

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

**CONFIRMED COPY
OF ORIGINAL FILED
Los Angeles County Superior Court**

AUG 17 2012

**HOLLIDAY v. CHICAGO MOTOR CARS CORP
CASE No. BC445784**

**John A. Clarke, Executive Officer/Clerk
BY ARMANDO GARCIA, Deputy**

Decision on Court Trial

This matter was tried as court trial, the plaintiff having waived his request for jury trial. Evidence was presented on July 5, 6, 10 and 12, and closing arguments were heard on July 12, 2012. The parties declined to bring a court reporter, and as a result, the court ordered the parties to agree on a settled statement at the end of each day of trial. The settled statements were fully submitted on July 23, 2012, and the court took the matter under submission on that date. In addition, the parties stipulated to several facts, including the following:

- 1) \$3,000 was a deposit made through Paypal on 5/25/10;
- 2) \$50,000 was sent on 6/1/10 by Holliday RX ("Holliday") to Chicago Motor Cars Corp. ("CMC");
- 3) The contract was entered into on 5/25/10;
- 4) CMC damages are limited to permissible liquidated damages. CMC will not seek consequential or incidental damages;
- 5) CMC received \$49,990 on 6/1/10 from Holliday (due to \$10 wire fee)
- 6) All emails identified as exhibits were sent and received by the individuals indicated therein;
- 7) True and correct discovery requests and responses are contained in the exhibits;
- 8) Under the terms and conditions of the contract, CMC was entitled to keep the \$3,000 deposit;
- 9) Parties waive jury.

During trial, the parties stipulated to the admissibility of trial exhibits 1-5, 10, 15, 16, 17, 58, and withdrew exhibits 6-9, 11-14, 18-29.

Background

Plaintiff Holliday RX through its principal Terence Holliday became interested in a 2008 Lambourgini Roadster when he saw it on eBay in May, 2010. Plaintiff had initially put a bid on the car on eBay two or three weeks prior to May 25, 2010. The required deposit on eBay was \$3,000. He bid \$240,000, but it was not a winning bid. Later, a salesman from CMC called plaintiff to see if

they could make a deal on the same automobile. The salesman was Mr. Barry Delisi, who was also the sole witness for defense. The evidence established that plaintiff reached an agreement with Mr. Delisi, salesman for CMC, and the price agreed upon was \$259,000. Mr. Delisi told plaintiff that a \$3,000 deposit would be sufficient. The parties agreed upon the terms, and plaintiff signed the Purchase Agreement on May 25, 2010. Plaintiff Holliday reviewed the Agreement, and initialed each page on behalf of Holliday RX. The Agreement, trial exhibit 10, was drafted by defendant.

Sometime prior to June 3, 2010,¹ plaintiff ruptured the L-4 disc in his back and was in excruciating pain. He ultimately required surgery. Plaintiff called Mr. Delisi to say that he was out of commission, and offered to send a payment of \$50,000 to show that he was a serious buyer. In that telephone conversation, plaintiff volunteered to send a \$50,000 payment in good faith, and then wired that amount to CMC. It is undisputed that the \$50,000 was not requested or demanded by CMC, but instead offered by plaintiff. Likewise, there is no evidence that the \$50,000 was negotiated between the parties.

The deal was still on as of June 28, 2010. (See trial exhibit 5.) Plaintiff wanted to inspect the car with a mechanic, and still planned to complete the purchase. Then sometime thereafter, plaintiff received a call from car dealer O'Gares in Beverly Hills. Mr. Gunsberg of O'Gares told plaintiff that CMC had put the car back on eBay. Gunsberg also purportedly told plaintiff some things that made Holliday not want to go through with the deal--namely that Barry Delisi of CMC had called O'Gares and made disparaging statements about Mr. Holliday's honesty and business acumen. Thereafter, Holliday called Delisi and asked why he contacted the Beverly Hills dealer and made the alleged statements. An argument ensued, and plaintiff then said he wanted his money back. Then, within approximately three weeks, CMC finalized a sale of the same Lamborghini to another purchaser for approximately \$5,000 more. Settled Statement of Proceedings, July 6, 2012 at page 11.

The Dispute

The dispute between the parties relates to the liquidated damages provision in the written agreement. The written agreement contains an integration clause, and is a fully integrated agreement. The Agreement provides that "this order includes all of the terms and conditions hereof, that this order cancels and supersedes any prior agreement, written or oral." The parties agree that the contract is not vague and ambiguous.

¹ As of June 3, 2010, salesman Delisi was already aware of plaintiff's medical problem. Trial exhibit 4.

CMC is seeking additional liquidated damages. CMC is not claiming consequential or incidental damages. The dispute in this case centers around the amount of liquidated damages agreed upon by the parties.

The parties ask the court to interpret the contract with respect to the liquidated damages provision, which is contained in paragraph 5 of the contract. The liquidated damages provision in the contract, paragraph 5, provides, *inter alia*, that "Dealer shall have the right, upon failure or refusal of Buyer to accept delivery of the Vehicle...to retain as liquidated damages any deposit made by buyer."

Defendant contends that the words "any deposit" includes any subsequent payment made by plaintiff even after the date of entering into the contract. Thus, defendant interprets "any deposit" to mean any subsequent payment for the automobile, apparently at any subsequent time. Thus, defendant contends that the contract provides that all partial payments made by plaintiff are deposits, regardless of when made, and thus are liquidated damages and non-refundable.

Plaintiff contends that "any deposit" means any deposit agreed upon at the time of entering into the contract. The parties agree that at the time of entering the contract, the deposit was \$3,000. The parties have stipulated that the contract was entered into on May 25, 2010, and that a deposit was made through Paypal at that time for \$3,000 by plaintiff. The Purchase Agreement (Exhibit 10) states the amount of deposit on the line entitled "Cash Down," and trial exhibit 2, the bill of sale, refers to the \$3,000 as "deposit." Plaintiff further contends that any deposit does not include a subsequent good faith payment by plaintiff to hold the car when his back injury disabled him for a period of time. Plaintiff further contends that the liquidated damages are limited to the deposit of \$3,000 which was agreed upon at the time plaintiff signed the contract.

The Witnesses

During the trial, the sole defense witness, Blerim "Barry" Delisi, salesman for CMC, was first called as an adverse witness in plaintiff's case. Delisi testified that prior to signing the contract, he and plaintiff Holliday agreed upon a \$3,000 deposit. He also testified that the \$50,000 payment by plaintiff was voluntary. Delisi further testified that in his view "payment" and "deposit" are the same thing, and they are all non-refundable. Yet Mr. Delisi testified that he never read the terms and conditions of this contract, and that prior to his deposition, he never heard the term "liquidated damages." The court inquired of defense witness Barry Delisi in order to better understand his testimony, including whether it was his belief that even a \$200,000 payment after entering into the contract would be a "deposit." Mr. Delisi did not know the answer to the question, despite the fact that he seemed convinced that a \$50,000 subsequent payment was a "deposit."

Plaintiff Terence Holliday testified that the parties agreed on a deposit of \$3,000 at the time he signed the Agreement, and that Delisi told him that a \$3,000 deposit would be sufficient. Holliday further testified that the \$50,000 was not discussed as a "deposit" under the Agreement, but was offered later as a voluntary good faith payment when his back was injured. He testified that he had intended to go to Chicago to inspect the vehicle, but could not do so with the back injury. Plaintiff contends that his purpose of offering the \$50,000 was to make a partial payment to hold the deal. Holliday testified that there was no discussion that \$50,000 was necessary to secure the deal, and no discussion regarding the \$50,000 as liquidated damages. Holliday also testified that Delisi specifically told him that the \$50,000 would be refunded if the transaction did not go through.

Liquidated Damages

The enforceability of a liquidated damages provision in a contract is governed by Civil Code section 1671, which provides that "a provision in a contract liquidating the damages for the breach of a contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing *at the time the contract was made.*" (Emphasis supplied.) Thus, California law requires not only that any such liquidated damages must be reasonable, but in addition, that the reasonableness of the liquidated damages clause must be measured "under the circumstances existing at the time the contract was made." In this matter, the contract was entered into on May 25, 2010. California law thus provides that the liquidated damages must be considered under the circumstances existing *at the time the contract was made* and must have been reasonable at that time. *Utility Consumers' Action Network, Inc. v. AT&T Broadband of Southern Cal., Inc.* (2006) 135 Cal. App. 4th 1023, 1029. In addition, under California law, the objective of a liquidated damages clause is to have the parties stipulate to an estimate of damages prior to any dispute so that both will know the extent of liability in the event of a breach. *El Centro Mall, LLC v. Payless Shoesource, Inc.* (2009) 174 Cal. App. 4th 58, 63. Thus, California law contemplates that a liquidated damages provision will be negotiated and agreed upon prior to finalizing a contract.

Accordingly, in reviewing a liquidated damages clause, the court must determine whether the amount selected as liquidated damages represents "a reasonable endeavor by the parties to estimate fair compensation for the loss sustained." *Id.* "Determining whether a reasonable endeavor was made depends upon both (1) the motivation and purpose in imposing the charges, and (2) their effect. *Id.* In other words, the amount set as liquidated damages "must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained." *Ridgley v. Topa*

Thrift & Loan Assn (1998) 17 Cal. 4th 970, 977; *Utility Consumers' Action Network, Inc. v. AT&T Broadband of S. Cal. Inc.* (2006) 153 Cal. App. 4th 1023, 1029. A liquidated damages clause will generally be considered unreasonable and unenforceable if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach.

Moreover, the amount of any liquidated damages cannot be a penalty. If the amount selected is designed to substantially exceed the damages suffered, and its primary purpose is to serve as a threat to compel compliance through the imposition of charges bearing little or no relationship to the amount of actual loss, then the purported liquidated damages provision is an invalid attempt to impose a penalty." *El Centro Mall, supra* at 63. According to the California Supreme Court, without a reasonable relationship to actual damages, a contractual clause purporting to predetermine damages must be construed as a penalty. *Id.* And, if the liquidated damages clause is a penalty, it is unenforceable. *Id., Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal. App 4th 1106.

Analysis

The Court finds, after considering the evidence and the arguments of counsel, that the parties negotiated for and agreed upon a liquidated damages provision of \$3,000. The contract was entered into on May 25, 2010, and the deposit reflected in the documentation was \$3,000. The evidence demonstrates that the parties negotiated for and agreed upon a \$3,000 deposit. Trial exhibit 2 reflects a bill of sale dated May 25, 2010 and prepared by Chicago Motor Cars which references the \$3,000 as a "previous deposit." The court finds that there was no discussion of anything but a \$3,000 deposit prior to the signing of the contract by plaintiff on May 25, 2010. Furthermore, although defendant argues that "any deposit" means more than one deposit could be made, the first issue is what deposit was agreed upon at the time the contract was made. As set forth above, the court finds that the deposit agreed upon at the time the contract was made was \$3,000. Moreover, interpreting the contract, the court finds that if the parties intended more than one deposit at the time they entered the agreement, then the word "deposit" would logically be "deposits."

The court further finds that the issue of the \$50,000 good faith payment did not arise until at least a week after the contract was signed. There is no evidence that the \$50,000 payment was negotiated as liquidated damages prior to entering into the written contract, and no evidence that \$53,000 was discussed as a deposit. The message wired with the \$50,000 payment dated June 1, 2010, had the following text: "HOLD DEAL." Trial exhibit 16. Furthermore, the written contract was never revised to indicate anything other than the \$3,000 deposit. The court finds no persuasive evidence that the parties agreed that \$53,000 was a valid or reasonable estimate of damages, and no evidence that the \$50,000 payment was negotiated at all.

The sole witness for defendant, Barry Delisi, was not always consistent or credible in his testimony. He changed his story between his deposition testimony, given under oath, and his trial testimony. Specifically, the court notes that Mr. Delisi's trial testimony was quite different from his deposition testimony on the \$50,000 and different from the defendant's answer to interrogatories. In his deposition, Delisi testified under oath that from the first discussions, the defendant would not accept only a \$3,000 deposit for the car, and required more. Delisi further testified at his deposition that he and Holliday agreed upon a \$53,000 deposit prior to entering into the contract on May 25, 2010. . See Settled Statement of 7-12-12. Delisi's testimony on this subject changed completely at trial, to the extent that he then contended that the \$50,000 payment was subsequent to agreeing on the \$3,000 deposit, but still could not recall the date of the conversation regarding the \$50,000. In addition, the documents introduced as evidence at trial were also inconsistent with Delisi's deposition testimony, in that the documents support a \$3,000 deposit at the time of signing the Agreement ("Bill of Sale", trial exhibit 2), and the \$50,000 was not wired until a week after the agreement was signed.

Likewise, at his deposition, Delisi testified plaintiff never told him of a back problem, but Delisi's own email to plaintiff contradicts this statement, and Delisi backed off of this testimony at trial. Among other things, Delisi's trial testimony about his call to the Beverly Hills car dealer doesn't make sense. Delisi impaired his credibility when he testified that he called that dealer because he was trying to locate Mr. Holliday, but later testified that the only thing he (Delisi) said to the car dealer was to ask if Holliday was a customer of the dealer. Delisi never asked how to get in touch with Holliday, which was purportedly his purpose for the call. In short, Delisi's testimony was inconsistent and contradictory on key issues, and therefore not very persuasive.

Although defendant for the first time at trial tried to characterize the \$50,000 as an oral modification to the written contract, the court agrees with plaintiff that there was no showing by defendant that there was an oral modification. Defendant did not establish an oral modification under Civil Code section 1698. There was no showing that there was a meeting of the minds, and no showing of consideration. Nor could Delisi even recall when the conversation regarding the \$50,000 occurred, so his testimony did not support an oral modification. His testimony before trial was that it occurred before signing the contract, which would mean it was not an oral modification. His testimony at trial was that he could not recall when the conversation occurred. In addition, Delisi further testified at trial that if CMC changed a deal, then they would send out new documentation to reflect the change, but no new documentation was sent out after the purported oral modification. And no document shows \$50,000 to be a deposit, and no document shows that the \$50,000 was to be non-refundable. Moreover, it is difficult to follow how there could have been an oral modification to liquidated damages that occurred after entering into the written contract, given

that the law is clear the liquidated damages must be set at the time the contract is entered into.

Furthermore, even if there had been an oral modification increasing the liquidated damages to \$53,000, the defendant needed to establish how a \$53,000 liquidated damages provision is not a penalty. From the evidence presented at trial, it seems clear that any provision for \$53,000 in liquidated damages was not negotiated for at the time of signing, and was not reasonable given the potential damages under the circumstances of the sale of this automobile. Thus, a \$53,000 liquidated damages provision would constitute an unauthorized penalty under California law, rendering the liquidated damages provision void.

In this dispute, each side contends the other breached the contract. To establish a breach of contract, one must establish the following elements: 1) existence of a contract; 2) plaintiff's performance under the contract; 3) defendant's breach of the contract; 4) damages. *Canova v. Trustees of Imperiall Distr. Employee Pension Plan* (2007) 150 Cal. App. 4th 1487, 1494.

The court finds that the contract was the written Purchase Agreement signed by plaintiff on May 25, 2010. There is no convincing evidence that there was an oral modification of that Agreement, and no convincing evidence that there was a meeting of the minds on any such oral modification. The court finds that the liquidated damages provision of the written Purchase Agreement is valid and enforceable, and the liquidated damages agreed upon were \$3,000. Thus, plaintiff has established that defendant has breached the contract by failing to return the \$50,000. Plaintiff is entitled to a return of the \$50,000 good faith payment, less the \$10 charge for the wire.

Defendant, on the other hand, has not established breach of contract because defendant has not shown any damages. Defendant is entitled to keep the \$3,000 deposit as liquidated damages under the written contract, but not entitled to keep the \$50,000 good faith payment.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Defendant Chicago Motor Cars Corporation shall take nothing by way of its cross-complaint, and its cross-complaint is dismissed with prejudice, and that Plaintiff Holliday RX, Inc. shall recover from defendant \$50,000, less the \$10 wire fee, plus costs of suit in the sum of \$ _____, pursuant to a cost bill to be filed pursuant to California Rule of Court 3.1700.

Dated: August 17, 2012

HOLLY E. KENDIG

Holly E. Kendig, Judge
Los Angeles Superior Court