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SUPREME COURT

**COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2011-SC-000415-D
(2010-CA-001544)**

RAMESH PATEL

APPELLANT

VS.

**APPEAL FROM MONTGOMERY CIRCUIT COURT
CIVIL ACTION NO. 2007-CI-90109**

TUTTLE PROPERTIES, LLC, et al.

APPELLEES

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REPLY BRIEF FOR APPELLANT
* * * * *


Submitted by:



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CERTIFICATE REQUIRED BY CR 76.12(6)

This is to certify that a true copy of the Reply Brief for Appellant was sent by first-class mail to Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9230; Honorable Beth Lewis Maze, Montgomery Circuit Judge, P.O. Box 1267, Mt. Sterling, Kentucky 40353; and Jesse R. Hodgson, Esq., White Peck Carrington, LLP, Attorneys for Appellees, P.O. Box 950, Mt. Sterling, Kentucky 40353-0950, this 2 day of October, 2012.



M. ALEX ROWADY, ESQ.

The purpose of this Reply brief is to explain how Appellees' brief actually supports reversal and remand to the circuit court so that the correct legal principles can be applied to determine the enforceability of the liquidated damages provision in the parties' agreements.

ARGUMENT

Appellees' brief argues that the lower courts (particularly the Court of Appeals) correctly assessed this dispute as one simply involving enforcement of contract terms. Appellees then implicitly concede this is truly a liquidated damages case by devoting considerable effort in an attempt to convince this Court that the essential provision of the parties' agreement would pass muster in any event as a proper liquidated damages clause. The net result of Appellees' machinations, however, is to reinforce the need for this Court's review of the decisions below and ultimately their reversal.

To their point of mere contract enforcement, Appellees proffer two bases for claiming this case falls outside traditional liquidated damages analysis. First they strongly imply the purchase and sale transaction at bar is somehow too complicated to be reviewed for fairness by use of liquidated damages principles. This reasoning ignores the very purpose of liquidated damages clauses, namely to simplify otherwise difficult calculations of loss upon breach of contract. United Services Auto. Ass'n v. ADT Sec. Services, Inc., 241 S.W.3d 335, 340-41 (Ky. App. 2006).

Secondly, Appellees claim that because Patel failed to insist upon the phrase "liquidated damages" in the parties' agreement he is not entitled to question whether his \$125,000.00 earnest money deposit was an appropriate sum of damages or an unenforceable penalty. Yet this contention defies the very essence of liquidated damages, which are defined as "an amount contractually stipulated as a reasonable estimation of actual damages to be recovered by one party if the other party breaches." Black's Law Dictionary (9th ed. 2009). The contractual provision requiring Patel to forfeit the earnest money should he breach is a textbook example of

just such a stipulation. Therefore, the courts below erred when they neither engaged in nor required a liquidated damages analysis. This alone should dictate the matter be remanded to the Montgomery Circuit Court.

As if to acknowledge the shortcomings in their stance, Appellees then spend considerable time attempting to justify their windfall as a proper liquidated damages award. Yet their copious discussion begs the very question not addressed below: whether the provision that allowed Appellees to keep the earnest money deposited was a binding liquidated damages term or an unenforceable penalty. Until that issue is resolved, no decision allowing Appellees to retain the funds can be sustained.

CONCLUSION

The circuit court did not adhere to Kentucky precedent when it failed to consider whether the earnest money clause in the parties' agreements was an appropriate measure of damages upon breach or instead an unenforceable penalty. This error was perpetuated by a divided Court of Appeals. Appellant now urges the Court to correct the lower courts' misjudgment by remanding the action to the Montgomery Circuit Court for further proceedings consistent with the well-established rules regarding the enforceability of liquidated damages.

Respectfully submitted,



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