**11 Fla. L. Weekly Supp. 840b**

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**Landlord-tenant -- Eviction -- Damages -- Liquidated damages claimed by landlord under lease is unenforceable penalty where liquidated damages clause grants option to landlord to choose liquidated damages or seek other statutory remedies, and there is no agreement to stipulated liquidated sum to be mutually applied to both parties -- Section 83.575, allowing for liquidated damages, applies only to tenants at end of their lease -- Even if statute applied, common law requirements for determining whether liquidated damages clause is unenforceable penalty still apply -- Landlord is entitled to recover actual damages -- Lost rent -- Landlord which chose remedy under Residential Landlord Tenant Act by retaking possession of premises upon execution of writ of possession was required to follow statute and make good faith effort to re-let unit and credit former tenant with rents collected from new tenant and, where landlord provided no evidence that it attempted to re-let premises, landlord is not entitled to lost rent damages**

OLEN RESIDENTIAL REALTY CORP., d/b/a Manatee Bay Apartments, Plaintiff, vs. KEVIN P. ROMINE, Defendant. County Court, 15th Judicial Circuit in and for Palm Beach County. Case No. 502004CC001245XXXXMB, Division RJ. May 27, 2004. Peter M. Evans, Judge. Counsel: Donna Barfied, West Palm Beach.

FINAL JUDGMENT

COUNT II DAMAGES

Findings of Fact

THIS CAUSE came on for trial on Count II of Plaintiff's, Olen Residential Realty Corp's., eviction complaint against Kevin Romine. The lease term under the subject lease commenced on 10/30/03 and was scheduled to end on 11/30/04. Count II of this complaint sought $1,473 in rent for January 2004, plus “complete rent through the term of the lease” plus “contractual fees”. Previously Olen Residential Realty Corp. successfully evicted Romine for non-payment of rent by an executed Writ of Possession enforced on March 3, 2004, at which time Olen Residential Realty Corp. d/b/a Manatee Bay retook possession of its apartment from Romine. Romine had deposited part of the January rent into the Court Registry in the amount of $1,368 but failed to deposit the February rent. Romine had paid his landlord a security deposit of $1440.00, which was equal to his monthly rental obligation under the lease. The testimony at trial from Olen Residential Realty Corp,'s manager revealed Romine failed to pay utilities of $208.73, water bills of $84.00, and late rental fees of $130.00. Affidavits showed court costs of $148.00 and attorneys fees of $351.00.

The issue of concern to this Court is the request by Olen Residential Realty Corp., to seek liquidated damages in the amount of three times monthly rent plus all of March rent, together with a rental concession fee of $1774.00 for a total liquidated damage fee of about five months rent. At trial Olen Residential Realty Corp, presented no evidence of any good faith attempt to re-let the apartment which was still vacant as of the time of trial, May 20, 2004. Olen Residential Realty Corp,'s manager testified that the complex had an average occupancy rate of about 98%.

Liquidated Damages

Whether a sum stipulated to be paid in the event of a breach of lease will be considered as an unenforceable penalty or liquidated damages is a question of law for the court. *Nicholas v. Miami Burglar Alarm Co.*, 266 So.2d 64 (Fla. 3d DCA 1972). Furthermore, where it is doubtful whether a contract provision constitutes a penalty or liquidated damages the tendency of the courts is to construe a provision for payment of an arbitrary sum an unenforceable penalty rather than one for liquidated damages. *Hyman v. Cohen*, 73 So.2d 393 (Fla. 1954). A “heads-I-win, tails-you-lose” approach to contractual defaults are patently unreasonable. Such provisions are antithetical to the concept of fair dealing in the marketplace and will not be enforced by courts of law. *Blue Lakes Apartments, Ltd., v. George Gowing, Inc.*, 464 So.2d 705, (Fla. 4th DCA, 1985). In simpler terms the contract drafter “cannot have their cake and eat it to.” In addition, it has long been a concept of fair dealing that “sauce for the goose is sauce for the gander.” See *Ocean Dunes of Hutchinson Island Development Corporation v. Colandelo*, 463 So.2d 437 (Fla. 4th DCA 1985). The parties can stipulate to different kinds of “sauces,” but both parties must have genuine, not illusory, obligations.

An option granted to the landlord to either choose liquidated damages or to sue for actual damages and thus become entitled to damages greater than the liquidated sum, destroys the character of the “liquidated damage” clause such that it becomes a penalty. A “liquidated damage” clause must fail if an option is granted to the landlord to either choose liquidated damages or to sue for actual damages because it indicates an intent to penalize the defaulting tenant and negates the intent to liquidate damages in the event of a breach. Thus, the tenant would always be at risk for damages greater than the liquidated sum. On the other hand, if the actual damages are less than the liquidated sum, the tenant would nevertheless be obligated by the “liquidated damages” clause because the landlord would opt to take the liquidated sum as it would represent the greater element of damage. As neither party intends the stipulated sum to be the agreed-upon measure of damages, the provision cannot be a valid liquidated damages clause. In *Lefemine, et al., v. Baron*, 573 So. 2d 326, (Fla. 1991) the Florida Supreme Court held, in pertinent part, that:

The reason why the forfeiture clause must fail in this case is that the option granted to Baron either to choose liquidated damages or to sue for actual damages indicates an intent to penalize the defaulting buyer and negates the intent to liquidate damages in the event of a breach. The buyer under a liquidated damages provision with such an option is always at risk for damages greater than the liquidated sum. On the other hand, if the actual damages are less than the liquidated sum, the buyer is nevertheless obligated by the liquidated damages clause because the seller will take the deposit under that clause. Because neither party intends the stipulated sum to be the agreed-upon measure of damages, the provision cannot be a valid liquidated damages clause.

The decision we reach today is in harmony with authorities from other jurisdictions. *Real Estate World, Inc. v. Southeastern Land Fund, Inc*., 137 Ga. App. 771, 224 S.E.2d 747 (Ct. App. 1976), overruled on other grounds, *Mock v. Canterbury Realty Co*., 152 Ga. App. 872, 264 S.E.2d 489 (Ct. App. 1980); *Jarro Bldg. Indus. Corp. v. Schwartz*, 54 Misc. 2d 13, 281 N.Y.S.2d 420 (App. Term 1967); *Dalston Constr. Corp. v. Wallace*, 26 Misc. 2d 698, 214 N.Y.S.2d 191 (Dist. Ct. 1960).

In J. Calamari & J. Perillo, The Law of Contracts @ 14-32, at 645 (3d ed. 1987), the authors state:

Two Pitfalls of Draftsmanship:

The Shotgun Clause and the Have Cake and Eat It Clause . . . .

Another pitfall into which contract draftsmen have plunged involves an attempt to fix damages in the event of a breach with an option on the part of the aggrieved party to sue for such additional actual damages as he may establish. These have been struck down as they do not involve a reasonable attempt definitively to estimate the loss.

Because Olen Residential Realty Corp, seeks liquidated damages the “*Lefemine* test” must be applied to Olen Residential Realty Corp,'s lease, which states in pertinent part:

4. H. PROVISION BY RESIDENT(S) TO MANAGER OF THIRTY DAYS WRITTEN NOTICE PRIOR TO THE DATE OF EXPIRATION OF TERMINATION OF THE TERM OF THE LEASE. Failure to provide a full thirty days notice of intent to vacate shall result in the Resident being charged for the balance of the notice period an amount based on the daily pro-rata rental amount, such amount not to exceed one month's rent. *Such charge shall be considered liquidated damages under this lease agreement*. (e.s.)

6. CANCELLATION FEE: Provided RESIDENT has not been in default hereunder during the term of this lease, and provided that RESIDENT strictly complies with the provisions of this paragraph, and has completed at least seven (7) months of occupancy, RESIDENT may cancel this lease before the expiration of the initial term by:

(a) ensuring that MANAGEMENT receives 30 days written notice of cancellation, all before the first day of the month of RESIDENT's proposed cancellation; plus

(b) paying on the date RESIDENT gives written notice of cancellation, all monies due through the date of proposed move-out (the last day of the month of cancellation); plus

(c) paying on the date RESIDENT gives written notice of cancellation, an additional amount equal to one month's rent as liquidated damages; plus

(d) returning the apartment in clean, ready-to-rent condition.

16. DEFAULT BY RESIDENT. If any rent required by this Lease shalt not be paid when due, or if the Resident in any other manner fails to perform any of the terms or conditions of this Lease, including any of the provisions of the Rules and Regulations and any other applicable addendum hereto, Resident shall be deemed to have breached this Lease, and *Management shall have all rights provided under state law and this Lease, including the right to terminate the Lease, retake possession of the premises, and recover damages. The parties agree in advance that if Resident fails to perform the provisions of paragraph 6 herein, and, prior to the expiration or termination of this Lease, the Resident vacates the premises either voluntarily or involuntarily, Resident shall be obligated to Management for an amount equivalent to 3 months rent which amount shall operate as liquidated damages. In the event of any other Breech of this lease inclusive of any property damage, Management shall be entitled to all remedies as provided by Florida Statute Chapter 83 and all other relevant provisions* of State and Federal Law and as provided in this Lease. Retention of the Security Deposit or termination of this Lease by Management shall not constitute a limitation of Management's right to damages.

28. BREACH OF AGREEMENT: Failure of RESIDENT to pay rent or other charges promptly when due or to comply with any other term or condition hereto or to comply with any other applicable provisions of the laws of the State of Florida, *shall at the option of the MANAGEMENT empower them to terminate this tenancy upon giving proper notice as set forth in the RESIDENTIAL MANAGEMENT and RESIDENT Act contained in the Florida Statutes*. (e.s.)

ADDENDUM TO LEASE

As a concession for signing a 13 month lease, the lessor will grant rent reduction of: $2376.00. This credit will be taken as follows (i.e., specify month):

Apply $1440 concession to rent for the month of November 2003. In addition apply $72.00 concession to rent up to and not exceeding November 2004 for Law enforcement discount. In addition apply $46.00 concession to rent for the month of October 2003 for law enforcement discount for remainder of month.

This concession is granted and will be applied as a rent credit if:

A) The resident makes each monthly payment on or before the fifth (5th) day of each month.

B) The resident occupies the premises for the full term of the lease.

*If the resident fails to make timely payment, or vacate the unit before the end of the 13 month term, then the credit listed above will be withdrawn and the amount will be due and payable to the lessor*. (e.s.)

Paragraphs 16 and 28 of the lease allow Olen Residential Realty Corp., full remedies for all its damages under Chapter 83 F.S. against Romine even if those damages exceed the liquidated damage amount in Paragraphs 4.H. (one months rent), Paragraph 6 (one months rent), Paragraph 16, (three months rent) and the rent concession in the Addendum (in excess of one months rent). The total “liquidated damages” with rent concession total over six month's rent.[**1**](http://www.floridalawweekly.com/flwonline/?page=showfile&fromsearch=1&file=../supfiles/issues/vol11/840b.htm&query=83.47&altdoc=true&fromeh=true#fn32) On its face this lease does not set a mutually agreed upon fixed liquidated damage because Olen Residential Realty Corp., retains the right to sue Romine for Manatee Bay's full actual damages (lost rents under Section 83.595 F.S.) without regard to the liquidated amount. Romine does not have a reciprocal right. For example, suppose Romine had breached his lease just one month into his tenancy and further suppose Manatee Bay could not rent the apartment for 12 months after making a good faith effort at re-letting. Under Paragraph 16 of the lease Olen Residential Realty Corp., reserves the right to sue under Section 83.595 F.S. for 12 months lost rent. On the other hand, if Olen Residential Realty Corp., exercises it's option to sue for liquidated damages, whether it be 5 or 6 months rent, it still reserves the right to re-let the unit to another tenant and begin to collect new rent without crediting Romine for the revenue i.e., double rent.

Olen Residential Realty Corp,'s “liquidated damage” clause must fail for two reasons. First, the option granted to Olen Residential Realty Corp, to choose liquidated damages or to seek all remedies provided by Florida Statute Chapter 83 is an unenforceable penalty.

It must also fail because neither agreed to a stipulated liquidated sum to be mutually applied to both parties (“what is good for the goose must be good for the gander”), and, therefore, these paragraphs of the lease cannot constitute valid liquidated damages. See *Lefemine, v. Baron,* supra, *Ocean Dunes v. Colondelo,* supra and *Cloud v. Schenck*, Case No. 1D03-2023, Court of Appeal of Florida, First District, *2004 Fla. App. LEXIS 4550*, April 6, 2004 [29 Fla. L. Weekly D849a]. Therefore, the liquidated damages claimed by Olen Residential Realty Corp, under its lease is an unenforceable penalty.[**2**](http://www.floridalawweekly.com/flwonline/?page=showfile&fromsearch=1&file=../supfiles/issues/vol11/840b.htm&query=83.47&altdoc=true&fromeh=true#fn33)

The newly enacted Section 83.575 F.S. effective May 23, 2003, (further amended by the 2004 Legislature) specifically allowed for liquidated damages but only as applied to tenants at the end of their lease. Romine is not a tenant “at the end of the rental agreement” and, therefore, 83.575 Florida Statutes has no application. Even if the Olen Residential Realty Corp., lease was subject to Section 83.575 the new law does not set forth any new or special definition for the term “liquidated damages” and therefore the common law requirements of *Lefemine* are still valid. The Olen Residential Realty Corp, lease cannot meet the *Lefemine* test. The plaintiff, Olen Residential Realty Corp, is not left without a remedy. Even if the Court finds that the liquidated damages clause is a penalty, a party is entitled to recover actual damages. See *Hutchinson v. Tompkins*, 240 So. 2d 180, 182 (Fla. 4th DCA 1970).

Residential Landlord Tenant Act

The Florida Residential Landlord Tenant Act (the “Act”) governs and regulates the Olen Residential Realty Corp, lease. Section 83.595, F.S. regulates the measure of damages the landlord is entitled to receive from a residential tenant when the tenant breaches the lease and vacates the unit. The Act codifies the common law on lost rental damages. These common law cases have always described the landlord's measure of damages as the exclusive remedy for the landlord. See *Hudson Pest Control, Inc., v. Westford Asset Management, Inc*., 622 So. 2d 546; (Fla 5th DCA, 1993). Any lease provision in violation of the Act is void.[**3**](http://www.floridalawweekly.com/flwonline/?page=showfile&fromsearch=1&file=../supfiles/issues/vol11/840b.htm&query=83.47&altdoc=true&fromeh=true#fn34) The Act prohibits a landlord from collecting “double rent” on the same unit from different tenants at the same time i.e. “double remedy”.[**4**](http://www.floridalawweekly.com/flwonline/?page=showfile&fromsearch=1&file=../supfiles/issues/vol11/840b.htm&query=83.47&altdoc=true&fromeh=true#fn35)

Section 83.595, F.S. states:

Choice of remedies upon breach by tenant. --

(1) If the tenant breaches the lease for the dwelling unit and the landlord has obtained a writ of possession, or the tenant has surrendered possession of the dwelling unit to the landlord, or the tenant has abandoned the dwelling unit, the landlord may:

(a) Treat the lease as terminated and retake possession for his or her own account, thereby terminating any further liability of the tenant; or

*(b) Retake possession of the dwelling unit for the account of the tenant, holding the tenant liable for the difference between rental stipulated to be paid under the lease agreement and what, in good faith, the landlord is able to recover from a reletting; or*

(c) Stand by and do nothing, holding the lessee liable for the rent as it comes due.

*(2) If the landlord retakes possession* of the dwelling unit for the account of the tenant, the landlord has a duty to exercise good faith in attempting *to* *relet the premises, and any rentals received by the landlord as a result of the reletting shall be deducted from the balance of rent due from the tenant*. For purposes of this section, “good faith in attempting to relet the premises” means that the landlord *shall use at least the same efforts to relet the premises as were used in the initial rental or at least the same efforts as the landlord uses in attempting to lease other similar rental units* but does not require the landlord to give a preference in leasing the premises over other vacant dwelling units that the landlord owns or has the responsibility to rent.

Olen Residential Realty Corp., retook possession of the apartment on March 3, 2004 when the Writ of Possession was executed. Thus, Olen Residential Realty Corp, chose the remedy under Section 83.595(1)(b) F.S. and took possession of the unit. Having chosen the option or remedy of retaking possession Olen Residential Realty Corp, was required to follow Section 83.595(2) and use a good faith effort to re-let the unit and to credit Romine with rents collected from the new tenant. Olen Residential Realty Corp, submitted no evidence at trial that it made any attempt to re-let the unit. Section 83.595, F.S. strictly governs the damages Olen Residential Realty Corp., may now collect from Romine for unpaid rent. They are entitled to an award of damages equal to the lost rentals from the time Romine vacated the unit (March 3, 2004) until the unit is re-rented. Because Olen Residential Realty Corp, did not present this evidence at trial it is not entitled to lost rent damages. However, Olen Residential Realty Corp., is entitled to it's actual damages calculated as follows:

Credits:

Court Registry January rent deposit $1368.00

Security deposit $1440.00

Owed:

January rent $1440.00

February rent $1440.00

March rent 3 days $139.35

Utilities of $208.73

Water bills of $84.00

Late rental fees of $130.00

Court costs of $148.00

Attorneys fees of $351.00

*Total Damages = $1133.08*

Judgment is therefore entered in favor of Plaintiff Olen Residential Realty Corp, d/b/a Manatee Bay Apartments and against the Defendant Kevin P. Romine, in the amount of *$1,133.08*, which shall accrue interest at the rate of 7% per annum, for which let execution issue.

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**1**It is not clear whether all these “contractual fees” are cumulative. Manatee seeks approximately 5 months rent total fees, including a refund of the rent concession, for the Romine breach.

**2**If a liquidated damage clause is invalid on its face it cannot be enforced against either party no matter who breached the contract. See *Hackett v. J.R.L. Development Inc*., 566 So.2d 601 (Fla. 2nd DCA, 1990).

**3**F.S. Section 83.47 Prohibited provisions in rental agreements.

(1) A provision in a rental agreement is void and unenforceable to the extent that it:

(a) Purports *to waive or preclude the rights, remedies, or requirements* set forth in this part.

Prior to the passage of Section 83.47 in 1973 court decisions allowed a contractual waiver of tenant rights. However, in *Bell v. Kornblatt*, 705 So. 2d 113, (Fla. 4th DCA, 1998) the Court recognized the legislative directive in residential tenancies and no longer allowed the waiver.

**4***Geiger Mutual Agency, Inc., v. Wright*, 233 So. 2d 444; (Fla. 4th DCA,1970).

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