STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

SHAFFER EXCAVATING, INC.,
a Michigan corporation,

Plaintiff,

vs.

FEDERAL-MOGUL, INC., a
Delaware corporation,

Defendant.
_____/

Case No. 13-00342-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION, BUT GRANTING DEFENDANT'S MOTION *IN LIMINE*

Michigan law teaches that, "[w]here one writing references another instrument for additional contract terms, the two writings should be read together." Forge v Smith, 458 Mich 198, 207 (1998). Here, the most recent purchase order defining the relationship between Plaintiff Shaffer Excavating, Inc. ("Shaffer") and Defendant Federal-Mogul, Inc. ("F-M") refers to two separate instruments that contain fundamental differences regarding termination rights. In light of this contractual dissonance, the Court must deny summary disposition under MCR 2.116(C)(10) to both sides and set the matter for trial. In doing so, however, the Court shall provide F-M relief on its request *in limine* for a ruling declaring a liquidated-damages clause inoperative because it constitutes a penalty provision.

I. Factual Background

Defendant F-M has asked for summary disposition pursuant to MCR 2.116(C)(10), which "tests the factual sufficiency of the complaint." See Maiden v Rozwood, 461 Mich 109, 120 (1999). In evaluating such a request, "a trial court considers affidavits, pleadings, depositions, admissions,

and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." Id. Accordingly, the Court shall establish the factual background of the parties' dispute by assessing the entire record in the light most favorable to Plaintiff Shaffer.[1]

Beginning in the 1980s, Plaintiff Shaffer serviced the Sparta Foundry, see Brief in Support of Defendant's Motion, Exhibit A (Deposition of Philip Shaffer at 6, 8-9), which required Shaffer to engage in hauling and land-fill management. In the 1990s, Defendant F-M purchased the Sparta Foundry. See id. (Deposition of Philip Shaffer at 8-9). As a result, on October 1, 2000, Shaffer and F-M entered into a four-page service agreement that specified the terms and conditions of the parties' commercial relationship. See Complaint, Exhibit A. That service agreement mandated a minimum term of three years, but thereafter permitted F-M to "terminate this agreement upon written notice given to [Shaffer] at least thirty (30) days prior to the intended termination date[.]" Id. The service agreement also included the following language concerning termination by F-M:

> In the event [F-M] should discontinue this service agreement other than as provided, it is agreed and contracted that [F-M] shall pay to [Shaffer] as liquidated damages a sum equal to six months charge to be determined on the basis of the average of the latest six months invoices during the existence of this service agreement[.]

See Complaint, Exhibit A (Terms and Conditions of Service Agreement at 1).

Plaintiff Shaffer furnished services to Defendant F-M for more than a decade, acting upon annual purchase orders issued by F-M to Shaffer at the beginning of each year. On January 9, 2012, F-M sent such a document entitled "Blanket Order for 2012" to Shaffer. See Complaint, Exhibit B. That one-page purchase order called for "Hauling, Leveling, and Grating Driveway as Defined in Your Contract." See id. In addition, the purchase order stated: "Terms and conditions of purchase

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[1] In addressing Plaintiff Shaffer's counter-demand for summary disposition pursuant to MCR 2.116(I)(2), the Court must view the record in the light most favorable to Defendant F-M.

are located at: www.federal-mogul.com/suppliers/termsandconditions." See id. Those terms and conditions allowed F-M to cancel "at FM's convenience, provided that in the event of cancellation at FM's convenience, FM will pay Supplier's reasonable costs to the date of cancellation." See Brief in Support of Defendant's Motion, Exhibit G (Federal Mogul Terms and Conditions, ¶ 13(c)).

Beginning in December of 2011, disputes arose between Plaintiff Shaffer and Defendant F-M about the parties' obligations. See Brief in Support of Defendant's Motion, Exhibits D & E (e-mail exchange). When the disagreements proved to be intractable, F-M sent Shaffer a letter on May 17, 2012, terminating the parties' commercial relationship "as of June 1, 2012." See id. Exhibit H. In response, Shaffer advised F-M *via* e-mail on May 19, 2012, that the "existing contract calls for 30 days notice of cancellation, or six month hauling fee's [sic] for cancellation to be paid for braking [sic] the contract." Id., Exhibit I. Shaffer "request[ed] 30 days to discontinue our services," see id., but F-M refused to relent, so in the fullness of time this litigation ensued. On January 10, 2013, in a straightforward complaint, Shaffer demanded $61,242.59 in liquidated damages for breach of the October 1, 2000, service agreement and the January 9, 2012, purchase order. F-M responded with a motion for summary disposition under MCR 2.116(C)(10) predicated upon the termination clause in the F-M terms and conditions cited in the January 9, 2012, purchase order. Accordingly, the Court must decide which written terms govern the parties' dispute.

II. Defendant F-M's Request for Summary Disposition

Because Defendant F-M has moved for summary disposition pursuant to MCR 2.116(C)(10), the Court can grant relief if "there is no genuine issue regarding any material fact . . . ." See Rose v National Auction Group, 466 Mich 453, 461 (2002). "A genuine issue of material fact exists when

the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." West v General Motors Corp, 469 Mich 177, 183 (2003). The Court must decide under these standards whether F-M is entitled to relief on Plaintiff Shaffer's claim for breach of contract.

The breach-of-contract claim advanced by Plaintiff Shaffer rests upon two documents: (1) the October 1, 2000, service agreement; and (2) the January 9, 2012, purchase order. See Complaint, Exhibits A & B. In contrast, the summary-disposition motion filed by Defendant F-M relies upon its own standard terms and conditions coupled with the January 9, 2012, purchase order. Thus, the Court must determine whether the purchase order issued by F-M on January 9, 2012, incorporates only the 2000 service agreement, only the F-M standard terms and conditions, or both documents. "Where one writing references another instrument for additional contract terms, the two writings should be read together." Forge, 458 Mich at 207. The purchase order issued by F-M to Shaffer on January 9, 2012, refers to responsibilities "defined in your contract" and to terms and conditions on the F-M website. See Complaint, Exhibit B. Because "there are several [documents] relating to the same subject matter, the intention of parties must be gleaned from all the agreements." Omnicon of Michigan v Giannetti Investment Co, 221 Mich App 341, 346 (1997). Consequently, the Court must consider the 2000 service agreement and F-M's standard terms and conditions in conjunction with the January 9, 2012, purchase order that refers to both of those documents.

The service agreement that both parties signed in 2000 imposes an unambiguous obligation upon F-M to provide notice of termination "at least thirty (30) days prior to the intended termination date[.]" See Complaint, Exhibit A. In contrast, F-M's standard terms and conditions authorize F-M in unambiguous language to end the commercial relationship "at FM's convenience, provided that

in the event of cancellation at FM's convenience, FM will pay Supplier's reasonable costs to the date of cancellation." See Brief in Support of Defendant's Motion, Exhibit G (Federal Mogul Terms and Conditions, ¶ 13(c)). Obviously, these two provisions cannot be squared with each other. Given the fact that F-M's termination of Shaffer complied with F-M's own standard terms and conditions, but violated the 30-day notice requirement in the 2000 service agreement, the Court concludes that the entirety of the parties' agreement gives rise to a genuine issue of material fact as to the propriety of F-M's termination of its relationship with Shaffer. As our Supreme Court has explained: "[I]f two provisions of the same contract irreconcilably conflict with each other, the language of the contract is ambiguous." Klapp v United Ins Group Agency, Inc, 468 Mich 459, 467 (2003). And because "the meaning of an ambiguous contract is a question of fact that must be decided by the jury[,]" id. at 469, the Court cannot award summary disposition to F-M.

Defendant F-M nonetheless posits that the conflict between the 2000 service agreement and the F-M standard terms and conditions is of no moment because the F-M terms superseded all of the conflicting terms of the 2000 service agreement. The matter, however, cannot be resolved quite so simply. To be sure, a subsequent agreement supersedes an original agreement when the subsequent agreement "contains an integration clause[.]" See Archambo v Lawyers Title Ins Co, 466 Mich 402, 414 (2002). But here, contrary to F-M's assertion, its own terms and conditions do not contain a true integration clause. Instead, F-M's terms and conditions state that its terms "will apply exclusively unless expressly amended by mutual written agreement between the parties." See Brief in Support of Defendant's Motion, Exhibit G (Federal Mogul Terms and Conditions, ¶ 1). Because F-M entered into a "mutual written agreement" with Plaintiff Shaffer on October 1, 2000, and then referred to that agreement in the purchase order on January 9, 2012, there exists an ambiguity necessitating trial.

III. Defendant F-M's Motion *In Limine*

Anticipating the Court's rejection of its motion for summary disposition, Defendant F-M has moved, in the alternative, for a ruling *in limine* that precludes Plaintiff Shaffer from resorting to the liquidated-damages clause in the October 1, 2000, service agreement in seeking damages for breach of contract. F-M acknowledges that the service agreement contains a liquidated-damages provision that prescribes the following formula for assessing damages for a breach by F-M:

> In the event [F-M] should discontinue this service agreement other than as provided, it is agreed and contracted that [F-M] shall pay to [Shaffer] as liquidated damages a sum equal to six months charge to be determined on the basis of the average of the latest six months invoices during the existence of this service agreement[.]

See Complaint, Exhibit A (Terms and Conditions of Service Agreement at 1). And beyond that, F-M does not appear to contest Shaffer's calculation of $61, 242.59 in liquidated damages as the amount due under that provision in the event of a breach of contract. But F-M contends that, because that figure bears no resemblance to the damages actually incurred by Shaffer, it should be characterized as an impermissible penalty, rather than an enforceable measure of liquidated damages. "The issue whether a liquidated damages provision is valid and enforceable is a matter of law[,]" see St Clair Medical, PC v Borgiel, 270 Mich App 260, 270 (2006), so the Court can take up the validity of the liquidated-damages clause prior to trial.

"A liquidated damages provision is simply an agreement by the parties fixing the amount of damages in the event of a breach and is enforceable if the amount is reasonable with relation to the possible injury suffered and not unconscionable or excessive." St Clair Medical, 270 Mich App at 270-271. Although a "double-damages" provision "is irrefutably punitive rather than compensatory in the sense that it provides for an award of damages above and beyond that necessary to make the

plaintiff whole under the contract[,]" see *In re* Certified Question, 468 Mich 109, 118 (2003), such a provision cannot be characterized as an impermissible penalty if it relates "'to the possible injury suffered' and [is] not 'unconscionable or excessive.'" See UAW-GM Human Resources Center v KLS Recreation Corp, 228 Mich App 486, 508 (1998). Under this analytical framework, the Court concludes that the liquidated-damages provision upon which Plaintiff Shaffer relies constitutes an impermissible – and thus unenforceable – penalty, as opposed to a reasonable approximation of the loss suffered by Shaffer.[2]

The October 1, 2000, service agreement plainly obligates Defendant F-M to give Plaintiff Shaffer 30 days' notice before terminating the parties' relationship, see Complaint, Exhibit A, so a liquidated-damages provision affording Shaffer one month's average charges under the contract as damages for a breach of that notice provision manifestly would be reasonable, even if Shaffer were actually deprived of only half of that notice period. But the liquidated-damages provision cited by Shaffer requires F-M to pay a sum equal to six months' charges for a violation of the 30-day notice-of-termination requirement. See Complaint, Exhibit A. If a "double-penalty" provision constitutes a punishment, rather than reasonable compensation, see Certified Question, 468 Mich at 118, then the liquidated-damages provision in the October 1, 2000, service agreement – which grants Shaffer

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[2] The reasonableness standard consistently articulated by our Court of Appeals in this context antedates our Supreme Court's decision in Rory v Continental Ins Co, 473 Mich 457 (2005), which quite clearly relegated to the dustbin of history the "reasonableness doctrine" in another context. See id. at 465-470. Indeed, our Supreme Court went so far as to explain that a "mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions." Id. at 470. Such sweeping language calls into question the "reasonableness" inquiry with respect to all contractual liquidated-damages provisions, but the Court must presume that our Court of Appeals found a justification for maintaining this standard in spite of the clear command of Rory. See Rosett v Trepeck, No 258531, slip op at 2 n1 (Mich App June 20, 2006); but see id. (Schuette, J, dissenting) (arguing that Rory applies to liquidated-damages provisions). Therefore, the Court must apply the reasonableness standard reaffirmed by our Court of Appeals in the wake of the Rory decision.

sextuple damages for a violation of the 30-day notice requirement – surely must be characterized as an unenforceable penalty provision. See, e.g., Rosestt v Trepeck, No 258531, slip op at 1-2 (Mich App June 20, 2006) (unpublished decision); see also Curran v Williams, 352 Mich 278, 283 (1958) (noting that "[c]ourts will not permit parties to stipulate unreasonable sums as damages, and where such an attempt is made have held them penalties and therefore void and unenforceable").

Plaintiff Shaffer defends the liquidated-damages provision as necessary to protect its large investment in the equipment required to perform its contractual obligations to F-M. Shaffer plainly had to invest substantial capital in equipment for its Sparta Foundry work, see Brief in Support of Defendant's Motion, Exhibit B, but Shaffer made those outlays of capital long before it entered into the service agreement with F-M in 2000. Moreover, the October 1, 2000, service agreement afforded Shaffer the protection of a three-year minimum period of service before F-M could even invoke the termination provision upon 30 days' notice to Shaffer. See Complaint, Exhibit A. "The validity of a liquidated damages clause depends on the conditions existing when the contract was signed rather than at the time of the breach." Barclae v Zarb, 300 Mich App 455, 485 (2013). In October of 2000, when Shaffer and F-M entered into the service agreement, Shaffer already owned the equipment it needed for the Sparta Foundry,[3] and the service agreement provided Shaffer with at least three years of operations to make money and amortize the equipment it had purchased. Under the circumstances that existed in 2000, therefore, the liquidated-damages provision cannot be viewed as necessary to enable Shaffer to recover its investment in the equipment needed to perform the contract. Thus, the Court concludes that the liquidated-damages provision cannot be enforced.

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[3] Plaintiff Shaffer's principal, Philip Shaffer, testified that his company began working at the Sparta Foundry in 1985 and purchased most of the equipment used on the F-M contract in the 1990s. See Brief in Support of Defendant's Motion, Exhibit A (Deposition of Philip Shaffer at 8, 57-87).

IV. Conclusion

For all of the reasons set forth in this opinion, the Court concludes that Defendant F-M is not entitled to summary disposition under MCR 2.116(C)(10) on Plaintiff Shaffer's breach-of-contract claim.[4] Reading all of the relevant documents together, F-M's assertion of the right to terminate the contract founders upon an ambiguity with respect to the requirements for termination. But the Court must grant relief to F-M on its motion *in limine* to preclude Plaintiff Shaffer from relying upon the liquidated-damages clause in the October 1, 2000, service agreement. As a result, the Court shall limit Shaffer to recovery of the actual damages flowing from F-M's alleged breach of the contractual agreement between the parties.

IT IS SO ORDERED.

Dated: January 3, 2014

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

[4] Similarly, Plaintiff Shaffer is not entitled to summary disposition under MCR 2.116(I)(2) on its claim for breach of contract.