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IN THE SUPERIOR COURT  
FOR THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MARGARET C. DUENAS,	)	CIVIL ACTION NO. 93-1252
Plaintiff.	)	
v.	)	<b>ORDER GRANTING</b>
	)	<b>PLAINTIFF'S MOTION</b>
ANTONIO ARRIOLA and,	)	<b>TO DISMISS</b>
MARIA ARRIOLA	)	<b>COUNTERCLAIM</b>
Defendants.	)	

This matter came before the Court on June 7, 1995, on Plaintiff Duenas's motion for partial summary judgment. Plaintiff argues that Defendants Arriolas' counterclaim for \$3,000.00 in late fees is unenforceable. Defendants oppose the motion, and in the alternative ask that the Court allow the counterclaim to stand at a reduced amount.

**I. FACTS**

On August 2, 1993, Plaintiff and Defendants entered into a residential lease agreement, setting monthly rent at \$300.00. The lease contained a late fee of \$25.00 for every day that the rent was late. *Motion for Temporary Restraining Order, Exh. A.* The parties used a form lease, two pages long and typed with the exception of handwritten insertions for pertinent variable information such as the

**FOR PUBLICATION**

1 identities of the parties, the amount of rent and the amount of the late charge. *Id.* This information  
2 was penned in by hand and stands out conspicuously.

3 Plaintiff claims that the lease was orally modified soon after it was entered into by an  
4 agreement under which Plaintiff would work on Defendant Antonio Arriola's 1993 electoral  
5 campaign in exchange for free lodging and bi-monthly wages. *Declaration of Margaret Duenas at*  
6 1. In addition, Plaintiff was promised continuing employment after the election. *Id.* Plaintiff claims  
7 that both promises were breached. First, Plaintiff allegedly received only one payment of \$50.00  
8 in wages. Second, days after the November election, the offer of continuing employment and free  
9 lodging was revoked. The revocation of employment was immediate and the revocation of lodging  
10 was effective as of December 2, 1994. *Id.* at 2.

11 On November 29, 1993, Plaintiff sought the assistance of the Labor Division of the  
12 Department of Commerce and Labor to collect the wages allegedly owed her. *Id.* Plaintiff claims  
13 that Defendants retaliated by padlocking Plaintiff's door, causing Plaintiff to institute this action,  
14 seeking declaratory, injunctive and monetary relief. *Complaint at 3.* Defendants counterclaimed,  
15 demanding rent and late payments relating back to the date of Plaintiff's first occupancy. In response,  
16 Plaintiff argues that the lease agreement was effectively revoked by the employment offer and  
17 therefore denies Defendants' right to either form of payment. However, for purposes of this motion,  
18 Plaintiff assumes the continuing effectiveness of the lease and moves for a partial summary judgment  
19 order declaring the late charge invalid.

## 20 21 **II. ISSUE**

22 Whether a lease provision establishing a \$25.00 late fee for every day that rent is overdue is  
23 enforceable.

## 24 25 **m. DISCUSSION**

### 26 1. Standard for Partial Summary Judgment.

27 Summary judgment is appropriate where there is no genuine issues of material fact. *Cabrera*

1 v. Heirs of De *Castro*, 1 N.M.I. 176 (1990) (citations omitted). The burden of demonstrating that  
2 there is no material factual issue rests with the movant. *Id.* If this obligation is met, the burden shifts  
3 to the nonmoving party to make a contrary showing. *Id.* In the case at hand, there exist factual  
4 disputes, yet none which are pertinent to the legitimacy of the late fee provision. Thus, summary  
5 judgment is proper on this issue. In reaching its decision, the court must view the evidence in the  
6 light most favorable to the nonmoving party. *Id.*

## 7 2. Liquidated Damages

8 The law permits a contract to contain a liquidated damages provision so long as the purpose  
9 is to compensate for actual damages. *Krupp Realty Co. v. Joel*, 309 S.E.2d 641 (Ga.App. 1983);  
10 *Highgate Association, Ltd. v. Merryfield*, 597 A.2d 1280 (Vt. 1991). In *Krupp Realty* the court found  
11 a \$50.00 late charge provision in a lease to be a valid liquidated damage. In so doing, the court  
12 identified the circumstances under which liquidated damages are appropriate as those where: (1) the  
13 damage caused by the breach is difficult or impossible to estimate; (2) the parties intended to provide  
14 for damages rather than a penalty; and (3) the sum stipulated is a reasonable pre-estimate of the  
15 probable loss. *Id.* at 642. Conversely, if the provision is intended to penalize rather than to  
16 compensate it will be invalidated. *Siara Management Co. v. Nedley*, No. 61433 (Ct. App. 8th Dst.  
17 Ohio 1992). Late payment clauses have been held to form a penalty where the purpose of the charge  
18 is to punish the tenant or to induce timely payment. *Highgate Assoc., supra*; *Spring Valley Gardens*  
19 *Associates v. Earle*, 447 N.Y.S.2d 629 (Co.Ct. 1982). One way to gauge the purpose of a late charge  
20 is to examine whether the charge is disproportionate to the damage suffered. *Id.*

21 Here, Defendants are claiming late fees in the amount of \$3,000 for a period of four months.  
22 While Defendants have failed to identify the amount or composition of their actual damages, it is  
23 certain that \$3,000 grossly exceeds any possible damage that Defendants could have suffered. Thus,  
24 the Court concludes that the charge is intended to penalize and must be stricken.

## 25 3. Unconscionability

26 The Court finds that the late charge must be stricken under the doctrine of unconscionability  
27 enunciated in the Restatement of Property. RESTATEMENT OF THE LAW, SECOND, PROPERTY,  
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1 LANDLORD TENANT § 5.6, cmt e. Seven CMC § 3401 instructs CNMI courts to apply the common  
2 law as expressed in the Restatements where, as here, there is no conflicting local law. The  
3 Restatement explains that an "agreement is unconscionable when it would shock the conscience of the  
4 court if enforced". The Restatement notes that this is a "somewhat vague and imprecise rule" but  
5 adds that an agreement may be 'against public policy and unconscionable if it "materially and  
6 unreasonably obstructs achievement of a well defined statutory, regulatory, or common law policy."  
7 RESTATEMENT OF THE LAW, supra. (citing *cf.* Uniform Commercial Code § 2-302 and RESTATEMENT  
8 OF THE LAW, SECOND, CONTRACTS, § 234 (Tent. Draft No. 5, 1970)). Relevant to this case is the  
9 policy against usurious interest rates set out in 4 CMC § 5501. A usurious rate is that which exceeds  
10 "2 percent per month on the balance due upon any contract made in the Commonwealth . . . involving  
11 a principal sum of \$300 or less."

12 While the usury law may not strictly apply here, it nevertheless concretely demonstrates the  
13 Commonwealth's policy against unjust interest rates. In the instant case, the late charges are 250  
14 percent of the assigned rent. The late fee is \$25.00 per day or \$750.00 per month, while the rent is  
15 only \$300.00 per month. This clearly subverts the well defined policy against usurious interest as set  
16 out in 4 CMC § 5501. Therefore, the Court has no hesitation in stating that such a charge "shocks  
17 the conscience of the court" and must be stricken. This conclusion is in line with established  
18 precedent vitiating, due to unconscionability, late charges which are disproportionately onerous  
19 compared to the rent. *Spring Valley Gardens Associates v. Earle*, 447 N.Y.S.2d 629 (Co.Ct. 1982);  
20 *Weidman v. Tomaselli*, 365 N.Y.S.2d 681 (Co.Ct. 1975) (held lease provision unenforceable on  
21 separate grounds of unconscionability, penalty, and contract of adhesion). In the words of the  
22 *Weidman* Court "it is the inherent power both of a court of law and a court of equity to prevent  
23 utilization of the institutions of justice for the perpetuation of injustice."

24 4. Contract of Adhesion

25 Plaintiff also claims that the late fee is unenforceable as the lease constitutes a contract of  
26 adhesion, defined as: "a contract in relation to a necessity of life, drafted by or for the benefit of a  
27 party for that party's excessive benefit, which party uses its economic or other advantage to offer the  
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1 contract in its entirety solely for acceptance or rejection by the offeree." *Weidman v. Tomaselli*,  
2 *supra.*; *Spring Valley Gardens Associates v. Earle, supra.* "All four elements must be present for  
3 a contract to be deemed a contract of adhesion." *Weidman v. Tomaselli, supra.* The requirement that  
4 the offer be "solely for acceptance or rejection" means that the offeree has no bargaining power to  
5 modify the agreement and therefore no meaningful choice. *Whitman v. Tomaselli, supra.* Lack of  
6 choice in the landlord tenant context is usually found where there is a housing shortage. *Id.*; *Spring*  
7 *Valley Gardens Associates v. Earle, supra.*; *Avenue Associates, Inc. v. Buxbaum, 371 N.Y.S.2d 736*  
8 *(Co.Ct. 1975)* (court took judicial notice of critical housing shortage, eliminating free choice); *c.f.*  
9 *Hertz Corp. v. Attorney General of State, 518 N.Y.S.2d 704, 708 (Sup.Ct. 1987)* (argument that  
10 rental agreement was unconscionable was denied because case did not pose a "take it or leave it"  
11 situation). Additionally, a factor in at least one case has been that the contract was not knowingly  
12 entered into. *Avenue Associates, Inc. v. Buxbaum, supra.* In *Avenue Associates*, lack of knowledge  
13 was inferred from the inordinate length and complexity of the lease, and its embodiment in a fine print  
14 form.

15 In contrast, here, Plaintiff has proffered no evidence that she was presented with a "take it  
16 or leave it" situation. Further, it cannot be said that Plaintiff did not knowingly enter into the lease,  
17 as it is relatively short, simple and emphasizes the penalty amount.' Accordingly, the record does  
18 not support the conclusion that the lease was a contract of adhesion. <sup>2</sup>

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21 <sup>1</sup> The lease is typed except for handwritten insertions for important **variables** such as the  
22 late charge. Naturally, this distinction underscores the amount and existence of the late charge.

23 <sup>2</sup> Cases invalidating a contractual **provision** based upon the finding that the agreement  
24 constitutes a contract of adhesion also generally hold that the provision is invalid because it constitutes  
25 a penalty and is unconscionable. *Whitman v. Tomaselli, 365 N.Y.S.2d 681 (Co.Ct. 1975)*; *Spring Valley*  
26 *Gardens Associates v. Earle, 447 N.Y.S.2d 629 (Co.Ct. 1982)*. Note, however, that the doctrines are  
27 not the same. A contract of adhesion **requires** that certain specific elements exist, while an  
unconscionable contract entails an amorphous analytical process. "[Unconscionability] is a concept not  
capable of a precise definition". *RESTATEMENT OF THE LAW, SECOND, PROPERTY, LANDLORD*  
*TENANT § 5.6, comment e.* Thus, an agreement which is not a contract of adhesion may be found to  
be **unenforceable** due to unconscionability. *Tai On Luck Corp. v. Cirota, 316 N.Y.S.2d 438.*

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**IV. CONCLUSION**

The late fee of \$25.00 contained in the lease is hereby stricken as it constitutes a penalty and is unconscionable. In addition, the Court denies Defendants' request to impose a reduced amount. Therefore, the Court GRANTS Plaintiff's motion for partial summary judgment.

SO ORDERED this 31<sup>st</sup> day of July, 1995.

  
MARTY W.K. TAYLOR, Associate Judge