 160 Conn. App. 194, 210.

75 2009 WL 1532376, at *3.

76 2010 WL 1375564, at *13.

77 Id. at *17; see also Land Group., Inc. v. Palmieri, No. CV065005259, 2009 WL 241687, at *10 (Conn. Super. Ct. Jan. 5, 2009), aff'd, 123 Conn. App. 84 (2010) (finding same).