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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
DAYS INN WORLDWIDE, INC., Plaintiff-Respondent,
v.
SATYAM SHIVAM ASSOCIATES, LLC, d/b/a Days Inn Kingsland, Manish Saraswat, Mahesh C.
Saraswat, and Manju Saraswat, Defendants-Appellants,
and
Shalini Saraswat, Defendant.
Submitted April 28, 2008.
Decided Aug. 12, 2008.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1938-05.

LoFaro & Reiser, LLP, attorneys for appellants ([Glenn R. Reiser](#) and [Sarah K. Resch](#), on the brief).

Connell Foley, LLP, attorneys for respondent ([Jeffrey L. O'Hara](#), of counsel; [Bryan P. Couch](#) and [James Haynie](#), on the brief).

Before Judges [GILROY](#) and [BAXTER](#).

PER CURIAM.

***1** This is a breach of contract action, arising out of defendant's Satyam Shivan Associates, LLC, a limited liability company d/b/a Days Inn Kingsland (SSA), default under a guest lodge licensing agreement (Agreement) with plaintiff Days Inn Worldwide, Inc. SSA and the individual defendant guarantors of the Agreement, Manish Saraswat, Mahesh C. Saraswat, and Manju Saraswat (collectively, the defendants), appeal from the June 8, 2007 order of the Law Division, which granted plaintiff partial summary judgment in the amount of \$726,005.55.^{[FN1](#)} We affirm in part; reverse in part; and remand the matter to the trial court for further proceedings consistent with this opinion.

[FN1](#). Shalini Saraswat had been named as a defendant in the original complaint. However, she was not named in the amended complaint or in any of the subsequent pleadings.

On February 16, 1998, plaintiff entered into the Agreement with SSA for the operation of a Days Inn guest lodging facility located in Kingsland, Georgia (the Facility) for a term of fifteen years. The Agreement required SSA to periodically pay plaintiff "recurring fees," which primarily consisted of royalty fees and basic reservation system user fees. The royalty fee is equal to 6.5% of the gross room revenues earned at the Facility, and the basic reservation system user fee is equal to 2.3% of gross room revenues. SSA was required to report the amount of gross room revenue to plaintiff.

Pursuant to the Agreement, SSA agreed to maintain accurate financial information, including books, records, and accounts, relating to the gross room revenues of the Facility and agreed to allow plaintiff to examine and audit the accounts. Under Section 11 .4 of the Agreement, plaintiff

could suspend the Facility from its reservation system for any default under the Agreement, although during such suspension, all reservation fees would continue to accrue.

Section 11.2 of the Agreement permitted plaintiff, on notice to SSA, to terminate the Agreement, for various reasons: including SSA's (1) failure to pay amounts due under the Agreement; (2) failure to remedy any other default of its obligations or warranties under the Agreement within thirty (30) days after receipt of written notice specifying one or more defaults under the Agreement; and (3) receipt of two or more notices of default under the Agreement in any one-year period, whether or not the defaults were cured.

Pursuant to Section 11.2, SSA agreed that in the event of a termination of the Agreement, it would pay liquidated damages to plaintiff in an amount not less than the product of \$2,000 multiplied by the number of guest rooms at the Facility. Interest would be payable on any past due amounts at the rate of 1.5% per month, or the maximum rate permitted by law, whichever is less. Under Section 17.4, the parties agreed that if either party instituted legal proceedings to enforce its rights under the Agreement, the non-prevailing party would "pay all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party to enforce the Agreement or collect amounts owed under this Agreement."

*2 On January 26, 2004, plaintiff and SSA entered into an Addendum to the Agreement for Satellite Connectivity Services (Addendum). Section 13(a) of the Addendum provided that plaintiff could terminate the Addendum if SSA defaulted under the Agreement. Section 13(c) of the Addendum provided that in the event of termination of the Addendum, SSA would pay liquidated damages to plaintiff in the amount of \$1,000 within ten days following the date of termination.

Defendants Manish Saraswat, Mahesh C. Saraswat, and Manju Saraswat, jointly and severally, guaranteed SSA's obligations under the Agreement (the Guaranty). Pursuant to the terms of the Guaranty, the individual defendants agreed that on SSA's default, they would immediately make all payments and perform all other obligations required under the Agreement.

SSA failed to properly report the gross room revenues, and repeatedly failed to timely pay the recurring fees as required by the Agreement. On October 11, 2004, plaintiff conducted an audit of the Facility's accounts. On November 11, 2004, plaintiff sent SSA a letter advising that an audit assessment of \$234,013.03 was due because of discrepancies revealed during the audit, that is, "differences between revenues transmitted through [plaintiff's reservation system] and the amounts reported to [plaintiff]. By letters dated February 9, 2005, July 22, 2005, and December 1, 2005, plaintiff advised SSA that (1) it was in breach of the Agreement for failing to pay the recurring fees, (2) it had thirty days within which to cure the default, and (3) if the default was not cured, then the Agreement might be terminated. Defendants failed to cure the default.

On March 15, 2006, plaintiff sent defendants a letter, terminating the Agreement and Addendum, as "a result of your failure to cure your default under the Agreement, due to your failure to meet your financial obligations." The letter further advised defendants that they were to: 1) immediately discontinue the use of plaintiff's trade name, service mark, signs, and advertisements, indicating that the guest lodge facility operated as a Days Inn; 2) pay plaintiff \$241,000 liquidated damages for premature termination of the Agreement and Addendum; and 3) pay plaintiff all outstanding recurring fees through the date of termination, which, as of March 8, 2006, was estimated at \$340,092.10. Defendants failed to pay the amounts due.

On July 6, 2005, plaintiff filed its complaint, seeking monetary and equitable relief alleging defendants defaulted under the Agreement, the Addendum, and the Guaranty. On March 27, 2006, the trial court entered default judgment against defendants in the amount of \$341,440.83, representing \$336,299.93 in recurring fees, \$1,096.30 in costs of suit, and \$4,044.60 in attorneys' fees.

On May 8, 2006, defendants moved to vacate the default judgment and for leave to file an answer. On June 9, 2006, the trial court vacated the judgment; granted defendants leave to file an answer; and awarded plaintiff attorneys' fees and costs for prosecuting the default judgment and defending the motion to vacate judgment, which amount was to be determined after plaintiff's counsel filed a certification of services. On July 22, 2006, the trial court entered an order awarding plaintiff's counsel attorneys' fees and costs in the amount of \$4,788.22. On August 18, 2006, plaintiff filed an amended complaint, asserting liquidated damages and violations of the Lanham Act [FN2](#).

[FN2](#). Plaintiff alleged in Count One of the amended complaint that defendants violated [15 U.S.C.A. § 1114\(1\)\(a\)](#) and [15 U.S.C.A. § 1125\(a\)](#) of the Lanham Act. [15 U.S.C.A. § 1114\(1\)\(a\)](#) in relevant part states: (1) Any person who shall, without the consent of the registrant-

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive ... shall be liable in a civil action by the registrant....

[15 U.S.C.A. § 1125\(a\)](#) in relevant part states: (a) Civil action.

(1) Any person who, on or in connection with any goods or services ... uses in commerce any word, term, name, symbol ... or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which-(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation ... or as to the origin, sponsorship, or approval of his or her goods [or] services ... shall be liable in a civil action....

***3** On December 21, 2006, the court signed an order to show cause as to why a preliminary injunction should not be entered restraining defendants from any further use of plaintiff's trade names or service marks. On or about January 27, 2007, defendants consented to a permanent injunction.

On May 11, 2007, plaintiff moved for summary judgment. On June 8, 2007, the trial court granted the motion as to all counts of the amended complaint, except for Count One asserted under the Lanham Act, and awarded plaintiff damages in the amount of \$726,005.55, representing \$388,931.20 in recurring fees (including interest), \$32,823.00 in attorneys' fees, \$3,836.15 in costs of suit, \$241,000 in liquidated damages, and \$59,415.37 in interest on the liquidated damage award. [FN3](#) Plaintiff subsequently dismissed Count One of the amended complaint with prejudice, rendering the June 8, 2007 order final.

[FN3](#). The amount contained in the June 8, 2007 order is \$.15 less than the total of the individual amounts awarded.

On appeal, defendants argue:

POINT I.

SUMMARY JUDGMENT WAS INAP[RO]PRIATELY ENTERED BECAUSE THERE EXISTS GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER APPELLANTS WERE EXCUSED FROM PAYING RECURRING FEES DUE TO BEING REMOVED FROM THE DAYS INN RESERVATION SYSTEM.

POINT II.

SUMMARY JUDGMENT WAS INAP[RO]PRIATELY ENTERED BECAUSE THERE EXISTS GENUINE ISSUES OF MATERIAL FACT AS TO THE AMOUNT OF DAMAGES.

- A. THE TRIAL COURT ERRONEOUSLY INTERPRETED AND APPLIED THE LIQUIDATED DAMAGE PROVISIONS OF THE PARTIES' CONTRACT IN AWARDING \$240,000 IN POST-TERMINATION DAMAGES.
- B. THE TRIAL COURT IMPROPERLY AWARDED \$57,209.13 IN AUDIT CHARGES WITHOUT CONDUCTING A PLENARY HEARING.
- C. THE TRIAL COURT IMPROPERLY AWARDED INTEREST ON LIQUIDATED DAMAGES.
- D. THE TRIAL COURT IMPROPERLY AWARDED ATTORNEY'S FEES AND COSTS OF \$36,659.15 DESPITE [PLAINTIFF'S] FAILURE TO COMPLY WITH R. 4:42-9.
- E. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE PAYMENTS MADE BY APPELLANTS WHICH WERE NOT CREDITED.

A trial court will grant summary judgment to the moving party "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); see also [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 \(1995\)](#). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

On appeal, "the propriety of the trial court's order is a legal, not a factual, question." Pressler, *Current N.J. Court Rules*, comment 3.2.1 on R. 2:10-2 (2008). "We employ the same standard that governs trial courts in reviewing summary judgment orders." [Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 \(App.Div.\), certif. denied, 154 N.J. 608 \(1998\)](#).

*4 We have considered defendants' arguments in light of the record and applicable law. Except for the arguments discussed below, none of defendants' contentions are of sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

In Point II-A, defendants argue that the trial court erred in awarding plaintiff \$240,000 in post-termination liquidated damages under the Agreement. ^{FN4} Defendants contend that the trial court's "conclusion that the aforesaid liquidated damages provision is enforceable and not a penalty constitutes a gross misapplication of the law." Defendants assert that there existed a "genuine issue of material fact as to the reasonableness" of the liquidated damages. We disagree.

^{FN4}. Defendants do not dispute the award of \$1,000 post-termination liquidated damages assessed under the Addendum.

"The purpose of a stipulated damages clause is not to compel the promisor to perform, but to compensate the promisee for non-performance." [Wasserman's, Inc. v. Twp. of Middletown, 137 N.J. 238, 254 \(1994\)](#). "Enforceable stipulated damages clauses are referred to as 'liquidated damages,' while unenforceable provisions are labeled 'penalties.'" [MetLife Capital Fin. Corp. v. Wash. Ave. Assocs, L.P., 159 N.J. 484, 493 \(1999\)](#) (quoting [Wasserman's, Inc., supra, 137 N.J. at 248](#)). "Liquidated damages is the sum a party to a contract agrees to pay if he breaks some

promise, ... arrived at by a good faith effort to estimate in advance the actual damage that will probably ensue from the breach, is legally recoverable as agreed damages if the breach occurs." [*Westmount Country Club v. Kameny*, 82 N.J. Super. 200, 205 \(App.Div.1964\)](#). However, "[a] *penalty* is the sum a party agrees to pay in the event of a breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach." *Ibid*.

Courts favor enforcement of liquidated damage clauses because of principles of judicial economy and freedom of contract. [*MetLife, supra*, 159 N.J. at 504](#). In determining whether a stipulated damage clause is enforceable as a valid liquidated damage clause or unenforceable as a penalty, we are guided by the test of whether the stipulated damage clause "is reasonable under the totality of the circumstances." [*MetLife, supra*, 159 N.J. at 495](#) (quoting [*Wasserman's Inc., supra*, 137 N.J. at 249](#)). "The reasonableness test is applied either at the time the contract is made or when it is breached." *Id.* at 502.

Here, the liquidated damage clause contained in section 12.1 of the Agreement provides in pertinent part:

If we terminate the License ... you will pay us within 30 days following the date of termination, as Liquidated Damages, an amount equal to ... [nothing] less than the product of \$2,000.00 multiplied by the number of guest rooms in the Facility....

In support of its motion for summary judgment, plaintiff submitted a certification from Valerie Capers-Workman, Vice President of plaintiff's Franchise Administration, stating in relevant part:

***5** Pursuant to Section 12.1 of the Agreement, SSA agreed that it would pay liquidated damages to [plaintiff] in an amount that would be no less than the product of \$2,000 multiplied by the number of guest rooms at the Facility. (i.e. \$2,000 x 120 = \$240,000).

This dollar amount is based on the system-wide average revenue earned by [plaintiff] on a per-room annual basis, as determined periodically by the information set forth in [plaintiff]'s Uniform Franchise Offering Circular. Due to the nature of the transient lodging business, revenue can fluctuate drastically from month to month depending upon factors such as the national, regional and local economy, the travel patterns of vacationers, the entry or withdrawal of competitors from the market and the effort, skill and resources of the licensee.

Based on the variables pertaining to the operation of a guest lodging facility and the formula agreed on by the parties for the purpose of determining the amount of liquidated damages, we are satisfied that the trial court correctly determined that the liquidated damages provision represented a reasonable estimate of future damages caused by termination of the Agreement, and that actual damages would have been difficult to estimate.

Defendants argue in Point II-C that the trial court erroneously awarded plaintiff interest on the \$241,000 in stipulated damages. We agree.

Plaintiff sought, and the trial court awarded, interest on the stipulated damage award at the rate of 1.5% per month from March 15, 2006, the date of termination of the Agreement, to June 8, 2007, the return date of the summary judgment motion. We are satisfied that the Agreement did not require SSA to pay such interest. The only provision in the Agreement requiring payment of interest on amounts due was Section 7.3. That section states that "[i]nterest is payable when you receive our invoice on any *past due amount* payable to us under this Agreement at the rate of 1.5% per month ... accruing from the due date until the amount is paid." (emphasis added). Defendants received a letter dated March 15, 2006, providing defendants with a "formal notice of termination" and explaining how "the termination of the Agreement [was] effective as of March 15, 2006." More importantly, the letter informed defendants that they "must ... pay Liquidated

Damages of \$240,000.00 as specified in the Agreement [and] ... pay Liquidated Damages of \$1,000.00 for early termination of the Addendum to the Agreement...."

Section 12.1 provided that if plaintiff terminates the Agreement, that defendants would have "30 days following the date of termination" to pay the liquidated damages. Also, under Section 13(c) of the "Satellite Connectivity Services Addendum," defendants had to pay Addendum liquidated damages "within 10 days following the date of termination." Defendants received the termination notice on March 15, 2006. Under the aforementioned provisions, the Addendum liquidated damages and the Agreement liquidated damages would not have become due until March 25, 2006, and April 14, 2006, respectively.

***6** The record is devoid of any evidence that plaintiff sent SSA invoices after March 15, 2006. Accordingly, pursuant to section 7.3 of the Agreement, which provides that, "[i]nterest is payable when you receive our invoice on any *past due amount*," defendants did not owe interest on the liquidated damages, because they never received an invoice on any "past due amount" of liquidated damages.

Defendants argue in Point II-D that the trial court improperly awarded plaintiff attorneys' fees and costs because plaintiff failed to support its fee application with an affidavit of services. We concur.

Appellate review of a trial court's attorney fee determination is deferential. [*Packard-Bamberger & Co. v. Collier*, 167 N.J. 427, 444 \(2001\)](#). We will only disturb the trial court's determination " 'on the rarest of occasions, and then only because of a clear abuse of discretion' " based on the record presented on the fee application. *Ibid.* (quoting [*Rendine v. Pantzer*, 141 N.J. 292, 317 \(1995\)](#)).

Generally, New Jersey courts follow the American Rule. *N. Bergen Rex Transp., Inc. v. Trailer Leasing Co.*, 158 N.J. 561, 569 (1999). Under that doctrine, the prevailing litigant is not entitled to attorneys' fees from the opposing party, rather each party is required to pay his or her own legal fees. *Ibid.* An exception to the rule is where the parties agree by contract to pay attorneys' fees. *Id.* at 570. Because it is an exception, "courts will strictly construe that provision in light of the general policy disfavoring the award of attorneys' fees." *Ibid.*

Here, the parties agreed that if plaintiff was required to file legal proceedings to enforce its rights under the Agreement, the non-prevailing party would "pay all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party to enforce the Agreement, or collect amounts owed under this Agreement." Because plaintiff recovered a majority of damages sought, plaintiff was a prevailing party under the attorney fee provision. *Id.* at 571.

Plaintiff was required to support its attorney fee application with an affidavit or certification of services from its counsel, "addressing the factors enumerated by [*R.P.C. 1.5\(a\)*](#)." *R.* 4:42-9(b). Plaintiff failed to comply with the rule. Although plaintiff did submit a certification of services from counsel, stating "[s]ince the inception of this matter, we have incurred a total of \$50,823 in attorneys' fees and \$3,836.15 in costs," the certification did not address the *R.P.C. 1.5a* factors, nor did the certification contain or have attached thereto an itemized statement of the actual legal services rendered, the amount charged for each item of service, and a statement of the costs expended. Moreover, in awarding plaintiff counsel fees and costs, the court did not address the [*R.P.C. 1.5\(a\)*](#) factors, but rather awarded the fees and costs only on the basis that plaintiff was the prevailing party under the attorney fee provision in the Agreement.

***7** Because plaintiff failed to properly support its application for attorneys' fees and costs with an affidavit or certification as required by *Rule* 4:42-9(b) and the trial court did not address the [*R.P.C. 1.5\(a\)*](#) factors before awarding the fees and costs, we reverse that part of the order awarding plaintiff \$32,823 in attorneys' fees and \$3,836.15 in costs. We remand the attorney

fees issue back to the trial court for reconsideration, after plaintiff files an appropriate affidavit or certification of services on notice to defendants.

We affirm in part; reverse in part; and remand the matter to the trial court to: 1) reconsider plaintiff's attorney fee application; and 2) enter an amended judgment in accordance with this opinion. We do not retain jurisdiction.

N.J.Super.A.D.,2008.

Days Inn Worldwide, Inc. v. Satyam Shivam Associates, LLC

Not Reported in A.2d, 2008 WL 3287234 (N.J.Super.A.D.)

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