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COURT OF APPEALS
STATE OF NEW YORK

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THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Plaintiff-Appellant,

-against-

D'AGOSTINO SUPERMARKETS, INC.,

Defendant-Respondent.

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NY County Clerk's Index No. 655914//2016

App. Division Case No. 2018-1298

MEMORANDUM OF LAW OF DEFENDANT-RESPONDENT D'AGOSTINO SUPERMARKETS, INC. IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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Defendant-Respondent, D'Agostino Supermarkets, Inc. ("Defendant-Respondent"), respectfully submits this Memorandum of Law in opposition to the motion for lease to appeal by plaintiff-appellant, The Trustees of Columbia University in The City of New York ("Plaintiff-Appellant").

CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 500.1(f) of the Rule of Practice for this Court, the undersigned counsel for D'Agostino Supermarkets, Inc. certifies that Defendant-Respondent does not have any parents, subsidiaries or affiliates.

PRELIMINARY STATEMENT

Hon. Saliann Scarpulla, and a unanimous panel of the Appellate Division, First Department, properly determined that a liquidated damage provision (the "Liquidated Damage Provision") contained in a leasehold surrender agreement (the "Surrender Agreement")[1] was an unenforceable penalty. The unenforceable

[1] Although Plaintiff-Appellant characterizes and defines the agreement in question as a "settlement agreement", it is important for this Court to recognize that the underlying agreement was a Surrender Agreement of a fifteen (15) year lease which commenced in 2003 and had less than two (2) years to run at the time it was terminated. This is very important because Plaintiff-Appellant recovered possession in 2016 of highly valuable commercial retail space on Broadway in Manhattan and was able to promptly re-rent space at likely significantly increased rents. A significant factor justifying the decisions below was the fact that, in response to Defendant-Respondent's cross-motion summary judgment determining the amount due under the Surrender Agreement, Plaintiff-Appellant refused to come forward with the actual replacement lease and explain how it calculated actual damages. Plaintiff-Appellant's failure to come forward with evidence was itself an admission that it was likely better off having Defendant-Respondent surrender the store and then release it at market rates to a new tenant – in this case, H-Mart, an Korean specialty store.

Liquidated Damage Provision purported to impose a penalty of over seven and one half (7.5) times the amount otherwise due, which was an effective late fee of over two thousand (2,000%) per cent per annum.

The default at issue was for the late payment of six (6) installments of $15,977.43, out of eleven (11) total monthly installments ("Monthly Surrender Payments") totaling approximately $175,000.00. The penalty which Plaintiff-Appellant sought to enforce was $1,029,969.54, plus interest and other costs to be established at trial, but believed to be at least $295,000.00, for a total of approximately $1,500,000. Both the trial court, and the Appellate Division, recognized that the Liquidated Damage Provision was unenforceable under long standing principles of law because it was unconscionable and because damages were readily calculable at the time of the Surrender Agreement.

Simply put, there is nothing worthy of review by the Court of Appeals. Principles of law governing liquidated damages are well established and there is no need or reason to revisit them. The suggestion that the Court of Appeals should revisit well established jurisprudence because the case involved "sophisticated parties represented by counsel" should be rejected. Cases where this Court has recently reaffirmed the law governing liquidated damages have all involved such parties. Principles of law preventing over-reaching and unconscionable contractual provisions have equal relevance in cases involving sophisticated parties. Indeed, as

this case demonstrates, even long established famous companies may find themselves in financial distress and susceptible of entering into contracts which impose unconscionable penalties. In any event, the factual determinations of whether a particular liquidated damages clause is an unenforceable penalty because it unconscionable on the facts of a particular case is something which can already be determined by the trial court, as a matter of fact, under existing case law, without further review by this Court.

Moreover, the facts of this case, as explained below, demonstrate that this case involves extremely unique circumstances, which are not properly subject to review by the Court of Appeals and which make this case an inappropriate vehicle for reconsideration of established jurisprudence governing liquidated damages. The facts of this case are a particularly egregious example of overreaching and bad faith to the extent that while Defendant-Respondent was admittedly late in making six (6) of eleven (11) monthly payments of $15,741.53, it actually tendered the full amount of $175,741.53 to Plaintiff-Appellant on December 29, 2016 (R. 171-174) before the final five (5) payments were even due. Given that the full amount of $175,741.53 was actually tendered on December 29, 2016, approximately seventy-seven (77) days after it was due under the notice of default and acceleration provision, but before the final five (5) payments were due, the Liquidated Damage Provision effectively imposes a late fee of over two thousand (2,000%) per cent per annum.

Plaintiff-Appellant's refusal to accept the full amount of the Monthly Surrender Payments in the amount of $175,741.53, which had been tendered in advance of the final due date, in the hope of collecting a penalty of approximately $1,500,000, demonstrated its bad faith desire to impose a crippling penalty rather than seek fair compensation.

Thus, as more fully set forth below, the decisions below were fully in accordance with established principles of law governing enforceability of liquidated damage provision as enunciated by this Court of Appeals. There is no split of authority between the Appellate Divisions. There are no dissents suggesting the need for reconsideration of established precedent. There is no basis for further review.

BACKGROUND FACTS

A. The Parties

Plaintiff-Appellant, The Trustees of Columbia University in The City of New York, in addition to running a world renowned university, is one of the largest land owners in the City of New York. *See* Wikipedia, *Columbia University*, https://en.wikipedia.org/wiki/Columbia_University (identifying Columbia as the second largest landowner in the City of New York, after the Catholic Church).

At all relevant times, Defendant-Respondent was a family-owned supermarket business. (R. 163.)

By way of background, Defendant-Respondent traces its history to the mid-1920s, when two teenagers – Nicola (Nick) and Pasquale (Patsy) D'Agostino – set out from Italy to pursue the American dream. By 1931, they had worked as pushcart peddlers, mill workers and apprentice butchers. One year later, in 1934, at the depth of the Great Depression, Nick and Patsy D'Agostino opened a small grocery store on Lexington Avenue and 83rd Street in Manhattan. The brothers initially stocked their store with groceries and baked goods, and later added a fresh meat section and trained butchers, to become what is believed to be the first full service supermarket ever seen in New York City. (R. 163.)

Defendant-Respondent eventually opened more stores in New York and became "New York's Grocer". Movies and television shows shot on location in

New York frequently use Defendant-Respondent's stores and "DAG BAGS" to help impart a sense of New York City realism. Will met Grace in a D'Agostino. Most long time New Yorkers remember the radio jingle, "Please Mr. D'Agostino, Move Closer to Me." (R. 163.)

At the height of its success, Defendant-Respondent provided employment for over 1,000 local people in 26 stores. (R. 163.)

Unfortunately, the economics of running local family-owned business, particularly traditional supermarkets have changed, and chains like A&P, Pathmark and Waldbaum's have disappeared. Other chains, such as Food Emporium and Fairway, have been through bankruptcy reorganizations. (R. 163-164.)

B. The Subject Store

The store in question (the "Surrendered Store") was comprised, at all relevant times, of the ground floor and basement levels of the building located at 2828 Broadway. The parties' lease (the "Terminated Lease") for the Surrendered Store) was dated as of December 2002, and was modified by a rider and as amended by a commencement date agreement dated as of 2004. (R. 42-104, 165.) The Terminated Lease recited that it was for a supermarket on the ground floor and part of the basement in a building to be constructed. Although the Terminated Lease is dated December 22, 2002, at that time the building was still under construction and the fifteen (15) year term did not commence until August 2003. (R. 165.)

C. The History of the Surrendered Store

The market for traditional supermarkets has suffered since the Surrendered Store was first opened in 2003, with extraordinary competition from internet companies like Amazon as well as a variety of other brick and mortar stores like CVS, Rite Aid, Costco, Target and Walmart selling items previously sold only in traditional supermarkets. Smaller traditional grocers are often being replaced with specialty and gourmet stores. (R. 163-164.)

At the time in question when payments for the Surrendered Store to Plaintiff-Appellant began to fall into arrears, Defendant-Respondent did not have sufficient funds on hand to continue operating, paying employees and keeping shelves stocked with food and pay other expenses, including payments under the Surrender Agreement. Simply put, Defendant-Respondent was in emergency, triage mode. (R. 164.)

In August 2016, as part of complex negotiations aimed at a potential eventual merger with the Gristedes chain, Gristedes loaned money to Defendant-Respondent to allow it to continue to keep food on its shelves and make payroll. The failure to make timely payment to Plaintiff-Appellant occurred while Defendant-Respondent was trying to avoid a complete shutdown which would have imperiled jobs for approximately six hundred (600) employees. (R. 164, 176-177.)

In 2016, Defendant-Respondent hired a reorganizational officer who attempted to reach out to landlords of several stores operating at a loss and negotiate, among other things, to surrender stores on mutually acceptable terms. In early 2016, Defendant-Respondent reached out to Plaintiff-Appellant to discuss the situation and they eventually entered into a dialogue. As reflected in an emails dated March 8, 2016 with Mr. Chandra, Plaintiff-Appellant's Assistant Director of University Acquisitions and Leasing, discussions were already ongoing and Plaintiff-Appellant represented that it was already looking for replacement tenants. (R. 165-166.) Mr. Chandra wrote:

> The feedback I have received thus far does not indicate replacement tenants have an inclination to pay for FF&E [furnishings, fixtures and equipment]

(R. 166; 180.)

Negotiations continued and a final proposal was made on May 4, 2016 (approximately sixty (60) days after the above-quoted email), for surrender as of May 31, 2016, when the total arrears would be $261,751.70. Mr. Chandra proposed the following payment schedule, which was eventually confirmed in the Surrender Agreement:

> 43,000 paid on execution of the document
> 43,000 paid on June 1, 2016
> Every month thereafter for 11 months, 15,977.43

(R. 166; 181.)

In April and May 2016, Defendant-Respondent assisted Plaintiff-Appellant in showing the Surrendered Store to a few prospective tenants. (R. 188-189.) An email dated May 23, 2016 – before the Surrender Agreement was signed – confirms that Plaintiff-Appellant already had a "new tenant" in place and was asking Defendant-Respondent to leave certain equipment in place. (R. 187.) Further, a review of New York City Department of Buildings' online database reveals that renovation plans were approved shortly after Defendant-Respondent surrendered the Surrendered Store. (R. 190-200.) Given the approval date of these plans, they were necessarily developed months earlier, likely around the time the Surrender Agreement was executed.

D. The Surrender Agreement

The Surrender Agreement was executed on or about May 27, 2016. (R. 105-111.) The Surrender Agreement called for "the surrender to Landlord the Lease and the Premises" and Landlord has agreed to accept said surrender as of May 31, 2018. (R. 106.)

Defendant-Respondent timely surrendered the Surrendered Store to Plaintiff-Appellant. (R. 167.)

Plaintiff-Appellant accepted Defendant-Respondent's surrender of the Surrendered Store and has a new tenant in place. (R. 167.) While Plaintiff-Appellant

has, through the date of this appeal, withheld disclosing its actual lease with the new tenant (even for an in-camera review), it is believed that this is a long-term lease with more favorable lease terms than Plaintiff-Appellant was receiving from Defendant-Respondent.

The Initial Surrender Payment and the Second Surrender Payments of $43,000.00 each were timely paid under the Surrender Agreement (R. 37, Complaint at ¶ 10), but Defendant-Respondent neglected to pay the Monthly Surrender Payments as it was in the midst of reorganization.

On or about October 14, 2016, Plaintiff-Appellant served a Notice of Default and Opportunity to Cure, referencing the Surrender Agreement and alleging that Defendant-Respondent failed to tender four (4) Monthly Surrender Payments. (R. 130.)

After this action was commenced, on or about December 29, 2016, Defendant-Respondent tendered $175,751.73, representing all eleven (11) Monthly Surrender Payments due to Plaintiff-Appellant under the Surrender Agreement, approximately half of which would not be due until the following year. (R. 168-169; 171-172.)

Rather than accept the check or open a dialogue, the check was returned with a letter from counsel stating:

> It is Plaintiff's position that Defendant is indebted to Plaintiff in a sum in excess of $1,000,000. Thus plaintiff will not accept the $175,751.73 payment.

(R. 151.)

E. The New Tenant

In conferences and motion practice in the lower Court, Plaintiff-Appellant failed and refused to produce an actual copy of the lease it entered into with a new tenant (the "New Tenant").

However, Plaintiff-Appellant ultimately acknowledged in opposing Defendant-Respondent's cross-motion that the Surrendered Store was re-rented to the New Tenant as of June 30, 2016. (R. 221.) The New Tenant turned out to be H-Mart, a Korean specialty grocery store.

PROCEDURAL HISTORY

Plaintiff-Appellant commenced this action on November 10, 2016 by the filing of a summons and complaint seeking damages based upon the Surrender Agreement. (R. 36-38, Complaint at ¶¶ 3-17.)

The complaint (R. 35-41), was both dated and filed November 10, 2016, after the Surrendered Store had been re-rented to the New Tenant on June 30, 2016. (R. 221, ¶ 4, and R. 226, ¶ 13.)

The Complaint contains three (3) causes of action. The first cause of action sought, as liquidated damages, the full rent due under the terminated lease from June 1, 2016 through August 31, 2018, even though the Surrendered Store had been re-rented to an H-Mart operator (as of June 26, 2016, according to Plaintiff-Appellant). (R. 36-38, R. 222 at ¶ 4.) The second cause of action sought, as further liquidated damages, tax escalations due under the Terminated Lease from June 1, 2018 through August 31, 2018, in an amount to be established at trial, but believed to exceed $275,000.00. The third cause of action sought, as even further liquidated damages, water used at the store by Defendant-Respondent (even though it was no longer in possession) in an amount to be established at trial, but believed to exceed $20,000.00.

Defendant-Respondent filed an answer on December 5, 2016. (R. 118-123.)

On December 19, 2016, Plaintiff-Appellant filed a pre-discovery motion for summary judgment seeking, in pertinent part, summary judgment for "the principal sum of $1,020,125.15, together with legal interest thereon," on its first cause of action for base rent under its first cause of action, and severing the claims for further liquidated damages on its second and third causes of action for tax escalations and water usage, which it alleged were for damages in an amount to be established at trial but believed to exceed $295,000.00 as additional liquidated damages. (R. 18-19.)

In its initial moving papers filed December 19, 2016, even though Plaintiff-Appellant had already re-rented the Surrendered Store to the New Tenant, this fact was conveniently omitted and kept secret from the lower Court.

On December 24, 2016, Defendant-Respondent filed an amended answer, which contained an expanded ninth (9th) affirmative defense which alleged that the Surrendered Store had been re-rented and that even if Plaintiff-Appellant was entitled to damages, such damages needed to be reduced by rent received from the New Tenant and that Plaintiff-Appellant was seeking an improper windfall and an unconscionable and unenforceable penalty. (R. 148-149.)

On December 29, 2016, Defendant-Respondent tendered to Plaintiff-Appellant a check for full payment of the Monthly Surrender Payments due under the Surrender Agreement in the amount of $175,751.53. (R. 171-172.)

By letter dated January 6, 2017, counsel for Plaintiff-Appellant notified counsel for Defendant-Respondent that his client would not accept the check for $175,751.53, because "Defendant is indebted to Plaintiff for a sum in excess of $1,000.000.00." (R. 151-152.)

On January 23, 2017, Plaintiff-Appellant filed a supplemental affirmation in support of its motion for summary judgment disclosing to the lower Court that his client had rejected the tender of $175,751.53. The January 23, 2017 supplemental affirmation of attorney David Grill expressly asserts and confirms that Plaintiff-

Appellant was pursuing a liquidated damage theory and therefore claiming as liquidated damages the full rent, including tax escalations and water meter charges under the Terminated Lease from June 1, 2016 through August 31, 2018, even though the Surrendered Store was re-rented as of June 30, 2016. (R. 140-141 and 221 at ¶ 4.)

On February 8, 2017, Defendant-Respondent opposed Plaintiff-Appellant's motion and cross-moved for summary judgment striking Plaintiff-Appellant's claim for liquidated damages and providing entry of a judgment against Defendant-Respondent in the amount of $175,751.73, with accrued interest from October 14, 2016, or in the alternative, denying Plaintiff-Appellant's motion and permitting discovery on the issue of damages and mitigation based upon the new lease. (R. 158-159.)

In support of its cross-motion striking the claim for liquidated damages, Defendant-Respondent submitted affidavits explaining the relevant facts and providing the lower Court with an email from Plaintiff-Appellant's assistant director of acquisitions and leasing dated May 23, 2016 (four (4) days before the Surrender Agreement was signed) discussing a request by the "new tenant" that Defendant-Respondent leave certain equipment when it vacated the Surrendered Store. (R. 187.) Defendant-Respondent also submitted an affidavit from its director of operations who explained that prior to the Surrender Agreement, he assisted

Plaintiff-Appellant in showing the store to prospective new tenants, including showing it to persons of Asian descent who mentioned that the store might become an "H-Mart." (R. 189.) The affidavits in support of the cross-motion further explained that work permits for a new store were approved as of September 21, 2016, which had been filed by Lihong Zhang. In support of its cross-motion, Defendant-Respondent also asserted that it was likely that Plaintiff-Appellant had obtained a significantly increased rent under its new lease with H-Mart and also that even if it paid a brokerage commission, it would have still needed to pay a brokerage commission had the Terminated Lease remained in effect until August 30, 2018. (R. 168.) Thus, the papers in support of the cross-motion asserted that Plaintiff-Appellant was improperly attempting to "double dip" by collecting rents from both the old and new tenants and that if its cross-motion were not granted, it was entitled to discovery on the issue of mitigation of damages.

In opposition to the cross-motion, Plaintiff-Appellant failed to come forward and produce a copy of the lease for the New Tenant and/or attempt to establish actual damages. Instead, Plaintiff-Appellant persisted in its theory that it was entitled to the full rental due from Plaintiff-Appellant through August of 2018 as "liquidated damages" regardless of whether it was paid by new tenant. (R. 212-215.) Indeed, at page 5 of attorney David Grill's affidavit in opposition to cross-motion, he has an

entire section titled in bold letters: "The Surrender Agreement's Liquidated Damage Provisions Is [sic] Enforceable." (R. 213.)

Finally, without producing the New Tenant's actual lease, Plaintiff-Appellant conceded that a new lease for the store was signed on June 30, 2016 (R. 221, ¶ 4) and acknowledged that Plaintiff-Appellant had been in negotiations with prospective tenants prior to the date of the Surrender Agreement. (R. 222, ¶¶ 7-8.)

i. The Decision in the Supreme Court

Judge Scarpulla issued a lengthy, reasoned decision finding that the claim for rent and additional for the entire period of June 1, 2018 through August 30, 2018, regardless of the fact that the Surrendered Store was re-rented as of June 30, 2018, was an unenforceable liquidated damage provision based upon clear authority from the Court of Appeals and Appellate Divisions. (R. 11-16.) Judge Scarpulla's decision carefully and properly analyzed the undisputed facts of the case and properly applied the applicable principals governing liquidated damages.

Judge Scarpulla properly denied Plaintiff-Appellant's motion to enforce a liquidated damage provision and granted Defendant-Respondent's cross-motion to strike the liquidated damage provision.

Finally, Judge Scarpulla held that Plaintiff-Appellant was not without remedy and that Defendant-Respondent must pay the full amount due under the Surrender Agreement with interest. (R. 16.)

No judgment was ever entered by Plaintiff-Appellant. While briefing was ongoing, Defendant-Respondent tendered the full amount, with interest, which Judge Scarpulla found due. Plaintiff-Appellant accepted the tender without prejudice to its rights on appeal.

In other words, as of today's date, Plaintiff-Appellant has been fully paid for the amount in default, with statutory interest. The only issue is whether Plaintiff-Appellant can recover a crippling penalty of over 7 ½ times the amount it bargained for and obtained.

ii. Unanimous Affirmance by the Appellate Division

Here, the Appellate Division issued a straightforward decision firmly grounded in existing case law. The Appellate Division stated:

> "We find that the damages at the time of the Surrender were ascertainable. Columbia's attempt to enforce the liquidated damage provision sought to 'secure performance by threat of a large penalty rather than to provide a reasonable assessment of probable damages.' ... We also find that the liquidated damages is unenforceable as 'unreasonable and confiscatory,' since it would result in an award 7 ½ times the amount that Columbia would have received if the Surrender Agreement had been fully performed." (citations omitted.)

The factual findings inherent in the above quoted findings make this case particularly ill-suited for review by the Court of Appeals.

ARGUMENT

I.
LAW GOVERNING LIQUIDATED DAMAGE PROVISIONS IS FIRMLY ESTABLISHED AND THERE IS NO NEED FOR FURTHER REVIEW

A. Grossly Disproportionate Liquidated Damage Provisions Violate Public Policy

It is well established that a liquidated damage clause that is "grossly disproportionate to the amount of actual damages provides for [a] penalty and is unenforceable . . . as a matter of law." *172 Van Duzer Realty Corp. v Globe Alumni Student Assistance*, 24 NY3d 528, 536, 2 NYS3d 39, 44 [2014]; *Truck Rent-A-Ctr. Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 424, 393 NYS2d 365 [1977], *JMD Holding Corp. v Congress Fin. Corp.*, 795 NYS2d 502, 4 NY3d 373, 379, [2005]; *Mosler Safe Co. v Maiden Lane Safe Deposit Co.*, 199 NY 479, 485 [1910]; *Sina Drug Corp. v Mohammed Ali Mohyuddin*, 2013 NY Slip Op 32984(U) [Sup Ct, NY County 2013, Kornreich, J.], *aff'd* 122 AD3d 444 [1st Dept 2014].

The enforcement of liquidated damages is determined "giving due consideration to the nature of the contract and circumstances." *172 Van Duzer Realty Corp.*, 24 NY3d at 536; *citing JMD Holding Corp.*, 4 NY3d at 379 [2005] *citing Mosler Safe Co.*, 199 NY at 485; *Leasing Serv. Corp. v Justice*, 673 F2d 70, 74 [2d Cir 1982].

It is important to note that in all of the above cited cases, the parties opposing liquidated damages were all sophisticated companies, without any claim of lack of legal representation, and this was not a factor that influenced the legal issues. The fundamental rules of law governing judicial disfavor and refusal to enforce grossly disproportionate penalties is fully applicable to sophisticated and legally represented defendants. Parties seeking to enforce grossly disproportionate liquidated damage provisions do not get a "free pass" on asking the Court to enforce unconscionable penalties simply because the other party is allegedly a sophisticated party or was represented by counsel[2].

While recognizing in general that parties are free to agree to liquidated damage clauses, this Court of Appeals reiterated in 2014 that:

> Liquidated damages that constitute a penalty, however, violated public policy and are unenforceable. A provision which required damages grossly disproportionate to the amount of actual damages provides for a penalty and is unenforceable.

172 Van Duzer Realty Corp., 24 NY3d at 536 (internal citations omitted). In *172 Van Duzer Realty Corp.*, the tenant seeking to challenge liquidated damages was a school which leased an entire building for use as "a dormitory." *Id at 351.* The legal

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[2] In Shakespeare's The Merchant of Venice, the sovereign would have no part of enforcing an unconscionable bargain of a pound of flesh for late payment of a loan. It did not matter that the victim of the liquidated damage provision for a pound of flesh was a member of the wealthy merchant class.

issue was whether a liquidation of damages was a penalty and thus "unconscionable" or "contrary to public policy," and not the alleged sophistication of a commercial party. *Id* at 544. In other words, the fact that parties may be considered sophisticated and/or may have been represented by counsel is irrelevant if the trial court finds a penalty is "grossly disproportionate."

The discussion by the Court of Appeals in the landmark case *Truck Rent-A-Center, Inc.* is relevant and no basis exists for reconsideration of established precedent:

> Liquidated damages constitute the compensation which, the parties have agreed, should be paid in order to satisfy any loss or injury flowing from a breach of their contract. In effect, a liquidated damage provision is an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement. Parties to a contract have the right to agree to such clauses, provided that the clause is neither unconscionable nor contrary to public policy. Provisions for liquidated damage have value in those situations where it would be difficult, if not actually impossible, to calculate the amount of actual damage. In such cases, the contracting parties may agree between themselves as to the amount of damages to be paid upon breach rather than leaving that amount to the calculation of a court or jury.
>
> On the other hand, liquidated damage provisions will not be enforced if it is against public policy to do so and public policy is firmly set against the imposition of penalties or forfeitures for which there is no statutory authority. It is plain that a provision which requires, in the event of contractual breach, the payment of a sum of money grossly disproportionate to the amount of actual damages provides

> for penalty and is unenforceable. A liquidated damage provision has its basis in the principle of just compensation for loss. A clause which provides for an amount plainly disproportionate to real damage is not intended to provide fair compensation but to secure performance by the compulsion of the very disproportion. A promisor would be compelled, out of fear of economic devastation, to continue performance and his promisee, in the event of default, would reap a windfall well above actual harm sustained. As was stated eloquently long ago, to permit parties, in their unbridled discretion, to utilize penalties as damages, 'would lead to the most terrible oppression in pecuniary dealings'.

Id at 423-25 (emphasis added) (internal citations omitted).

"The party challenging a liquidated damages clause must establish either that actual damages were readily ascertainable at the time the contract was entered into or that the liquidated damages were conspicuously disproportionate to foreseeable or probable losses." *United Tit. Agency, LLC v Surfside-3 Mar., Inc.*, 65 AD3d 1134, 1135, 885 NYS2d 334 [2d Dept 2009] (emphasis added) *citing Bates Adv. USA. Inc. v 498 Seventh, LLC*, 7 NY3d 115, 120, 818 NYS2d 161 [2006]; *JMD Holding Corp.*, 4 NY3d at 384; *Truck Rent-A-Ctr.*, 41 NY2d at 424. The fact that established law places the burden of proof upon the party seeking to avoid a liquidated damage award is further reason that further review by the Court of Appeals is unnecessary.

B. The Liquidated Damage Provision for over seven and one-half times the actual damages under the Surrender Agreement was effectively a late fee of over 2000% per annum and is grossly disproportionate as a matter of law

The determination of whether the particularly penalty in this case was grossly disproportionate and unconscionable is a fact specific determination which does not warrant further review by the Court of Appeals.

In deciding this case, the Appellate Division relied upon its own decision in *Sandra's Jewel Box Inc. v 401 Hotel, L.P.*, 273 AD2d 1, 3, 708 NYS2d 113, 115 [1st Dept 2000]. In that case, the Appellate Division held that late fees in a lease, which awarded a three hundred sixty five (365%) per cent per annum penalty, should not be enforced. Nothing in this case, which involves an even greater penalty of over 7 ½ times the amount in default, justifies further judicial. *See Clean Air Options, LLC v Humanscale Corp.*, 142 AD3d 923, 924, 38 NYS3d 152, 153 [1st Dept 2016]; *see also Gabriel v Board of Managers of Gallery,* 130 AD3d 482, 15 NYS3d 1 [1st Dept. 2015].

C. Defendant-Appellant's damages were readily calculable when the Surrender Agreement was signed and bear no relation to the liquidated damage provision

Defendant-Respondent came forward with substantial evidence demonstrating that Plaintiff-Appellant's damages were ascertainable at the time it executed the Surrender Agreement. Defendant-Respondent demonstrated that by

the time the Surrender Agreement was signed, Plaintiff-Appellant had already either re-rented the Surrendered Store or was close to signing a new lease with the New Tenant. On May 23, 2016, before the Surrender Agreement was signed, Plaintiff-Appellant's director of leasing was discussing the "new tenant." (R. 187.)

Documentary evidence confirms that Plaintiff-Appellant had the New Tenant as early as May 23, 2016 as evidenced by the email dated May 23, 2016 at 10:12AM (R. 187) from Mr. Anil D. Chandra, Plaintiff-Appellant's Assistant Director of University Acquisitions and Leasing.[3] (R 187.) Mr. Chandra's May 23, 2016 email stated the following:

> The new tenant wants to know if you are leaving the baler and conveyor belt?

(R. 18) (emphasis added.) In other words, at the time of the Surrender Agreement, Plaintiff-Appellant was fully aware that the Surrender Store would be re-rented and in asking for damages of the full rent for breach of an agreement to pay monthly installments of approximately $15,000 totaling approximately $175,000, it is beyond dispute that Plaintiff-Appellant was improperly seeking to impose a crippling penalty rather than seeking proportionate compensation for any future breach.

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[3] New York City Building Department online records also show that construction plans were filed and approved shortly after Defendant-Respondent surrendered the Surrendered Store

Moreover, given that the Surrendered Store was already re-rented or about to be re-rented, the Liquidated Damage Provision, if enforced, would have effectively allowed Plaintiff-Appellant to "double-dip" and collect rent from both a tenant which gave up the Surrendered Store and from a "new tenant." This fact makes this case particularly unsuitable for further review.

Plaintiff-Appellant's "alternative" relief of a hearing on actual damages was neither plead nor addressed in Plaintiff-Appellant's underlying motion or opposition to Defendant-Respondent's cross-motion because Plaintiff-Appellant was not seeking that particular relief in the Court below and cannot now seek such new relief on appeal.

Further, Plaintiff-Appellant's failure to request this new "alternative relief" in its Amended Notice of Motion was not an oversight because it proceeded without even disclosing that the Surrendered Store was re-rented.

Procedurally, Defendant-Respondent cross-moved for an order "striking Plaintiff's claim for liquidated damages and providing for entry of a judgment against Defendant in the amount of $175,751.73, with accrued interest from October 14, 2016." (R. 158.) In support of its application, Defendant-Respondent's affidavits explained that Plaintiff-Appellant had a new tenant likely paying a much higher rent and that even if Plaintiff-Appellant paid a brokerage commission, it would have paid a commission two (2) years later had the Terminated Lease run its

full course. In response to the cross-motion, Plaintiff-Appellant did not ask for a hearing. Instead, it simply defended its claim for liquidated damages saying "Plaintiff has no obligation to ever address the actual damages incurred because the parties agreed to specified liquidated damages." (R. 223.) Plaintiff-Appellant describes the obligation to pay a brokerage commission in 2016 as "unanticipated", but does not deny that had there never been a surrender it would have needed to pay a brokerage commission in 2018 when the Terminated Lease otherwise would have terminated. (R. 223.) Likewise, while Plaintiff-Appellant attempts to justify its claim for approximately $1.3 million in liquidated damages by claiming that it gave free rent months to the New Tenant, it refuses to say whether if, after the free rent period, it obtained increased rent that offset the initial free rent. (R. 223.) Ultimately, Plaintiff-Appellant's refusal to come forward with the actual lease with the New Tenant precludes the request for a remand for a hearing on this appeal since Plaintiff-Appellant did not ask for a hearing on actual damages and instead allowed Defendant-Respondent's cross-motion to be submitted based upon the assertion that Plaintiff-Appellant had "no obligation" to ever address the actual damages "because the parties agreed to specified liquidated damages." (R. 223.)

II.
THIS CASE DOES NOT INVOLVE PUTTING PARTIES BACK IN PRE-RESOLUTION POSITIONS

In the first sentence of its preliminary statement and throughout its Memorandum of Law in support of the motion for leave to appeal, Plaintiff-Appellant incorrectly suggests that this case involves issues of putting parties back in "pre-resolution positions in the event of breach." This is simply not correct.

Here, as explained above, prior to the Surrender Agreement, Defendant-Respondent was in possession of the Surrendered Store under a lease which was nearing the end of a term, but also with a rent substantially below current market. Defendant-Plaintiff approached Plaintiff Appellant months before the Surrender Agreement was signed seeking to terminate the Lease under a transaction which allowed re-rental of the Surrendered Store. Defendant-Respondent remained in possession and facilitated re-rental by allowing prospective tenants to visit and even offering to leave or remove fixtures as required by the New Tenant.

At the time that the Surrender Agreement was signed, the Surrendered Store was either re-rented or about to be re-rented. Under these circumstances, the status quo was not restored by the Liquidated Damage Provision. Instead, the Liquidated Damage Provision was, as correctly recognized by the Appellate Division, simply an onerous penalty designed to punish default with crippling penalties and not put

the parties pack in "pre-resolution positions." Thus, review of this case for such a purported principal of law is neither warranted nor appropriate.

CONCLUSION

Plaintiff-Appellant's suggestion that this case involves some novel or important issue of law should be rejected. The Supreme Court and Appellate Division relied upon well-established principles of law governing liquidated damages which prevent unconscionable penalties. There is no split in authority in the Appellate Divisions. There is no dissent suggesting any reason for further review. Based upon the foregoing, Plaintiff-Appellant's motion seeking leave to appeal should be denied.

Dated: March 7, 2019
New York, NY

D'AGOSTINO, LEVINE, LANDESMAN,
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By: _____

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AFFIDAVIT OF SERVICE
VIA FEDEX OVERNIGHT MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Francesca DeVito swears under the penalties of perjury:

I am not a party to the action, am over 18 years of age and reside in New York County, New York.

On March 7, 2019 I served the within *Memorandum of Law In Opposition to Motion for Leave to Appeal,* by depositing a true copy thereof by overnight mail under the exclusive care and custody of Federal Express overnight mail, addressed to the following persons at the last known addresses set forth after the names below:

Rivkin Radler, LLP
477 Madison Avenue, 20th Floor
New York, NY 10022

FRANCESCA DEVITO

Sworn to on the 7th
day of March, 2019

Notary Public

CHRISTOPHER M TARNOK
Notary Public, State of New York
No. 02TA6205912
Qualified in Nassau County
Commission Expires 06/20/2021