IT IS ORDERED as set forth below:

Date: January 22, 2014

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

In re:	:	
	:	CASE NO. 12-42142-MGD
THE BERNSTEIN COMPANY, LLC,	:	
	:	CHAPTER 7
	:	
Debtor.	:	
	:	
CHRISTOPHER A. TIERNEY,	:	
	:	
Plaintiff,	:	
	:	
v.	:	ADVERSARY CASE NUMBER
	:	13-4006-MGD
COMFORT INN AND SUITES OF ROME, LLC, a Georgia limited liability corporation, and Does 1 through 10,	:	
Defendants.	:	

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Prior to the filing of its Chapter 11 petition, Debtor, The Bernstein Company, LLC ("Debtor") defaulted under a Purchase and Sale Agreement ("Sale Agreement") for a hotel property

by its inability to obtain financing. The cross motions for summary judgment in this adversary proceeding address which party is entitled to the earnest money deposit made under the Sale Agreement. As more fully set forth below, the Court holds that the consequences of Debtor's failure to obtain financing were not excused, and the earnest money belongs to the Seller.

Plaintiff, Christopher A. Tierney, Chapter 7 Trustee ("Plaintiff") and Defendant, Comfort Inn and Suites of Rome, LLC ("Defendant") have filed cross motions for summary judgment. (Docket Nos. 11 and 13). Plaintiff, as Trustee, brings his claims on behalf of the bankruptcy estate. Plaintiff filed the Affidavit of David Bernstein in support of his Motion. (Docket No. 12). Defendant attached to the Cross Motion the Sale Agreement, Amendment No. 1 to Purchase and Sale Agreement ("Amendment"), a Consent Order from the Magistrate Court of Floyd County ("Consent Order"), a Notice of Default Letter ("Default Letter"), and a Pre-closing Management Agreement ("Management Agreement"). Defendant timely filed a Response to the Motion and Plaintiff filed a Reply. (Docket Nos. 13-4). A hearing was held on November 5, 2013. Subsequent to that hearing, both Defendant and Plaintiff filed Supplemental Briefs. (Docket Nos. 17 and 19). Defendant also filed a Second Supplemental Brief. (Docket No. 20). A second hearing was held on December 3, 2013. Subsequent to that hearing, Plaintiff filed a second Supplemental Brief as well as the Supplemental Affidavit of David Bernstein. (Docket Nos. 22 and 24). A final hearing ("Hearing") was held on January 3, 2014.

The parties dispute the right to a refund of a deposit made in connection with a failed attempt to purchase real property. Plaintiff asserts that Debtor's estate is entitled to a refund of a $405,000 deposit paid by Debtor (hereinafter Plaintiff and Debtor collectively referred to as "Purchaser") for the purchase of a Comfort Inn & Suites hotel. By contrast, Defendant (hereinafter referred to as

"Seller") alleges that it is entitled to keep the deposit. After the flurry of paperwork filed in this case and the myriad of issues raised, the parties agreed at the Hearing that three issues remained to be determined by the Court. Those issues are whether Seller's obligation to assign the franchise was waived by Purchaser, whether Seller provided sufficient notice of its intent to terminate the contract, and whether $405,000 constitutes reasonable liquidated damages under the circumstances. An analysis of these issues, discussed herein, leads the Court to conclude that Seller is entitled to retain the deposit, and Purchaser is not entitled to a refund.

I. Facts

1. The Sale Agreement

Purchaser and Seller entered into a Sale Agreement for purchase of a hotel for $4,350,000.[1] Section 4 of that Agreement states "[t]he deposit shall be nonrefundable" except in a limited set of circumstances, including where "the Seller . . . is unable to assign the Comfort Suites franchise pursuant to Section 8 of the Agreement . . . ." Section 8 of the Sale Agreement requires that "[a]t Closing, the Seller shall cause the franchise from Choice Hotels, Inc. for a Comfort Suites Hotel to be transferred to the Purchaser and Seller shall pay the franchise transfer fee." Plaintiff asserts that Seller was unable to transfer the franchise agreement. The Affidavit of David Bernstein states as much and adds that, as a result, he, David Bernstein, had to pay $45,000 to secure a franchise agreement. Seller asserts that its duty to transfer the franchise agreement never arose because the parties never reached closing. Section 13.1 of the Sale Agreement provides that in the event of Purchaser's default, "Seller's sole remedy shall be to terminate this Agreement by written notice to

[1] The Sale Agreement is not dated. The Default Letter sent by Seller, as well as the Managment Agreement, state that the Sale Agreement was executed on June 7, 2007.

Purchaser and to retain the Deposit as full liquidated damages . . . ." Further, the Sale Agreement states "[i]t is hereby agreed that, without resale, Seller's damages will be difficult to ascertain and that the Deposit constitutes a reasonable liquidation thereof in connection with any termination hereof as a result of Purchaser's default prior to Closing, and is intended not as a penalty, but as full liquidated damages."

2. The Amendment

In November of 2008, the parties executed the Amendment. The Amendment increased the purchase price to $4,384,935.82. Section 2(f) of the Amendment required that on or before December 31, 2008, Purchaser must provide evidence of financing. Section 2(f) further provides that upon failure to deliver such evidence, and if "such failure remains uncured for ten (10) days after written notice from Seller, Seller shall have the option to declare Purchaser in default under the [Sale] Agreement. In that event, Seller may terminate the [Sale] Agreement and retain the Deposit as liquidated damages pursuant to Section 13.1 of the [Sale] Agreement." Section 2(c) states that "all conditions to Purchaser's obligations under the [Sale] Agreement have been satisfied or are hereby waived by Purchaser, excepting only the Seller's obligation to deliver the Closing Documents at closing pursuant to Section 10.1.1 of the [Sale] Agreement." Section 10.1.1 references Section 12, which lists thirteen documents or categories of documents to be delivered by Seller at closing. The franchise agreement was not included in that list. Finally, Section 2(g) provides for a cross default with the Management Agreement. It is undisputed that Purchaser did not provide evidence of financing prior to the December 31, 2008 deadline. Section 4 of the Amendment states, "[e]xcept as expressly amended herein, all of the terms and conditions of the [Sale] Agreement remain in full force and effect." Section 2(e) referenced the Management Agreement, stating that it was being

"executed and entered into by the Purchaser and Seller on or about the date hereof."

3. The Management Agreement

The Management Agreement was executed on November 13, 2008. This Agreement allowed Purchaser to manage the Property prior to the closing of the sale. Section 7 provides that Purchaser would pay $22,500 per month as management fees. Section 10 provides that if Purchaser "fail[s] to make any of the payments required by Section 7 of this Management Agreement when due . . . [then] at the option of [Seller] and without further notice or opportunity to cure, [Seller] may declare a default hereunder." This Section went on to say that "[a] default by [Purchaser] under this Management Agreement shall constitute a default under the [Sale] Agreement, and likewise, a default by [Purchaser] under the [Sale] Agreement shall constitute a default under this Management Agreement. In either event, [Seller] shall be entitled to exercise any remedies set forth herein and in the [Sale] Agreement."

4. The Consent Order and Default Letter

The parties engaged in litigation in state court, and the Consent Order was entered on May 14, 2010**.** The Consent Order required Purchaser to close on the hotel by August 27, 2010. The Consent Order also required that Purchaser pay Seller monthly fees of $22,500 and make payments on outstanding taxes. Finally, Purchaser was required to provide evidence of financing by June 25, 2010. On June 15, 2012, Dharmendra "Dave" Patel sent the Default Letter to Purchaser on behalf of Seller. The Default Letter stated that Purchaser was in default of both the Sale Agreement and the Management Agreement because Purchaser failed to close by the closing date**,** as extended by the Consent Order. Purchaser was also allegedly in default for failure to pay the $22,500 management fee and failure to pay property taxes. The Default Letter afforded Purchaser fifteen

days to cure the defaults.

It is undisputed that Purchaser never obtained financing for the purchase of the hotel and that this constituted a default under the Sale Agreement and Amendment. The parties dispute whether Section 2(c) of the Amendment waived Seller's obligation to transfer the franchise agreement. Plaintiff asserts, and the Supplemental Affidavit of David Bernstein contends, that the Amendment was only intended to address issues with the repairs and construction needed at the hotel. Mr. Bernstein states, "I did not intend to make the franchise agreement or the Flag-transfer issues a part of the Amendment." The parties also dispute whether the Default Letter provided sufficient notice of default pursuant to one or more of the executed documents, or alternatively, whether notice was insufficient but would nonetheless not entitle Purchaser to a refund. Finally, the parties dispute whether $405,000 as liquidated damages was reasonable in the circumstances and under Georgia law. Because the Court finds that all of the remaining disputes involve legal and not fact issues, this matter is ripe for summary judgment.

II. Standard for Summary Judgment

Pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure, incorporating Rule 56 of the Federal Rules of Civil Procedure, a grant of summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The movant bears the "initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted); *accord*, *e.g., Mann v. Taser Int'l, Inc.*, 588

F.3d 1291, 1303 (11th Cir. 2009). The court must resolve a motion for summary judgment by viewing all evidence and drawing all reasonable inferences in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985); *Lubin v. Cincinnati Ins. Co.*, 2010 WL 5313754, at *4 (N.D. Ga. Dec. 17, 2010) (citing *Patton v. Triad Guar. Ins. Corp.*, 277 F.3d 1294, 1296 (11th Cir. 2002)). To defeat a summary judgment motion, "[a]ll that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *BP Prods. N. Am., Inc. v. Se. Energy Group*, 282 Fed. Appx. 776, 779 (11th Cir. 2008) (internal quotations and citations omitted). As to Plaintiff's Motion, considering the record in the light most favorable to the Defendant, the Court concludes that the requirements for granting summary judgment have not been met. As to Defendant's Cross Motion, summary judgment in favor of Defendant is appropriate.

III. Was the obligation to transfer the franchise agreement waived?

First, the Court notes that the interpretation of a contract is a question of law. *Board of Com'rs of Crisp County v. City Com'rs of City of Cordele*, 315 Ga. App. 696, 699 (Ga. Ct. App. Apr. 25, 2012). Despite the assertions in Mr. Bernstein's Supplemental Affidavit, the waiver language in the Amendment is clear. Section 2(c) provides that "*all conditions* to Purchaser's obligations" are waived except for "Seller's obligation to deliver the Closing Documents . . ." (emphasis added). "If the language of a contract is clear and unambiguous, the terms of the agreement are controlling and [a court] should look no further to determine the intention of the parties." *Terry v. State Farm Fire & Cas. Ins. Co.*, 269 Ga. 777, 778 (1998). A court must "take the contract by its four corners, and determine its meaning from its language . . . ." *Id.* Thus, where

the contractual language is clear, the court should not consider parol evidence. *Board of Com'rs of Crisp County* 315 Ga. App. at 699.

The Court finds no ambiguity in the contractual language. The Court will not consider Mr. Bernstein's Supplemental Affidavit in construing the contract because it constitutes parol evidence. All conditions, including Seller's obligation to transfer the franchise agreement, were waived, except for Seller's obligation to transfer the Closing Documents. The Closing Documents are defined in § 10.1.1 of the Sale Agreement, which references § 12. Section 12.2.2 lists the documents to be delivered by Seller at closing. The franchise agreement is not included in that list. The Court notes that its interpretation of the contractual language also makes sense given the undisputed facts of this case. By the time the Amendment was executed in November of 2008, Purchaser had already secured a franchise agreement. Thus, it is not surprising that Purchaser would waive this condition since he had no need for the franchise from Seller.

Purchaser argues in his Supplemental Brief that the "all conditions" language in the Amendment is ambiguous because a "literal interpretation leads to absurd results." First, the Court notes that the fact that enforcing a contract would lead to unusual or unfavorable results does not necessarily enable the Court to look beyond the clear language of the contract – it may may only mean that one party made a bad deal. Even still, the Court disagrees with Purchaser that enforcing the waiver creates absurd results. Purchaser explains that waiving "all conditions" would mean that Purchaser was waiving (1) Seller's duty to maintain insurance on the hotel (Sale Agreement § 9.2); (2) Seller's duty not to place encumbrances on the hotel (Sale Agreement § 9.1); (3) Purchaser's right to terminate in the event of condemnation (Sale Agreement § 14.1); (4) Purchaser's protections in the event of damage to the hotel (Sale Agreement § 14.2); and (5) Purchaser's right to obtain a

certificate of occupancy at closing (Sale Agreement § 10.1.2).

Purchaser's arguments fail because the Closing Documents listed in § 12 would in fact protect Purchaser from relinquishing all of these rights. For example, § 12.2.1 requires Seller to provide a limited warranty deed free of all encumbrances except for the "Permitted Exceptions" and § 12.2.4 requires Seller to deliver a title affidavit making representations regarding Seller's title to the land and liens against the property. Both of these provisions speak to the concerns numbered (2) and (3) above. Section 12.2.11 specifically addresses number (4) and states that "in addition to the documents described in § 14.2 above, Seller shall deliver to Purchaser at Closing the following additional materials." Section 12.2.12 requires Seller to provide all documents relating to the "operation of the Property" and § 12.2.3 requires Seller to assign all "Service Contract[s]" to Purchaser. Though not directly responsive to concerns (1) and (5), maintaining service contracts and delivering documents relating to the operation of the property could include or at least be effected by the insurance on the property and the occupancy of the hotel. Thus, the Court is not persuaded by Purchaser's argument.

Finally, Purchaser further argues that if the language of the waiver was intended to be so broad, then the liquidated damages clause in § 2(f) of the Amendment would be rendered superflous because the "waiver language would have rendered the Deposit nonrefundable in all cases." The Court disagrees with this characterization based on the plain language of Section 2(c). The waiver did not render the deposit nonrefundable in all cases because the waiver explicitly excepted Seller's obligation to deliver the Closing Documents.

IV. Did Seller provide sufficient notice of default?

Purchaser asserts that Seller was also in default because it failed to provide proper notice

under § 2(f) of the Amendment. Seller sent the Default Letter to Debtor on June 5, 2012, which Purchaser asserts initiated a ten-day cure period. The Default Letter, according to Purchaser's Supplemental Brief, did "not precisely comport with [§ 2(f)'s] requirement that [Seller] allow [Purchaser] ten (10) days to cure post-notice by providing a loan letter. In any event, [the Default Letter] came too late. Because . . . the [Default Letter] came *21 months after* the final August 27, 2010 closing date . . . " (emphasis included in original).

Seller responds that § 2(f) provided only one option for declaring default, in addition to § 10 of the Management Agreement and § 13 of the Sale Agreement, and by virtue of the cross default provisions of § 10 of the Management Agreement and § 2(g) of the Amendment. Seller points the Court to the language in § 2(f) which provides that in the event that Purchaser fails to provide the financing letter before December 31, 2008, Purchaser "shall have the option to declare Purchaser in default under the [Sale Agreement]." Thus, the default provision of § 2(f) was optional and not exclusive of the default provisions allowed under either the Sale Agreement or the Management Agreement. The plain language of the contract, which speaks of an "option," supports this interpretation. Further, considering the Amendment in total, this interpretation comports with the parties' clear intent. The Amendment extended the deadline for financing, and in conjunction, provided a new default provision. It is clear that unless explicitly stated, the Amendment was not intended to abrogate either parties' rights under the Sale Agreement or the Management Agreement. The Amendment specifically states in § 2(e) that the Management Agreement was being executed and entered into on or about the same day as the Amendment and does not include any modification of the provisions of the Management Agreement. Section 4 of the Amendment expressly provides that unless otherwise stated, "all of the terms and conditions of the [Sale] Agreement remain in full

force and effect."

Section 13.1 of the Sale Agreement provided that Seller only provide "written notice" of default. Under § 10 of the Management Agreement, Seller could declare a default "without further notice or opportunity to cure." Thus, the Letter did comply with the notice of default provisions under the Sale Agreement and the Management Agreement.

V. Are the liquidated damages reasonable?

Under Georgia law, for liquidated damages to be enforceable, three criteria must be met: actual damages must be "difficult or impossible of accurate estimation," the liquidated damages must not be intended as a penalty, and the sum "must be a reasonable pre-estimate of the probable loss." *Southeastern Land Fund, Inc. v. Real Estate World, Inc.* 237 Ga. 227, 230 (1976). "[T]he burden is on the defaulting party to show that the provision is a penalty." *Liberty Life Ins. Co. v. Thomas B. Hartley Const. Co., Inc.*, 258 Ga. 808, 809 (1989). Whether or not a liquidated damages provision is enforceable is a matter of law for the court to decide.[2] *Id.* Further, in Georgia, "a provision in a real estate sale contract authorizing the seller to retain the purchaser's earnest money deposit in the amount of 10 percent of the sale price as liquidated damages in the event of a breach by the purchaser is reasonable and enforceable as a matter of law." *Oran v. Canada Life Assur. Co.*, 194 Ga. App. 518, 520 (Ga. Ct. App. Feb 2, 1990).

The ordinary damages associated with failing to close on a real estate contract "is the difference between the contract price and the market value of the property at the time of the buyer's

[2] Analysis of the three criteria may, however, require resolution of questions of fact; here, the parties do not dispute the underlying facts. At the Hearing, the Plaintiff indicated that he wanted to further develop the facts through discovery on this issue. However, neither party has asserted any disputed facts and both parties have had ample time to develop the facts and to file briefs and affidavits in support of those facts.

breach." *Liberty Life Ins. Co.,* 258 Ga. at 809. The Georgia Supreme Court in *Liberty Life Ins. Co.* stated that in the context of a buyer-breached contract for real estate, actual damages would have been difficult to estimate because market value would be "subject to the varying opinions of experts, who would have to reconstruct a past market when making their evaluation." Likewise, in the case before the Court, the Sale Agreement containing the liquidated damages provision was executed in 2007. Purchaser breached in June of 2010 when it failed to provide evidence of financing. Estimating damages would have been difficult at the time the contract was entered into because the date of a future breach was unknown as was the value of the property on the date of a future breach. The amount of the liquidated damages was less than ten percent the purchase price, both as agreed to in the Sale Agreement and as increased by the Amendment. This amount is reasonable as a matter of law. Because the provision was a reasonable pre-estimate of damages, it was not intended as a penalty. The contractual language in the Sale Agreement confirmed that intent.

VI. Conclusion

The Court concludes that summary judgment in favor of Seller is appropriate. Purchaser waived Seller's obligation to transfer the franchise agreement, thus Seller was not in default. Purchaser, on the other hand, was in default for several reasons, including its failure to provide a letter of financing. Seller properly perfected its right to declare a default under both the Sale Agreement and the Management Agreement by sending Purchaser the Default Letter. Finally, the liquidated damages provision is reasonable and enforceable.

Accordingly, it is

ORDERED that Plaintiff's Motion for Summary Judgment is **DENIED** and Defendant's Cross Motion for Summary Judgment is **GRANTED**.

The clerk is directed to serve a copy of this Order on Plaintiff, counsel for Plaintiff, Defendant and counsel for Defendant.

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