Prepared by the Court

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| KM CONSTRUCTION CORP.,<br><br>Plaintiff,<br><br>vs.<br><br>JACKSON TOWNSHIP MUNICIPAL UTILITIES AUTHORITY, JOHN AND. JANE DOES, 1-10 AND ABC COMPANIES, 1-10,<br><br>Defendant(s). | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION<br><br>OCEAN COUNTY<br><br>CIVIL ACTION<br><br>DOCKET No. OCN-L-3426-17 |

OPINION

The plaintiff, KM Construction Corp. ("KM") is a New Jersey corporation that performs general contracting and construction throughout New Jersey. Defendant, Jackson Township Municipal Utilities Authority ("JTMUA"), is a public entity created under the Municipal and County Utilities Law, N.J.S.A 40:14B-1 et seq. JTMUA solicited public bids in the spring of 2016 for a demolition and construction project involving a two million gallon water tower.

On May 12, 2016, JTMUA solicited bids for the public improvement project formally known as the Manhattan Street Complex Water Storage Improvements and Warehouse Building Project ("the project"). The proposed work called for the demolition of an abandoned water treatment plant, including a 1-million-gallon water ground storage tank and a 0.2-million-gallon elevated water storage tank. The proposed work also called for construction of new facilities, including a 2-million-gallon water storage tank/standpipe and related site improvements.

KM obtained the project contract documents on or around May 20, 2016, with July 14, 2016, established as the date on which the bids would be opened. JTMUA issued Addendum No. 1 on July 1, 2016, to respond to questions from bidders or otherwise clarify the wording and intent of the contract documents. KM received the Addendum on July 1, 2016, requiring the contractor (or its subcontractor) to submit design documents for the tank and the tank foundation. Addendum No. 1 dated July 1,2016 indicates on page 4, *"Tank foundation shall be designed by the tank manufacturer based on a ringwall foundation type as shown on Contract Drawing G-501. Concrete foundation /slab does not extend below the interior of the tank."* Robert Laurie, the KM employee responsible for project's development, stated in his deposition that KM believed Addendum No. 1 prohibited the use of a "slab" or "mat" foundation. JTMUA's contract documents for the project (Contract Drawing G-501) specified a different, "ring wall" foundation.

KM was awarded the contract on August 25, 2016. O'Brien & Gere ("OBG") prepared the contract documents for the project, including specifications and drawings, although they did not design the proposed water tank. Before KM was awarded the contract, KM initially contacted Caldwell Tanks, Inc., Louisville, Kentucky, as a potential subcontractor to design the tank and its foundation. KM's bid for the project included Caldwell's pre-bid foundation design for the tank. On December 7, 2016, KM cancelled its Letter of Intent to Award to Caldwell. KM then started working with Fisher Tank Company ("Fisher"), a Chester, Pennsylvania company as a potential tank subcontractor to design the tank and foundation. KM never entered into a signed agreement with either tank manufacturing company. KM notified JTMUA that there was a problem with the contract documents and their accepted bid tank design on December 21, 2016. On February 10, 2017, KM submitted a Submittal 22 with the Fisher engineering foundation drawings. On March

16, 2017, KM and JTMUA met to discuss the project and the additional requirements JTMUA put in the comments of their submittal review. On March 17, 2017, JTMUA issued an email to KM to explain that JTMUA would review the new submittal, Submittal 22-R1, once KM had determined its direction on the project. JTMUA reached out to KM on April 20, 2017, May 2, 2017, asking if KM wanted JTMUA to review the foundation submittal. KM received a Notice of Default on June 7, 2017, including a contractual amount of time to cure the default. JTMUA returned Submittal 22-R1 on June 22, 2017. JTMUA made a claim on the performance bond with Selective Insurance ("Selective"), the surety on the project, based on KMs failure to perform. Selective's subsequent investigation resulted in Selective paying JTMUA eight hundred fifty-three thousand six hundred twelve dollars ($853,612.00) and securing a replacement contractor for the project.

This action concerns KM Construction's claim that JTMUA terminated and enforced an out-of-sequence and untimely claim against Selective. These plaintiffs commenced an action in the Law Division alleging that JTMUA breached the contract with KM and has jeopardized KM's bonding for future jobs. The defendants counterclaim alleges that, pursuant to Article 4.24 of the General Conditions of the contract, KM is responsible for $5,000.00 per day in liquidated damages.

In 2017, Plaintiffs instituted this action against Defendant JTMUA. In their Complaint the Plaintiffs allege that JTMUA breached its contract by improperly terminating its contract with KM. Plaintiffs also allege that JTMUA breached an implied covenant of good faith and fair dealing and have been unjustly enriched by KMs bonding company. Plaintiffs assert they have suffered financial harm as a result of Defendant's alleged breach.

JTMUA has now filed a motion for summary judgment claiming that Plaintiff cannot establish the elements of a breach of contract claim. Plaintiff has filed a cross motion for partial summary judgment asserting that Defendant's liquidated damages claim is unenforceable.

This matter comes before the court upon the motion of Defendant/Counterclaimant Jackson Township Municipal Authority seeking an Order granting summary judgment, dismissing Plaintiff's Complaint with prejudice, and awarding JTMUA over $1.1 million in liquidated damages. In addition to Orders denying Defendant's motion, Plaintiff KM Construction seeks an Order granting partial summary judgment dismissing JTMUA's claim for "liquidated damages." For the reasons set forth herein, the court **DENIES** the Defendants' Motions.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). This standard requires the Court to consider the evidence presented "in the light most favorable to the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The Court must determine whether a rational factfinder could possibly resolve the alleged dispute in favor of the non-moving party. Ibid. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). Because the grant of summary judgment serves as a final disposition of the issues contemplated by the order, courts generally "seek to afford 'every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case.'" Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (1988).

New Jersey law has established the four elements of a breach of contract claim, placing the burden on the plaintiff to prove: (1) that the parties entered into a contract containing particular terms; (2) that the plaintiff did what the contract required the plaintiff to do; (3) that the defendant did not do what the contract required the defendant to do; (4) that the defendant's breach of the contract caused a loss to the plaintiff. Globe Motor Company v. Igladev, 225. N.J. 469, 482 (2016). Each element must be proven by a preponderance of the evidence. *Id* at 482; Liberty Mutual Insurance Co. v. Land, 186 N.J. 163, 169 (2006).

The parties have both acknowledged the existence of a contract as an undisputed fact in this matter. JTMUA asserts that KM breached the contract by: (a) failing to engage a tank manufacturer to design the foundation for the tank; (b) failing to immediately notify JTMUA of potential discrepancies in the contract documents; (c) failing to notify JTMUA of a potential change order within twenty (20) calendar days; (d) failing to diligently prosecute the work; and (e) "walking off" the job without completing it. JTMUA also claims that KM cannot show that JTMUA did not do what it was required to under the contract. KM maintains that the delays in the project were caused by: (a) the internal inconsistency and ambiguity of the contract documents; (b) the JTMUA's refusal to accept subcontractor and tank manufacturer Fisher's recommendation for a mat foundation; and (c) the JTMUA's refusal to answer key questions or review the revised foundation submittal made by KM.

Claims such as those that KM failed to immediately notify JTMUA of potential discrepancies in the contract documents and failed to notify JTMUA of a potential change order within twenty (20) calendar days are simple to prove. The concepts of "immediate" and clear

timelines do not require a finder of fact to decipher. However, the assertions that KM failed to engage a tank manufacturer to design the foundation for the tank, failed to diligently prosecute the work, and “walked off” the job without completing it, are still unproven from the moving papers.

The matter will not be concluded until the remaining issues in dispute between the parties have been resolved. The first issue presented is whether KM breached the contract by failing to diligently prosecute the work in question or whether KM's conduct was reasonable and consistent with the contract under the circumstances. The dispute between the parties centers around the type of foundation to be designed by the tank manufacturer. Addendum No. 1 indicates on page four the following Question and Answer:

> **Q.** *Please verify the if there is fiber mesh in slab on grades and verify inside the tank, no slab on grade is indicated just stone sub base with a three inch topping layer of fine sand.*
>
> **A.** *Tank foundation shall be designed by the tank manufacturer based on a ringwall foundation type as shown on Contract Drawing G-501. Concrete foundation /slab does not extend below the interior of the tank.*

KM’s bid submission which was approved by the JTMUA relied upon a foundation design created by Caldwell Tank. Despite continued negotiations between KM and Caldwell a contract for services was never executed between the parties and KM later entered discussions with Fisher Tank to replace Caldwell for the design and construction of the two-million-gallon water tower. According to Robert Laurie of KM, Fisher Tank indicated that, “the foundation design proposed

on G-502 is inadequate for the specified tank." (Laurie email, January 16, 2017 @ 10:13:32 AM to Earl Quijano). The Plaintiff further indicated in the same email correspondence that, "they would not provide additional engineering work required for ringwall foundation without the additional cost approved."

The dispute between JTMUA and the plaintiff as to the adequacy of whether the ringwall design described in G-502 would support the two-million-gallon water tank calls for expert opinion. To further complicate the issue, the fact finder must determine whether G-502 requires the bidder to comply with the specifications set forth in the document or whether the bidder must design the foundation to support the tank submitted by the bidder so long as the contractor designs and installs a ringwall foundation. Here the plaintiff never requested the JTMUA review a foundation for the water tank. Despite numerous attempts to resolve the foundation dispute between January 2017 and May of 2017, the parties failed to come to an agreement. Ultimately the JTMUA issued a notice of default to KM on June 7, 2017. Article 4.24 of the General Conditions of the contract indicates: *"Contractor agrees that said work shall be prosecuted regularly, diligently and uninterruptedly at such rate of progress that will ensure full completion thereof within the time specified"*.

JTMUA has highlighted in its filing papers that KM's manager testified he had no reason to dispute the claims that KM performed no work on the project between December 23, 2016, and June 23, 2017. However, KM has argued in its filing papers that the delay in approving design for the water tank foundation resulted in the delayed work. As set forth under the Contract Time Schedule:

> "The total Contract time limit is **<u>Nine Hundred (900) Consecutive Calendar Days</u>** from the date specified in the "Notice to Proceed". (emphasis supplied).

The Notice to Proceed was issued by the JTMUA on November 2, 2016. As of the date of JTMUA's Notice of Default, six hundred eighty-three days remained for the completion of the contract. Questions of fact remain undecided as to whether the contractor complied with its obligation to prosecute its work, "*regularly, diligently and uninterruptedly at such rate of progress that will ensure full completion thereof within the time specified"*

Pursuant to the terms of the contract, a construction schedule was submitted which set forth—in exquisite detail—each and every date for the commencement and completion of every phase and detail of the construction project. The construction schedule submitted by KM on October 21, 2016, declares the length of the project to encompass nine hundred days beginning on November 16, 2016, and terminating on May 4, 2019. The JTMUA claims that the contractor had abandoned any and all work on the project by demobilizing the last piece of construction equipment from the site on May 2, 2017. Multiple construction schedules were submitted between the parties. According to the construction schedule dated February 15, 2017, the contractor was to commence the standpipe foundation on March 6, 2017. Nothing in the record suggests there is any factual dispute as to the amount of work performed by KM. The issue in dispute requires a fact finder to determine whether KM regularly, diligently, and uninterruptedly prosecuted the work to be performed under the contract and the construction schedule.

The details in dispute also raise a question as to whether, if they did breach, whether KM's alleged breaches were "material," and therefore sufficient to warrant termination of the contract.

A "material" breach, as opposed to a minor technical breach, relieves the non-breaching party of its obligations under the agreement and permits termination of the contract. See, e.g., Magnet Resources, Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 285 (App. Div. 1998) ("It is black letter contract law that a material breach by either party to a bilateral contract excuses the other party from rendering any further contractual performance."). Determinations will have to be made by a fact finder as to whether the contractor's refusal to submit plans for a ring foundation to support the Fisher Tank was a material breach of the contractor's obligation under the contract, or whether the contractor had sufficient time remaining to submit plans from an alternate tank manufacturer which complied with the bid specifications. The question of materiality is a factual inquiry that requires consideration of multiple factors, but a material breach has generally been described as one that "'goes to the essence of the contract.'" Roach v. BM Motoring LLC, 228 N.J. 163, 174–75 (2017).

Additional questions still in dispute include whether KM substantially performed under the contract up to the time of the termination, whether the JTMUA breached the contract by delaying the project and wrongfully terminating the agreement, and whether the JTMUA complied with the duty of good faith and fair dealing. These issues are factual inquiries to be determined by the finder of fact. See, e.g., Magnet Res., Inc. v. Summit MRI, Inc., 318 N.J. Super. 275, 286 (App. Div. 1998) ("Whether conduct constitutes a breach of contract and, if it does, whether the breach is material are ordinarily jury questions."); 218-220 Mkt. St. Corp. v. Krich-Radisco, Inc., 124 N.J.L. 302, 307 (E. & A. 1940) (affirming that the issue of substantial performance "was properly a jury question"); 23 Williston on Contracts § 63:22 at 507 (Lord ed., 2002) ("[W]hether particular conduct violates or is consistent with the duty of good faith and fair dealing necessarily depends

upon the facts of the particular case, and is ordinarily a question of fact to be determined by the jury or other finder of fact."), quoted in, Net 2 Funds, LLC v. Hartz Mountain Indus., Inc., 2018 WL 2122723, at *10 (App. Div. May 9, 2018)4 ; Model Jury Charges (Civil), 4.10J, "Implied Terms — Covenant of Good Faith and Fair Dealing" (rev. Dec. 2011). These claims turn on factual inquiries that must be decided by a finder of fact and so raise an issue of material fact that cannot be disposed of with summary judgment.

KM Construction seeks summary judgment and a declaration from this court that the liquidated damages clause in the contract with JTMUA is null and void. The parties agreed under Section 4.24 of the General Conditions of the contract to a remedy for a delay in the completion of the contract. The language of the contract found under the General Conditions sets forth the obligation of the parties as follows:

Section 4.24 **"Time for Completion and Liquidated Damages"**

The Contractor and the Owner recognize that delay in completion of the project will result in damage to the Owner in terms of the effect of the delay in the use of the project, and will also result in additional cost to the Owner for engineering, inspection and administration of the contract. Because some of this damage is difficult or impossible to estimate, the parties agree that if the Contractor fails to complete the project and each and every part and appurtenance thereof fully, entirely and in conformity with the provisions of the contract within the time stated in the contact, the Contractor shall pay the Owner liquidated damages, in accordance with the following schedule, in lieu of the above stated actual damage. Such liquidated damages shall be paid for each and every calendar day, as hereinafter defined, that he is in default on time to complete the work.

That provision was followed by a table stating the liquidated damages allegedly due per calendar pay based upon the size of the contract:

| ORIGINAL CONTRACT AMOUNT | | LIQUIDATED DAMAGES |
|---|---|---|
| From More Than | To and Including | Per Calendar Day |
| $ -0- | $ 10,000 | $ 100 |
| 10,000 | 25,000 | 150 |
| 25,000 | 50,000 | 250 |
| 50,000 | 100,000 | 375 |
| 100,000 | 500,000 | 500 |
| 500,000 | 1,000,000 | 750 |
| 1,000,000 | 2,000,000 | 1,000 |
| 2,000,000 | 5,000,000 | 2,000 |
| 5,000,000 | 10,000,000 | 5,000 |
| 10,000,000 | 20,000,000 | 4,000 |
| 20,000,000 | --- | 5,000 |

The decision whether a stipulated damages clause is enforceable is a question of law for the court. Wasserman's Inc. v. Twp. of Middletown, 137 N.J. 238, 257 (1994). "In an ordinary breach-of-contract case, the function of damages is simply to make the injured party whole, and courts do not assess penalties against the breaching party." *Cox v. Sears Roebuck & Co.,* 138 N.J. 2, 21 (1994); see also Wasserman's, supra, 137 N.J. at 254 ("One injured by a breach of contract is entitled only to just and adequate compensation.") Put differently, a proper breach of contract action must simply place the non-breaching party "in 'as good a position as he would have been in had the contract been performed.'" Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 13 (2004) (quoting Scully v. US WATS, Inc., 238 F.3d 497, 512 (3d Cir. 2001)).

Under New Jersey law, "[p]arties to a contract may not fix a penalty for its breach." Westmount County Club v. Kameny, 82 N.J. Super. 200, 205 (App. Div. 1964). "'Penalties and forfeitures are not favored; and calling an outrageous penalty by the more kindly name of liquidated damages does not absolve it from its sin.'" Kutzin v. Pirnie, 124 N.J. 500, 518 (1991) (quoting Arthur Linton Corbin, The Right of a Defaulting Vendee to the Restitution of Installments

Paid, 40 Yale L.J. 1013, 1016 (1931)). Courts have historically "scrutinized contract provisions that provided for the payment of specific damages upon breach." Metlife Capital Fin. Corp. v. Wash. Ave. Assocs. L.P., 159 N.J. 484, 493 (1999) (citation omitted). "The need for [this] close scrutiny arises from the possibility that stipulated damages clauses may constitute an oppressive penalty." Ibid. "Public law, not private law, ordinarily defines the remedies of the parties. Stipulated damages are an exception to this rule. Stipulated damages allow private parties to perform the judicial function of providing the remedy in breach of contract cases, namely, compensation of the nonbreaching party, and courts must ensure that the private remedy does not stray too far from the legal principle of allowing compensatory damages.

Stipulated damages substantially in excess of injury may justify an inference of unfairness in bargaining or an objectionable *in terrorem* agreement to deter a party from breaching the contract, to secure performance, and to punish the breaching party if the deterrent is ineffective." [*Wasserman's*, supra, 137 N.J. at 250 (quoting Wassenaar v. Panos, 331 N.W.2d 357, 362 (Wis. 1983)).] Thus, common law requires a distinction between predicted actual damages and illegal penalties in stipulated damages clauses. "Enforceable stipulated damages clauses are referred to as 'liquidated damages,' while unenforceable provisions are labeled 'penalties.'" Metlife, supra, 159 N.J. at 493. The Appellate Division explained this distinction: "Liquidated damages is the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damage that will probably ensue from the breach, is legally recoverable as agreed damages if the breach occurs. A penalty is the sum a party agrees to pay in the event of a breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach." [Westmount

Country Club, supra, 82 N.J. Super. at 205 (citing McCormick, Handbook on the Law of Damages § 146, pp. 559– 600 (1935)).]

The Appellate Division previously held that a stipulated damages clause was only enforceable if "(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and (b) the harm that is caused by the breach is one that is incapable or very difficult of estimate." *See id.* at 206 (citing Restatement of Contracts § 339 (1932)). However, now the test is more one of "reasonableness":

> *Damages for breach by either party may be liquidated in the agreement, but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.*

[Restatement (Second) of Contracts, supra, § 356(1).]

Therefore, "'the overall single test of validity is whether the [stipulated damage] clause is reasonable under the totality of the circumstances.'" Metlife, supra, 159 N.J. at 495 (alteration in original) (quoting *Wassenaar*, supra, 331 N.W.2d at 361). This test may be applied either at the time the contract is made or at the time it is breached. Id. at 502. "Reasonableness" is determined by weighing: (1) the difficulty of estimating damages; (2) the intent of the parties; (3) the degree of the nonbreaching party's actual damages; and (4) the parties' relative bargaining power. See Wasserman's, supra, 137 N.J. at 250–54.

New Jersey is "align[ed] . . . with those cases from other jurisdictions 'in which the court has refused to enforce the agreement to pay a specified sum on the express ground that the actual injury done was either nothing at all or was not hard to determine and was very much less than the agreed sum.'" Nohe v. Roblyn Dev. Corp., 296 N.J. Super. 172, 178 (App. Div., 1997) (quoting 5 Corbin on Contracts §1063 (Supp. 1996)), certif. den., 149 N.J. 36 (1997). Therefore, "[i]f, to take an extreme case, it is clear that no loss at all has occurred, a provision fixing a substantial sum as

damages is unenforceable." Restatement (Second) of Contracts, supra, § 356, cmt. b (quoted in Nohe, supra, 296 N.J. Super. at 178).

Although the Appellate Division has previously indicated that courts should determine the enforceability of a stipulated damages clause as of the time of the making of the contract, Westmount Country Club, supra, 82 N.J. Super. at 206, 197 A.2d 379, the modern trend is towards assessing reasonableness either at the time of contract formation or at the time of the breach. Calamari & Perillo, supra, § 14-31 at 642 (stating, "there are two moments at which the liquidated damages clause may be judged rather than just one").

Actual damages, moreover, reflect on the reasonableness of the parties' prediction of damages. "If the damages provided for in the contract are grossly disproportionate to the actual harm sustained, the courts usually conclude that the parties' original expectations were unreasonable." Wassenaar, supra, 331 N.W.2d at 364; see 5A. Corbin on Contracts § 1063 (1951) ("It is to be observed that hindsight is frequently better than foresight, and that, in passing judgment upon the honesty and genuineness of the pre-estimate made by the parties, the court cannot help but be influenced by its knowledge of subsequent events."). Determining enforceability at the time either when the contract is made or when it is breached encourages more frequent enforcement of stipulated damages clauses. Calamari & Perillo, supra, § 14-31 at 642.

Two of the most authoritative statements concerning liquidated damages are contained in the Uniform Commercial Code and the Restatement (Second) of Contracts, both of which

emphasize reasonableness as the touchstone. Farnsworth, supra, § 12.18 at 938. Thus, section 2-718 of the Uniform Commercial Code, adopted in New Jersey as N.J.S.A. 12A:2-718, provides: (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

Similarly, the Second Restatement (Second) of Contracts provides:

> *Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.*
>
> [Restatement (Second) of Contracts § 356(1) (1981).]

Consistent with the trend toward enforcing stipulated damages clauses, the Appellate Division has recognized that such clauses should be deemed presumptively reasonable and that the party challenging such a clause should bear the burden of proving its unreasonableness. Central Steel Drum Co. v. Gold Cooperage, Inc., 200 N.J. Super. 251, 265, 491 A.2d 49 (concluding "that in the context of commercial parties having comparable bargaining power there should be presumptive validity of a liquidated damage clause"), certif. denied, 101 N.J. 303, 501 A.2d 960 (1985), *overruled on other grounds*, Kutzin v. Pirnie, 124 N.J. 500, 591 A.2d 932 (1991); see also J.L. Davis & Assocs. v. Heidler, 263 N.J. Super. 264, 274-75, 622 A.2d 923 (App.Div.1993) (determining that "the party being assessed liquidated damages has the burden 'to offer proof of contractually acceptable excuses in order to avoid the application of the liquidated damage clause'") (quoting Monsen Eng'g Co. v. Tami-Githens, Inc., 219 N.J. Super. 241, 250, 530 A.2d 313 (App.Div.1987)). But see Utica Mut. Ins. Co. v. DiDonato, 187 N.J. Super. 30, 42-43, 453

A.2d 559 (App.Div.1982) (holding that the party advocating enforcement of stipulated damages clause has the burden of proof and persuasion). Similarly, most courts today place the burden on the party challenging a stipulated damages clause. Calamari & Perillo, supra, § 14-31 at 643.

In commercial transactions between parties with comparable bargaining power, stipulated damage provisions can provide a useful and efficient remedy. See Priebe & Sons v. United States, 332 U.S. 407, 411-13, 86 S. Ct. 123, 126, 92 L. Ed. 32, 38-39 (1947) (observing that "[t]oday the law does not look with disfavor upon 'liquidated damages' provisions in contracts[] [w]hen they are fair and reasonable attempts to fix just compensation for anticipated loss caused by breach"). Sophisticated parties acting under the advice of counsel often negotiate stipulated damages clauses to avoid the cost and uncertainty of litigation. Such parties can be better situated than courts to provide a fair and efficient remedy. Absent concerns about unconscionability, courts frequently need ask no more than whether the clause is reasonable. We do not reach the issue of the enforceability of liquidated damage clauses in consumer contracts. Notwithstanding the presumptive reasonableness of stipulated damage clauses, we are sensitive to the possibility that, as their history discloses, such clauses may be unconscionable and unjust. Foont--Freedenfeld Corp. v. Electro--Protective Corp., 126 N.J. Super. 254, 258, 314 A.2d 69 (App.Div. 1973), aff'd o.b., 64 N.J. 197, 197 A.2d 379 (1974); Westmount Country Club, supra, 82 N.J. Super. at 206, 197 A.2d 379; Goetz & Scott, supra, 77 Colum.L.Rev. at 588 (stating that "in the absence of bargaining unfairness, a stipulated damage clause reflects equivalent value").

The purpose of a stipulated damages clause is not to compel the promisor to perform, but to compensate the promisee for non-performance. Farnsworth, supra, § 12.18 at 936. Accordingly,

provisions for liquidated damages are enforceable only if "the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach." Westmount Country Club, supra, 82 N.J. Super. at 206; see also Restatement (Second) of Contracts, supra, § 356 comment a. (stating, "The parties to a contract may effectively provide in advance the damages that are to be payable in the event of breach as long as the provision does not disregard the principle of just compensation."). One injured by a breach of contract is entitled only to just and adequate compensation. McDaniel Bros. Constr. Co. v. Jordy, 195 So. 2d 922, 925 (Miss.1967). Thus, the subject cancellation clause is unreasonable if it does more than compensate plaintiffs for their approximate actual damages caused by the breach.

Defendant JTMUA included a claim for liquidated damages in its counterclaim against KM. JTMUA stated in its claim that "the Project was delayed approximately 227 calendar days due to the unjustified change order request from KM and by KM's failure to prosecute the Project in accordance with the Agreement." The two hundred twenty-seven calendar day delay refers to the contract completion date established with the replacement contractor provided under the surety bond. After JTMUA declared KM in breach of contract, Selective Insurance, in its capacity as provider of the surety bond, provided Eagle Construction Services, Inc. ("Eagle") as the replacement contractor on the project. JTMUA entered into a new construction contract with Eagle on August 9, 2017. JTMUA's contract with Eagle extended the original construction completion date to December 4, 2019. KM's agreement with JTMUA required the contractor to complete the project on May 4, 2019, or two hundred twenty-seven days earlier than the later executed agreement with Eagle. A question of fact remains as to whether JTMUA was entitled to declare KM in default of its contract obligations and terminate the relationship between the parties. Therefore, a fact finder must determine whether JTMUA suffered a delay in the construction

completion date because of KM's default, or whether the delay was self-created by JTMUA's agreement with Eagle to extend the construction completion deadline.

The decision whether a stipulated damages clause is enforceable is a question of law for the court. 218-220 Market St. Corp., supra, 124 N.J.L. at 304, 11 A.2d 109; Robinson v. Centenary Fund, 68 N.J.L. 723, 725-26, 54 A. 416 (E. & A.1902). Although the question is one of law, it requires the resolution of underlying factual issues. Highgate Assocs., Ltd. v. Merryfield, 157 Vt. 313, 597 A.2d 1280, 1282 (1991). Accordingly, the trial court will defer any determination of liquidated damages until such time as the fact finder, or the parties resolve the dispute over the obligation of the parties to comply with the material terms of the contract.

Here, the trial court must consider the reasonableness of the liquidated damages clause by evaluating the anticipated amount of damages which would be suffered by the JTMUA once the breach had occurred. The court must evaluate the reasonableness of the liquidated damage calculation not by evaluating the actual damages suffered, but by evaluating the relative position of the parties at the time the contract was drafted and determining whether the damage formula was reasonably calculated at the time of the contract's execution. In resolving that issue, the court will consider, among other relevant considerations, the reasonableness of the per diem rate of damages no matter when the breach has been established; the reasoning of the parties that supported the calculation of the stipulated damages; the contractor's duty to mitigate damages; and the actual cost suffered by the JTMUA through the failure of KM to perform under the terms of the contract awarded. Because the stipulated damages clause is presumptively reasonable, the burden of production and of persuasion rests on the contractor.

The plaintiff's motion for summary judgment to bar its obligation to pay liquidated damages to the JTMUA is denied without prejudice. The plaintiff may renew its application upon the determination of the fact finder regarding the alleged breach of contract. The factual issues in dispute pertaining to material elements of the contract prevent and constrain the court from granting the defendants cross-motion for summary judgment.

/s/ Craig L. Wellerson

CRAIG L. WELLERSON, P.J. Cv.