

FILED
Superior Court of California
County of Los Angeles
JUL 02 2013
John A. Clarke, Executive Officer/ Clerk
[Signature]
Deputy

**Superior Court of California
County of Los Angeles**

EVA NOWACZEK,

Petitioner,

v.

ANDREW NOWACZEK,

Respondent.

Case No.: BD 395039

ORDER

Petitioner's RFO came on regularly for hearing on September 30, 2013. The Request seeks a determination of the amount of the judgment in this dissolution proceeding under two stipulations and then enforcement thereof. The first is a stipulation and judgment entered March 17, 2004 and the second is a stipulation and order modifying that judgment entered November 13, 2008. Two provisions of the judgment, one of which was modified in 2008, are involved in this RFO.

The first provision, paragraph 2.B., requires Respondent to pay the balance due on the mortgage on the property at 9939 La Canada Way by July 15, 2008, and to do so in monthly

ORDER

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1 payments of \$4,000 due on the first of each month. The judgment indicated that the mortgage
2 maintained on the property was \$750,000. If two payments are delinquent, the unpaid balance is
3 due and interest at the then current legal rate of 10% is imposed on the balance.

4
5 Paragraph 2.B. was modified in the November 13, 2008 stipulation to extend the time
6 that the mortgage must be paid off by four years, to July 15, 2012, and to fix the balance due on
7 the mortgage as of July 16, 2008 at \$570,000. The payments on the mortgage were increased to
8 \$10,000 per month due on the first of each month. If the mortgage is not paid in full by July 15,
9 2012, then the balance must be paid in a lump sum. This modification was apparently made in
10 contemplation of the sale of the property in 2008. Other than the provision in the original
11 judgment concerning two delinquent payments, there is no provision of interest or penalty in
12 conjunction with the obligation to pay the mortgage.
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14
15 At the time that the La Canada property was sold, Respondent had not paid off the
16 mortgage. The proceeds from the sale of the house were apparently applied to satisfy the
17 remaining balance owed to the lender. Petitioner did not make any demand that Respondent then
18 pay her the balance of the mortgage that was due at the time of the sale.
19

20 The second provision, paragraph 2.C.(i) and (ii), provides for an equalization payment.¹
21 Part (i) provides for an equalization payment in the amount of \$600,000, to be paid at the rate of
22 *at least* \$5,000 per month due on the first of each month, and that it was to be fully paid by
23 March 17, 2007, three years from the entry of judgment. Part (ii) provides that if Respondent
24 fails to pay \$600,000 within three years that the amount would be increased to \$2,000,000. If
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27 ¹ Petitioner seems to be arguing that she gave up any provision or entitlement for spousal support. The Court
28 understands the assertion to relate to an argument that the equalization payment and especially the provision for
increasing the amount of that payment in the event that the equalization payment was not fully paid within the time
agreed was in part in recognition of Petitioner's need for income.

1 two payments are delinquent, then the entire balance at that time would be due and interest
2 thereon would accrue at the legal rate of 10%. This provision was neither modified nor
3 referenced in the November 13, 2008 stipulation modifying the original judgment.

4
5 Respondent advances several defenses to the RFO. Respondent argues that Petitioner has
6 not accounted for every payment that he has made, and he attaches copies of checks and other
7 accounting documents to substantiate his position. At issue, also, is a payment that Respondent
8 made of \$26,000.² Petitioner claims that Respondent is attempting to add \$26,000 as a credit to
9 his payments as the value of a boat transferred to Petitioner, and which Petitioner later
10 transferred back to Respondent.³ Respondent argues, principally and at length, that the penalty
11 in the judgment that increases the equalization payment from \$600,000 to \$2,000,000 less the
12 amounts previously paid is an impermissible *liquidated damages* clause under Civil Code §1671,
13 and cites several authorities for the proposition.
14
15

16 **Amounts Paid Under the March 17, 2004 Judgment**

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18 Respondent testified that he has made all of the equalization payments required including
19 the \$26,000 additional payment. He testified that he is \$4,000 short of the full \$600,000.
20 Petitioner says that Respondent elected not to pay off the balance in 2007, and therefore the
21 amount of the equalization payment increases to \$2,000,000. While Petitioner continues to argue
22 that the \$26,000 should not be added to the payments on the equalization obligation, counsel for
23 Petitioner does concede that the Respondent has paid \$570,000 of the \$600,000. The Court finds
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26
27 ² Respondent also seeks credit for \$200,000 for the transfer of title to Petitioner in property in Poland. Petitioner
concedes that such a credit is warranted and stipulated that the amount Respondent has paid should be increased by
that amount.

28 ³ Respondent has submitted documents that indicate that the transfer of the title to the boat to Petitioner was for
\$1.00, and that the transfer back to the Respondent was for no consideration.

1 that the \$26,000 payment was not related to the transfer of title to the boat and should be credited
2 to the equalization payments. When the \$26,000 is added as a credit, Respondent has paid all but
3 \$4,000 of the equalization payment. The dispute then with respect to the equalization payment is
4 (1) whether the provision in the stipulated judgment for an increase in the amount of the payment
5 at March 17, 2007 if the \$600,000 had not been fully paid is subject to any limitation under Civil
6 Code §1671, and, if so, (2) whether the increase in the amount, \$1,400,000, is unreasonable and
7 therefore void under Civil Code §1671, given that virtually all of the payments contemplated in
8 the original judgment have been made.
9

10
11 **Civil Code Section 1671 Applies To Stipulated Judgments Which Are Contracts**

12 **Under California Law**

13
14 Petitioner argues that the penalty provision in the March 17, 2004 judgment, not
15 addressed or modified in the November 13, 2008 modification is a judgment and not a matter of
16 contract, and that Civil Code §1671 applies only to contracts. California courts that have directly
17 reached the issue have held that a stipulated judgment is a **contract** and must be construed under
18 the rules applicable to any other **contract**. *Jamieson v. City Council of the City of Carpinteria*
19 (2012) 204 Cal. App. 4th 755, 761; *In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 47. Civil
20 Code §1671, by its terms, permits liquidated damages “unless the party seeking to invalidate the
21 provision establishes that the provision was unreasonable under the circumstances existing at the
22 time the contract was made.” At the time that the parties reached a settlement in the dissolution
23 proceedings, the liquidated damages clause at issue here was included in that settlement
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1 agreement.⁴ As a matter of contract law, the clause is subject to the limitations of Civil Code
2 §1671. *Sybron, supra*, 76 Cal. App. 3rd at 900.

3
4 Petitioner argues that the cases that have struck liquidated damages clauses in judgments
5 under civil Code §1671 have only arisen in situations in which the stipulated judgment is entered
6 and the party objecting to the clause immediately appeals from that judgment. That is a
7 distinction without a difference. If the clause is to be measured under contract principles “under
8 the circumstances existing at the time the contract was made”, it makes no difference whether the
9 analysis required under §1671 is made at the time the contract is merely a contract being
10 enforced, at the time that it is entered as a judgment, or at the time a party seeks to enforce the
11 contractual provision incorporated into a judgment against an objecting party. If the provision is
12 *void*, it is simply that, *void* and not “voidable”. It has no force and effect from its inclusion in the
13 contract at its inception.
14
15

16 **Validity of the Penalty Provision In the March 17, 2004 Judgment and Amount Due**

17 **Thereunder**

18
19 The Petitioner argues that the equalization payment was increased to \$2,000,000 at the
20 election of Respondent when he “chose” to continue making payments rather than pay the
21 balance due on March 17, 2007. Petitioner then adds interest on the unpaid balance of the
22 \$2,000,000 which means that as of May 1, 2013, Respondent owes Petitioner \$2,426,020 on the
23
24

25
26 ⁴ Respondent argues that the judicial officer approving the settlement agreement and entering it as a judgment may
27 have simply signed off on the agreement or otherwise did not consider whether that clause was a permissible
28 liquidated damages clause. There is no evidence before the Court one way or the other to review the degree to
which the judicial officer scrutinized every clause in the seventeen page settlement agreement. That does not render
valid an otherwise *void* provision since the courts have an obligation to see that the judgment entered into is a “just”
one before enforcing a void provision. See *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990)
50 Cal. #d 658, 664.

1 equalization payment. The Court notes that the equalization "penalty" or "liquidated damages"
2 in the judgment would add liquidated damages (or a penalty) of more than three times the
3 amount of the obligation, and then, if two payments are late, would further add interest at 10%
4 on the balance as well. That would be an unreasonable estimate of damages under Civil Code
5 §1671. See *Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal. App. 4th 495
6 (striking a liquidated damages clause that would assess a penalty of \$40,000 more); *Sybron*
7 *Corp. v. Clark Hospital Supply Corp.* (1978) 76 Cal. App. 3rd 896 (striking a liquidated damages
8 clause that provided a penalty for failure to make 12 payments totaling \$72,000 in the amount of
9 \$100,000). In *Sybron*, the appellant there had paid \$42,000 of the required \$72,000 before
10 becoming delinquent, and the Respondent obtained a stipulated judgment for \$100,000. The
11 Court noted the issue was whether the liquidated damages provision was enforceable:
12

14 Under California law **liquidated damages** not reasonably related to actual
15 damages are unenforceable and void as penalties. An exception exists where
16 damages cannot readily be ascertained (*Civ. Code*, §§ 1670, 1671, *supra*, fn. 2),
17 but since damages for the withholding of money are easily determinable -- i.e.,
18 interest at prevailing rates -- penal provisions for mere delay in the payment of
19 money are not ordinarily enforceable. (*Civ. Code*, § 3302; *Knight v. Marks* (1920)
20 183 Cal. 354, 357 [191 P. 531].) Although provisions for **liquidated damages** for
21 late payments can be characterized as provisions for alternative performance
22 rather than penalties, and were once enforced as such (see *Hellbaum v. Lytton*
23 *Sav. & Loan Assn.* (1969) 274 Cal.App.2d 456 [79 Cal.Rptr.]), it is now clear that
24 when such "late charges" bear no relation to actual damages for delay, they are
25 void. (*Garrett v. Coast & Southern Fed. Sav. & Loan Assn.* (1973) 9 Cal.3d 731,
26 740 [108 Cal.Rptr. 845, 511 P.2d 1197, 63 A.L.R.3d 39].) Furthermore, the
27 burden falls on the party seeking to enforce **liquidated damages** to establish that
28 damages for delay were impracticable to ascertain at the time the contract
specifying **liquidated damages** was executed. (*Lowe v. Massachusetts Mut. Life*
Ins. Co. (1976) 54 Cal.App.3d 718, 734 [127 Cal.Rptr. 23].)

25 *Sybron, supra*, 76 Cal. App. 3rd at 900. Here there has been no showing that calculating the
26 amount of damages from failure to pay \$600,000 within three years was impracticable, when the
27 minimum payments would only reduce that amount by \$180,000, leaving a balance due of
28

1 \$420,000 which could then have had interest added. The remedy for such a void clause, under
2 *Sybron*, was to reduce the stipulated judgment in that case to \$72,000 plus interest.
3 “[E]nforcement of the default provisions would result in a \$28,000 penalty for delaying payment
4 of \$30,000, a penalty which bears no rational relationship to the amount of actual damages
5 suffered by respondent. Such an agreement is unenforceable.” *Id.* at 903. The penalty here is
6 considerably harsher than the penalty in *Sybron*, and the *Sybron* court found the penalty there
7 “considerably harsher than the arrangement characterized as penal in *Garrett*”. *Id.*, citing
8 *Garrett v. Coast & Southern Fed. Sav. & Loan Assn.* (1973) 9 Cal. 3d 731.
9

10
11 The liquidated damages provision under paragraph 2.C. of the March 17, 2004 judgment
12 in this case is void and should be stricken from the judgment. The Respondent has paid
13 \$596,000 of the \$600,000 equalization payment and should make that final payment of \$4,000
14 within thirty (30) days of the entry of this Order.
15

16 **Balance Due Under Paragraph 2.B., the Mortgage Obligation**
17

18 Paragraph 2.B. presents a different issue. There is no liquidated damages provision with
19 respect to payment of the mortgage on the La Canada Way house. The provision in pertinent
20 part, is as follows:
21

22 It is ordered that Respondent shall pay off the aforementioned mortgage no later
23 than five years from July 15, 2003, the date of signature of the original loan
24 papers on the property. Until Respondent pays off [the] mortgage, Respondent
25 shall make monthly payments to Petitioner in the sum of \$4,000 toward
26 Petitioner’s mortgage payments....

27 ...If any two payments herein are delinquent by twenty days, the entire unpaid
28 balance of Petitioner’s mortgage shall be deemed due and payable by Respondent
and the unpaid balance shall bear interest at the legal rate, currently 10%....

As indicated above, that provision was modified in the November 13, 2008 stipulation to
extend the period within which the mortgage must be paid by four years, commencing July 16,

2008, and that during that time Respondent was to pay Petitioner \$10,000 per month against the debt. The modification also provided that Respondent was to pay off the mortgage balance as of the date of sale of the property.

The 2008 modification further provided:

If the total amount of \$570,000 has not been paid in full by July 15, 2012, then Respondent shall pay to Petitioner a lump sum payment equal to the remaining balance.

And:

Provided that payments are made pursuant to this Stipulation and Order, then no interest shall be assessed against the outstanding amount of \$570,000. As such the entire amount of each monthly payment of \$10,000 shall be applied against the outstanding balance of \$570,000.

Respondent maintains that he has paid a total of \$382,975, comprising payments of \$182,975 and a credit, conceded by Petitioner, of \$200,000 for the transfer of title to the property in Poland which Petitioner avers was July 27, 2010.

Petitioner's RFO contains a form FL-421, "Payment History Attachment" that indicates the payments Petitioner recognizes by month, and the amounts Petitioner states were paid from July 2008 through July 2012, when the mortgage was to have been paid off under the modification are as follows:

	2008	2009	2010	2011	2012
Jan		10,000	5,000	7,500	5,000
Feb		10,000	10,000	5,000	5,000
MAR		10,000	7,500	7,500	5,000
Apr		10,000	5,000	7,500	5,000
May		10,000	7,500	0.00	5,000
June		10,000	5,000	0.00	5,000

	2008	2009	2010	2011	2012
July	10,000	10,000	7,500	7,500	5,000
Aug	10,000	10,000	0.00	5,000	
Sep	10,000	10,000	7,500	5,000	
Oct	10,000	5,000	7,500	0.00	
Nov	10,000	5,000	7,500	5,000	
Dec	10,000	5,000	7,500	5,000	
total	60,000	105,000	75,500	55,000	35,000

Petitioner's Payment History (totaling the amounts Petitioner states were paid) therefore credits Respondent with paying, from July 1, 2008 through July 31, 2012, \$330,500 towards the July 16, 2008 mortgage balance of \$570,000. When Respondent is credited with the additional \$200,000 for the transfer of the land in Poland, the amount paid by the end of July, 2012 was \$530,500, and the balance then due on July 31, 2008 would be \$39,500. Also, the credit of \$200,000 applied from July 27, 2010 corrects any deficiency in the payment actually made through July 2012 such that no two payments between July 2008 and July 2012 remained unpaid. There is no evidence presented that either Petitioner or Respondent considered, as of July 2012, that there had been two payments delinquent by 20 days such that the balance due on such date would be accelerated and immediately due and payable with interest. Paragraph 2.B. does not provide any penalty for failure to pay off the mortgage by July 15, 2003 or for interest on any balance then not paid. The modification of November 17, 2008, does not provide for any penalty or interest in the event that the lump sum due on July 15, 2012 (the then unpaid balance on the mortgage) was not then paid. The record does not indicate any demand or request for such a payment or for interest at that time. Respondent continued to pay and Petitioner continued to accept payments from Respondent until this RFO was filed.

Petitioner states in his declaration, under penalty of perjury, that he has paid through May 2013 the sum of \$182,975 towards the mortgage balance since the November 13, 2008 stipulation re modification, and that with the credit for the \$200,000, he owes a balance on the mortgage of \$187,025. The Court accepts that number as the balance now due, and will order Respondent to pay \$187,025 in a lump sum payment within 30 days of the entry of this order.

Interest Due Under Paragraph 2.B., If Any

The Court must apply the facts to the language of paragraph 2.B. to determine what is due from the Respondent to the Petitioner under that provision as modified. The parties made no demands or offers in 2012 to accelerate payment of the balance due on the mortgage or with respect to any interest. The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time they entered into the contract. *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; see also Civ. Code, § 1636. That intent is interpreted according to objective, rather than subjective, criteria. *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126. When the contract is clear and explicit, the parties' intent is determined solely by reference to the language of the agreement. (§§ 1638 ["language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity"]; 1639 ["[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"].) The words are to be understood "in their ordinary and popular sense" (§ 1644) and the "whole of [the] contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (§ 1641.)

Paragraph 2.B. refers to the payment of mortgage payments, and the payments to
Petitioner by Respondent are "against this debt" (November 13, 2008 modification) or "towards
Petitioner's mortgage payments" (March 17, 2004 judgment). The judgment protects Petitioner
in the event that Respondent defaults and Petitioner is unable to make the mortgage payments by
requiring Respondent to indemnify Petitioner and to compensate Petitioner for any losses
including but not limited to purchasing comparable housing for Petitioner in the event of a
foreclosure. The whole of the contract language related to the mortgage on the La Canada Way
property, taken together with each clause helping to interpret the other, clearly demonstrates an
intent to ensure that the lender was paid in full with no loss to Petitioner from any default. The
November 13, 2008 modification provides that upon sale of the property, the Respondent was to
pay off the balance of the mortgage. Once the mortgage was satisfied, Respondent was to pay
the balance due on the mortgage at the time of the sale to Petitioner. The judgment and
modification seems to treat payments made before the sale of the house and satisfaction of the
mortgage by payment in full at the time of the sale as payments to the lender. After the sale of
the house, however, Respondent is to continue paying monthly payments to the Petitioner until
the amount of the balance at the time of the sale has been paid to Petitioner as reimbursement for
the reduction in the proceeds from the sale caused by payment of the balance of the balance of
the mortgage to the lender. In order to reconcile these two provisions,⁵ the Court determines that
the mortgage was paid in full at the time of the sale, but the Petitioner continued to have a right
to be reimbursed for the amount paid at the time of the sale to the lender. Thus, after the sale no
mortgage payments could be delinquent; only the reimbursement to Petitioner could be

⁵ As required under Civil Code §1641, the Court must give effect to every part of the agreement and judgment, if reasonably practicable, each clause helping to interpret the other.

1 delinquent. Since the agreement and judgment only applied the interest penalty to the balance of
2 an unpaid mortgage and not to the amounts to be paid to Petitioner, no interest is due.

3 Attorneys' Fees

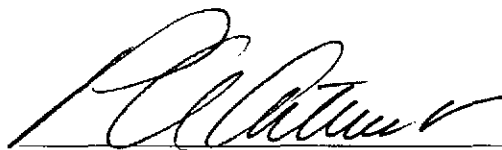
4
5 Petitioner filed this RFO seeking a determination of the amount of the judgment now due.
6 The judgment provides for attorney's fees in the event of any "default in payments or otherwise"
7 by Respondent with respect to points 2.B. and/or 2.C. While this RFO is essentially an
8 accounting to determine what amounts are due under the judgment and its modification, it clearly
9 resulted from a need to enforce the judgment after a determination of the amounts due was made
10 by the Court. The Court finds that attorney's fees are required under the language of the
11 judgment which states that "Respondent *shall* be ordered to pay Petitioner's reasonable
12 attorney's fees and other costs" related to enforcement of such provisions. Respondent did
13 concede in his declaration in response to the RFO that he had not made timely all of his
14 payments, and that he still owes significant amounts, which this Court has ordered now to be
15 paid within thirty days of the entry of this order.
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19 The Court finds that the work needed to prepare the RFO and to provide the Court with
20 the documentation needed, although inconsistent with Respondent's position and documents,
21 was well performed and reasonable under the circumstances of this matter, involving as it did
22 financial archeology into an old judgment and modification and after a lengthy history of
23 payments made and received. The hourly rate charged by Petitioner's counsel is well below the
24 rate that this Court sees in matters of this complexity, and the work product was clear, succinct
25 and helpful to the Court. The Court will order payment by Respondent of attorney's fees and
26 costs in the amount of \$20,000, to be paid within thirty days of the entry of this order.
27
28

Therefore, the Court enters the following Order:

Within thirty (30) days of the entry of this Order, Respondent pay to Petitioner the sums of \$4,000 for the balance due of the equalization payment, \$187,025 for the balance of the amount of the mortgage which Respondent has not yet reimbursed Petitioner, and \$20,000 towards Petitioner's attorney's fees, for a total of \$211,025.

Date: October 2 2013



Patrick A. Cathcart
JUDGE OF THE SUPERIOR COURT