

16 Misc.3d 127(A), 841 N.Y.S.2d 828, 2007 WL 1835527 (N.Y.Sup.App.Term), 2007 N.Y. Slip Op. 51266(U)

Unreported Disposition

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(The decision of the Court is referenced in a table in the New York Supplement.)

Supreme Court, Appellate Term, New York,
2nd and 11th Judicial Districts.
SAMIRO SERVICES, INC. d/b/a Scientific Fire
Prevention Co., Appellant,
v.
JGAB, INC. d/b/a Mama's Empanadas, Respondent.
No. 2006-620 Q C.

June 18, 2007.

Present: PESCE, P.J., WESTON PATTERSON and GOLIA, JJ.

*1 Appeal from an order of the Civil Court of the City of New York, Queens County (Gerald Dunbar, J.), entered January 10, 2006. The order granted defendant's motion for summary judgment and denied plaintiff's cross motion for summary judgment.

Order reversed without costs, defendant's motion for summary judgment denied and plaintiff's cross motion for summary judgment in the principal sum of \$3,296.04, plus 25% attorney's fees, granted.

Plaintiff instituted this action for breach of a contract for cleaning services rendered at defendant's special instance and request to the grease exhaust system in defendant's premises. Defendant moved for summary judgment dismissing the action. Plaintiff cross-moved for summary judgment.

It is undisputed that the parties entered into a written contract wherein plaintiff agreed to clean defendant's exhaust system every three months and defendant agreed to pay plaintiff \$335, plus tax, per service. The contract further provided, inter alia,

that payment was due at the time of completion of each service; that balances unpaid after 30 days would receive a finance charge of 1.5% per month, or the maximum allowed by law, whichever is less; that if defendant failed to pay any charges for more than 90 days after they were due, plaintiff, at its option, was entitled to cancel the agreement and receive payment equivalent to one-half of all services that would have been rendered for the balance of the unexpired term, "this deemed a liquidated damage and not a penalty"; that if litigation was commenced based on defendant's breach, defendant would be obligated to pay 25% of the monies due as attorney's fees, plus costs and disbursements; and that any claim of unsatisfactory service would be waived unless plaintiff received written notice of same within seven days from the date of service.

In February 2004, plaintiff serviced defendant's exhaust system. Defendant subsequently advised plaintiff that it was not satisfied with the service. Plaintiff responded that since defendant had not provided plaintiff with written notice and since more than seven days had elapsed from the date of service, it would not return and re-service the exhaust system. Defendant then advised plaintiff that it was withholding payment until such time as plaintiff re-serviced the system. In response, plaintiff stated that it would not service the system until it had received payment. By the time the next service was scheduled, defendant had engaged another company to perform said work. Plaintiff instituted the instant action more than 90 days after its last service at defendant's premises. Defendant then issued payment for the disputed bill. As a result, the only claim remaining concerns the sum of \$3,296.04, to which plaintiff asserts it is entitled as liquidated damages, plus attorney's fees.

A liquidated damages provision is an estimate, made by the parties at the time they enter into an agreement, of the extent of the injury that would be

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sustained as a result of a breach of the agreement (*Truck Rent-A-Center v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 424 [1977]), and the contracting parties have a right to provide for same where the amount is neither unreasonable nor contrary to public policy (*Crown It Services, Inc. v. Koval-Olsen*, 11 AD3d 263, 266 [2004]). The courts will generally sustain a liquidated damages clause so long as the provision is neither a penalty nor a forfeiture, and equity will intervene to invalidate a liquidated damages clause only in rare cases (see *Fifty States Mgt. Corp. v. Pioneer Auto Parks*, 46 N.Y.2d 573, 577 [1979]). Under the circumstances herein, the liquidated damages provision is enforceable as the actual damages were not readily ascertainable, and the amount sought, 50% of the cost of the services that would have been rendered for the balance of the unexpired term, are not conspicuously disproportionate to the foreseeable losses (see *JMD Holding Corp. v. Congress Fin. Corp.*, 4 NY3d 373, 378 [2005]). In view of the foregoing, the order is reversed, defendant's motion for summary judgment denied and summary judgment entered in favor of plaintiff in the principal sum of \$3,296.04, plus attorney's fees in the sum of 25% of the amount awarded.

PESCE, P.J., WESTON PATTERSON and GOLIA, JJ., concur.

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