

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

Jacob de la Cruz,) Civil Action No. 2013-CP-10-978
)
 Plaintiff,)

v.)

J.R. Williams and Associates, LLC,)
 Joseph R. Williams, individually, U.S.)
 Pest and Environmental Services, LLC)
 f/k/a U.S. Home Protect of Charleston,)
 LLC f/k/a U.S. Pest and Environmental)
 Services, LLC, Todd D. Hanik,)
 individually, Kent Golden, individually,)
 Stewart Sparks individually and d/b/a)
 Spivey & Sparks, Mike Spivey)
 individually and d/b/a Spivey & Sparks,)
 James Otterberg a/k/a James Michael)
 Otterberg, Laura Otterberg a/k/a Laura)
 Bagwell Otterberg, and John Doe)
 representing any other unknown)
 contractors or subcontractors on this)
 project,)
 Defendants.)

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT ONLY AS
TO DEFENDANTS J.R. WILLIAMS
AND ASSOCIATES, LLC AND
JOSEPH R. WILLIAMS,
INDIVIDUALLY

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This matter is before the Court on a motion for summary judgment by Defendants J.R. Williams and Associates, LLC and Joseph R. Williams, individually, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Before the Court were the pleadings, motions, memoranda, affidavit of the Plaintiff and other papers on file. The Court heard oral argument on January 8, 2014. For the reasons stated below, the motion for summary judgment as to liquidated damages by the Defendants J.R. Williams and Associates, LLC and Joseph R. Williams, individually, is **GRANTED**.

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I. FACTS

On January 14, 2009, Defendants James and Laura Otterberg were trying to sell their home ("the Home"). They provided a South Carolina Residential Property Condition Disclosure Statement regarding the Home to Plaintiff, Jacob de la Cruz, who was an interested potential buyer.

On February 14, 2009, prior to closing, Plaintiff hired Defendant J.R Williams and Associates LLC and Joseph R. Williams ("Williams Defendants") to perform a residential home inspection.¹ On February 16, 2009, Plaintiff hired Defendants U.S. Pest Control and Environmental Services, LLC to inspect the home and prepare an Official South Carolina Wood Infestation Report ("CL-100"). Plaintiff purchased the home on March 27, 2009. On April 10, 2011, Plaintiff hired Defendant Spivey and Defendant Sparks to make repairs to the Home.

On February 19, 2013, Plaintiff filed suit alleging various claims related to alleged structural damage and deterioration of the Home. The Williams Defendants filed their motion for summary judgment on September 13, 2013.

II. LEGAL STANDARD

A party is entitled to summary judgment where 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 and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 558; 671 S.E.2d 79, 85 (Ct. App. 2008).

¹ The contract states that the company "agrees to perform a limited visual inspection" of the home.

III. ANALYSIS

THE LIQUIDATED DAMAGES PROVISION IN THE CONTRACT LIMITS THE WILLIAMS DEFENDANTS' POTENTIAL LIABILITY AS A MATTER OF LAW.

The court finds as a matter of law that the Williams Defendants' liability is limited to \$200.00 pursuant to the terms of the enforceable liquidated damages clause contained in the February 14, 2009 Inspection Agreement.

Plaintiff concedes the existence of an enforceable home inspection contract and pleads consideration. The contract is valid, therefore the liquidated damages provision should be enforced. The South Carolina Supreme Court recently affirmed a trial court's grant of summary judgment to a home inspection company and enforced a very similar agreement, determining that, in the context of a potential buyer contracting a home inspector, a clause limiting liability is neither unconscionable nor a violation of public policy. See Gladden v. Boykin, 402 S.C. 140, 739 S.E.2d 882 (2013). The court was clear, "[i]t is one thing to impose greater demands on the builder of a new home, who is in a position to know of the home's defects, and another to impose a similar standard on an inspector who makes only a brief survey of the home with the buyer's full knowledge of the limited service the inspector is offering." Id. at 144, 739 S.E.2d at 884. Thus, Defendants' liability extends only to the fee Plaintiff paid in exchange for the home inspection. The Williams Defendants have offered Plaintiff a check in the amount of the fee paid for the home inspection, but Plaintiff has refused the check.

In Gladden, the court analyzed the statutory scheme governing the issue of home inspections and liability for undisclosed defects in the sale of residential property. Id. at 143, 739 S.E.2d at 883. Noting that purchasers are protected from unqualified home inspectors by licensure requirements, the court found it significant that "the General Assembly did not require

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home inspectors to carry errors and omissions liability insurance.” Id. (citing S.C. Code Ann. § 40-59-500 et seq. (2011)). Further, the court clarified that a home purchaser’s remedy for undisclosed defects lies in the Residential Property Condition Disclosure Act², which “imposes liability on a *seller* if she knowingly withholds such information.” Id. at 144, 739 S.E.2d at 884 (emphasis added).

The Plaintiff claims that the liquidated damages clause is unconscionable. The Gladden court noted that “[l]imitation of liability and exculpation clauses are routinely entered into.” Id. at 145, 739 S.E.2d at 884 (citing Head v U.S. Inspect DFW, Inc., 159 S.W.3d 731, 748-49 (Tex. App. 2005) (likening the limitations on liability in burglar and fire alarm system contracts to a home inspection contract)). The court concluded, “[w]e cannot say that a limitation of liability clause in a home inspection contract is so oppressive that no reasonable person would make it and no fair and honest person would accept it.” Id.

Here, the liquidated damages provision reads as follows:

4. LIQUIDATED DAMAGES

It is understood and agreed by the parties hereto that the Company is not an insurer, that the payment for the Inspection and the Inspection Report is based solely on the value of the service provided by the Company in the performance of the limited visual inspection and the production of the Inspection Report as described herein, that it is impractical and extremely difficult to fix actual damages, if any, which may result from a failure to perform such services, and in the case of failure to perform such services and a resulting loss, Company’s liability hereunder shall be limited and fixed in the amount equal to a refund of the inspection fees paid, as liquidated damages, and not as a penalty, and this liability shall be exclusive.³

² S.C. Code Ann. § 27-50-10 et seq. (2007 & Supp. 2011).

³ In Gladden, the subject clause stated:

LIMIT OF LIABILITY: It is understood and agreed that should [~~Home Inspection Company~~] and/or its agents or employees be found liable for any loss or damages resulting from a failure to perform any of it’s [sic] obligations, including but not limited to negligence, breach of

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In Gladden, 402 S.C. at 145, 739 S.E.2d at 884-85, the court held that “[c]ourts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract. The Plaintiff claims that he was unsophisticated and did not know that the contract contained a provision limiting damages. Viewing the evidence in the light most favorable to Mr. De La Cruz, there is no evidence to suggest he was not capable of understanding or agreeing to the terms of the Inspection Agreement. The Agreement was two pages long. All headings, including the heading “**LIQUIDATED DAMAGES**” were bold and capitalized. The Plaintiff testified that he, in fact, read and looked over the document. Further, Plaintiff is an educated man and an experienced medical device salesman who owns his own customer relationship software company.

Plaintiff had previously purchased a duplex in Ohio and has been renting the property since around 2006. He has previously entered into five contracts with individuals who have rented his duplex in Ohio or the other half of the subject property. Plaintiff agreed that he expects tenants to understand the provisions of the rental contract that they sign. There is no evidence of obscuring of contract terms, coercion, inequality of bargaining power, or inability to understand the terms of the contract.

contract or otherwise, the the [sic] liability of [Home Inspection Company] and/or it's agents or employees shall be limited to a sum equal to the amount of the fee paid by the client for this inspection and report.

402 S.C. 140 n.1, 739 S.E.2d 882 n. 1.

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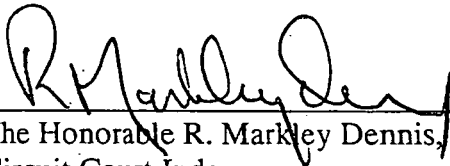
CONCLUSION

For the reasons stated above, the Court grants the Williams Defendants' motion for summary judgment on the basis of the liquidated damages provision as a matter of law.

Damages are limited to the refund of the fee for the home inspection, \$200. The Defendants may file a check in the amount of \$200 with the Clerk of Court to be held until the resolution of this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Williams' Defendants' Motion for Summary Judgment is **GRANTED**.

This 15 day of January, 2014 at Charleston, South Carolina.



The Honorable R. Markley Dennis, Jr.
Circuit Court Judge

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