

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TROPICAL NURSING, INC.,)
)
 Plaintiff,) C.A. No. 04C-08-110 (MJB)
)
 v.)
)
INGLESIDE HOMES, INC.,)
)
 Defendant.)

Submitted: October 13, 2006

Decided: December 11, 2006

Upon Defendant's Motion for Summary Judgment **GRANTED**.

OPINION AND ORDER

Charles S. Knothe, Esquire, Law Offices of Charles S. Knothe, Attorney for Plaintiff.

David H. Williams, Esquire, Morris, James, Hitchens & Williams LLP, Attorney for Defendant.

BRADY, J.

I. INTRODUCTION

This breach of contract action was filed by Tropical Nursing, Inc. (“Tropical”) against Ingleside Homes, Inc. (“Ingleside”) for alleged violations of the terms of a contract for temporary nurse staffing. Tropical alleges Ingleside violated the terms of their agreement when it impermissibly hired certain nurses and nursing assistants who were placed by Tropical as temporary employees at Ingleside. Tropical seeks liquidated damages in the amount of 500 times the hourly billing rate of each employee. Currently before the Court is Ingleside’s Motion for Summary Judgment, seeking a ruling that the liquidated damages provision is a penalty and is, therefore, void as against public policy. For the reasons that follow, Ingleside’s Motion for Summary Judgment on the issue of the validity of Tropical’s liquidated damages clause is GRANTED.

II. FACTUAL BACKGROUND

These are the undisputed facts that emerge from the parties’ submissions and arguments at a hearing on the motion. Tropical provides temporary nursing employment services to health care institutions. Tropical and Ingleside entered into an agreement for staffing services whereby Tropical provided nurses and nursing assistants to Ingleside whenever

needed. Tropical and Ingleside had a non-exclusive relationship in which neither party was obligated to purchase or provide services. Time cards were provided, which Ingleside's employees were to sign, confirming the hours worked, and for which compensation was required. The liquidated damages provision at issue here was printed on the back of the time cards in a section titled "terms and conditions." It provides that Ingleside may not hire a contracted employee for 180 days following the expiration of service or until 1,000 hours of work has been completed, and further, that in the event Ingleside violates this provision, Ingleside must compensate Tropical in an amount equivalent to 500 times the hourly billing rate.¹ Tropical alleges that Ingleside has hired nine nurses and six certified nursing assistants under contract with Tropical, before the completion of 1000 hours of work and within 180 days.

According to Tropical, at the time of contract, Tropical's employee billing rate was between \$40-\$50 per hour; Tropical was responsible for Social Security, Medicare, unemployment insurance and workman's

¹ See Defendant's Opening Brief, Exhibit A. The "Terms and Conditions" statement provides in relevant part:

"The standard work release payment will be five hundred (500) times the hourly billing rate for that employee. This is required until the employee completes 1,000 hours in continuous assignments with us, the client. We further agree not to accept this employee for assignment from any other temporary agency for a period of 180 days following the end of this assignment."

compensation insurance; and, the gross profit per employee was approximately 50% of the billing rate.

III. CONTENTIONS OF THE PARTIES

Ingleside's contentions

In the instant Motion for Summary Judgment, Ingleside argues that the damages provision is unenforceable because the provision is a penalty and not a valid liquidated damages clause under Delaware law. Ingleside contends that Tropical is attempting to enforce the very same liquidated damages provision that was previously held invalid by this Court in *Tropical Nursing, Inc. v. Arbors*.² According to Ingleside, Tropical intends the provision to be an economic incentive not to breach the contract³ and the damages required are not a reasonable estimate of the damages which would probably be caused by the breach. Therefore, Ingleside argues, the provision is invalid as a penalty.

² No. 03C-09-204 RRC, 3 slip op. (Del. Super. Ct. April 4, 2005); Ingleside does not contend, however, that the *Arbors* opinion acts to estop Tropical from contending as it does here, because the previous case settled before trial. In fact, at the hearing, counsel for Ingleside confirmed that Ingleside does not contend Tropical is collaterally estopped from seeking to enforce the liquidated damages provision.

³ In *Arbors*, Tropical acknowledged that “[t]o be reasonable, a liquidated damage provision should be set at a figure that does not create an economic incentive for the employer to breach the contract. In other words, it should not be cheaper to breach the contract than to honor it.” *See Arbors*, at 14.

Tropical's contentions

Tropical argues that the liquidated damages provision is not a penalty. Tropical contends the anticipated damages were difficult to ascertain at the time of the contract because the number of days an employee might work was uncertain. Tropical claims it dealt with the uncertainty by requiring Ingleside to compensate for 500 hours, regardless of the length of time the particular employee was employed by Ingleside.

Tropical also contends the provision is not excessive, but is equivalent to the approximate actual loss it suffered. Tropical contends its profit is approximately 50% of an employee's hourly rate. The provision prohibits Ingleside from hiring an employee until the employee has completed 1,000 hours of work for Tropical (generating approximately 500 hours of profit). In case of breach, payment of 500 hours of employee's salary to Tropical is roughly equivalent to actual loss, Tropical argues.

In the alternative, if the Court invalidates the provision, Tropical argues that it is entitled to actual damages.

IV. STANDARD OF REVIEW

The standard for granting summary judgment is high.⁴ Summary judgment may be granted where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.⁵ “In determining whether there is a genuine issue of material fact, the evidence must be viewed in a light most favorable to the non-moving party.”⁶ “When taking all of the facts in a light most favorable to the non-moving party, if there remains a genuine issue of material fact requiring trial, summary judgment may not be granted.”⁷

V. DISCUSSION

Under Delaware law, a liquidated damages award is valid unless its enforcement would serve as a penalty, rather than a reasonable assessment of anticipated damages.⁸ A penalty is a sum inserted into a contract in order to serve as a punishment for default, rather than a measure of compensation for breach, and is void as against public policy.⁹ “[I]f a provision is considered a penalty, it is void as against public policy and recovery is

⁴ *Mumford & Miller Concrete, Inc. v. Burns*, 682 A.2d 627 (Del. 1996).

⁵ Super.Ct.Civ.R. 56(c).

⁶ *Muggleworth v. Fierro*, 877 A.2d 81, 83-84 (Del. Super. Ct. 2005).

⁷ *Gutridge v. Iffland*, 889 A.2d 283 (Del. 2005).

⁸ *S.H. Deliveries, Inc. v. Tristate Courier & Carriage, Inc.*, 1997 WL 817883, 2 (Del. Super.).

⁹ *Delaware Bay Surgical Serv., P.A. v. Swier, M.D.*, 900 A.2d 646, 650 (Del. 2005).

limited to actual damages; if the provision is a true liquidated damages provision, it will be enforced according to its terms.”¹⁰

A provision is a valid liquidated damages clause when: “1) “the damages which the parties might reasonably anticipate are difficult to ascertain (at the time of contracting) because of their indefiniteness or uncertainty, and 2) the amount stipulated is *either* a reasonable estimate of the damages which would probably be caused by the breach or is reasonably proportionate to the damages which have actually been caused by the breach.”¹¹ Furthermore, this Court has held that “as a liquidated damages clause, the amount based on past billing is a reasonable forecast of harm and not a penalty.”¹²

In *Tropical Nursing, Inc v. Arbors*,¹³ the validity of the very same provision Tropical is attempting to enforce here was challenged. This Court found the liquidated damages provision was a penalty and therefore,

¹⁰*S.H. Deliveries, Inc. v. Tristate Courier & Carriage, Inc.*, 1997 WL 817883, 2 (Del. Super.).

¹¹*Tropical Nursing Inc., v. Arbors at New Castle Subacute & Rehab. Ctr.*, Del. Super., No. 03C-09-204, Cooch, R.J. (April 4, 2005)(quoting *S.H. Deliveries, Inc. v. Tristate Courier & Carriage, Inc.*, 1997 WL 817883, 2 (Del. Super.); see also *Lee Builders v. Wells*, 103 A.2d 918 (Del. Ch. 1954)(holding that liquidated damages are valid and will not be disturbed “where the damages are uncertain and the amount agreed upon is reasonable.”).

¹²*Faw, Casson & Co., L.L.P. v. Halpen*, 2001 WL 985104 (Del. Super.) (upholding a provision in accounting partnership agreement which allowed parties to leave partnership and take clients, but required withdrawing partner to compensate the partnership by paying one hundred percent (100%) of the gross fees billed by the company to a particular client over the twelve month period immediately preceding such termination).

¹³ No. 03C-09-204, Cooch, R.J. (Del. Super. Ct. April 4, 2005).

unenforceable. There, Judge Cooch explained that “in essence, a ‘penalty’ is an agreement to pay an amount that is not related to the actual damage suffered by the non-breaching party.”¹⁴ Furthermore, “where the damages are easily ascertainable or the amount set by the liquidated damages formula is excessive, then the provision is a penalty and not a valid liquidated damages clause and is void.”¹⁵ In *Arbors*, the Court found that the potential damages were not indefinite or difficult to ascertain.¹⁶

Tropical further asserts that the provision is not excessive. In support of its position, Tropical cites a footnote in *Arbors* in which the Court stated that the formula used in *Tropical Nursing, Inc. v. Genesis Health Ventures, Inc.*¹⁷ “contemplated a less onerous payment that is based on past billing similar to the past billing formula that was held to be valid in *Faw, Cass & Co. v. Halpen.*”¹⁸ In *Genesis*, Tropical’s formula required “a work release payment in the amount of 25% of the employee’s yearly salary rate, as billed

¹⁴ *Id.* at 12.

¹⁵ *Id.* at 13.

¹⁶ *Tropical Nursing Inc., v. Arbors at New Castle Subacute & Rehab. Ctr.*, Del. Super., No. 03C-09-204, Cooch, R.J. (April 4, 2005)(referring to the complaint in *Tropical Nursing, Inc. v. Genesis Health Venture, Inc.* Del. Com. Pl., C.A. No. 2002-06-317, where Tropical sought to enforce a liquidated damages provision based on past billing.). The defendant’s Expert Report presented two methods by which Tropical could have determined damages. The first method was based on Tropical’s lost profits calculated by taking the profit margin realized on a nurse and multiplying it by the hours the nurse worked for the defendant. The second method was a benefits received/expenses saved method calculated by assessing the difference between what defendant would have paid to Tropical for services for a specific nurse and what defendant directly paid the nurse as its employee.

¹⁷ Del. Com. Pl., C.A. No. 2002-06-317.

¹⁸ 2001 WL 985104 (Del. Super.).

to the client, on a 40 hour week.”¹⁹ According to Tropical’s computation, a work year consists of 2,080 work hours, 25% of which is 520 hours. Therefore, Tropical contends the calculation of compensation is in an amount actually more than, but roughly equivalent to, 500 work hours. Tropical asserts the calculation demonstrates that the provision is not excessive, and is, therefore, valid.

Tropical’s position is incorrect, however. In *Arbors*, the Court referred to a provision that was based upon a particular employee’s actual hours of past employment, not a hypothetical or potential number of hours of work. Here, Tropical has no basis upon which to believe any of its employees would have completed 1,000 hours of work for Ingleside. The liquidated damages provision here is not dependant upon an employee’s actual hours of employment. Rather, it is a generic calculation that applies to all employees regardless of the length of time employed by Ingleside.

This Court finds that the provision is not a reasonable estimate of anticipated damages or reasonably proportionate to the damages actually caused by a breach. Additionally, the damages as to each specific employee are not difficult to ascertain. The terms of the provision serve as an

¹⁹ *Tropical Nursing Inc., v. Arbors at New Castle Subacute & Rehab. Ctr.*, Del. Super., No. 03C-09-204, n. 31, Cooch, R.J. (April 4, 2005)(citing *Tropical Nursing, Inc, v. Genesis Health Venture, Inc.* Del. Com. Pl., C.A. No. 2002-06-317(Amended Complaint)).

