TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PRELIMINARY STATEMENT

Bridgeport Cultural Authority ("BCA") has appealed from the trial court's granting of *Motion for Summary Judgment* to the Plaintiff-Appellee, in this breach of contract matter. BCA withheld from its final payment to Corvo Construction Co., Inc. ("Corvo") $52,000 for liquidated damages. Corvo sued BCA, which resulted in a Complaint and Answer. As a result of BCA's answer, Corvo filed a *Motion for Summary Judgment*, claiming that there was no genuine issue of material fact, and the trial court granted the motion.

QUESTION PRESENTED

Did the trial court err in determining that the liquidated damages clause in the contract between BCA and Corvo imposed a penalty for breach of contract and therefore was invalid because the clause failed to satisfy three conditions: (1) the damage which was to be expected as a result of a breach of contract was uncertain in amount or difficult to prove; (2) there was intent on the part of the parties to liquidate damages in advance; (3) the amount stipulated was reasonable in the sense that it was not greatly disproportionate to the amount of the damage which, as the parties looked forward, seemed to be the presumable loss which would be sustained by the contractee in the event of a breach of contract. Berger v. Shanahan, 118 A.2d 311 (Conn. 1955).

Neither Corvo nor BCA disputes that they showed intent to liquidate damages (second condition). However, Corvo contends that BCA did not show that liquidated

damages were reasonable to presumable loss (third condition), and that damages would have been difficult to prove (first element).

STATEMENT OF CASE

Before construction of the Nutmeg Dome, BCA researched profit data from other venues in cities of comparable size and found their bookings to average between 12 and 15 per month, two or three of which were concerts and the rest sports, conventions, and community events. The average daily profit from these venues was $1,500 after all expenses, such as mortgages, salaries, etc., were paid.

BCA contracted Corvo to build the Nutmeg Dome, which would be used primarily as a venue for concerts, sporting events, conventions, and community activities, but secondarily as offices for personnel needed to run the Nutmeg Dome. Paragraph 4 of the contract stated that the facility was ". . . to be ready for full use on or before the first day of July" of this year. Moreover, the parties agreed to liquidated damages of $2,000 per day for each day of delay, and was so stipulated in Paragraph 51 of the contract: "Because of the difficulty of determining lost income in the entertainment industry, in the event of Corvo's failure to perform its obligations according to the schedule set out herein, Corvo shall be liable to BCA in the amount of two thousand dollars for each day of delay."

Corvo conceded that, due to its fault, the electrical and ventilation systems were not installed according to the contract, and, as a result, the system would not be adequate to support the laser and fog effects of Allegheny Steel Corporation ("AlSteCorp"), the band scheduled to perform on July 25. (This was the first scheduled

event in the Nutmeg Dome.) Throughout July, local media reported that AlSteCorp may not be able to use their specialized effects at this concert. This show was AlSteCorp's ninth of 16 concerts in their North American tour. After their first concert was highly praised on MTV, the remaining shows, except Bridgeport, sold out within hours after tickets became available. Eighteen hundred tickets went unsold, representing a profit loss of $22,000. AlSteCorp did perform the show, but without their special effects. On MTV, their lead guitarists criticized the venue, saying ". . . no self-respecting creative artist would schedule a gig in this place. Can you imagine just standing on the stage and not being able to do anything but play the instruments? They must think we do grunge for a living."

On July 27, Corvo completed the repair work to BCA's satisfaction.

SUMMARY OF ARGUMENT

The trial court properly granted the Plaintiff-Appellee's *Motion For Summary Judgment*. because the liquidated damages clause of the contract was invalid for the following three reasons: (1) the stipulated liquidated damages were not reasonably proportionate to presumable loss; (2) the stipulated liquidated damages were not reasonably proportionate to actual damages; (3) damages would not have been difficult to ascertain.

ARGUMENT

The purpose of a liquidated damage clause is to compensate the party damaged by a breach of contract for any loss that they occurred as a result of the breach – to put

the party in the place where they would have been if the breach of contract had not occurred. A liquidated damages clause is not intended to be a lottery or windfall for the party who is injured. Perhaps because liquidated damages clauses have been misused, this court made reference to ". . . the checkered history of liquidated damages clauses." Vines v. Orchard Hills, Inc., 435 A.2d 1028 (Conn. 1980). The court further observed that ". . . judicial resistance to enforcement of forfeitures has long been commonplace, particularly with regard to contract clauses purporting to liquidated damages." Vines, 435 A.2d at 1022.

I. THE PLAINTIFF–APPELLEE'S *MOTION FOR SUMMARY JUDGMENT* WAS PROPERLY GRANTED BY THE TRIAL COURT BECAUSE THE CONTRACT'S LIQUIDATED DAMAGES CLAUSE WAS INVALID SINCE IT WAS DISPROPORTIONATE TO PRESUMABLE LOSS.

This is an appeal from a summary judgment, which is revealed de novo in this court. Gumby v. Pokey 333 A.2d 654 (Conn. 1979). Summary judgment should occur only where there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Yanow v. Teal Industries, Inc. 422 A.2d 311 (Conn. 1979). In this case, the movant was entitled to judgment as a matter of law.

The liquidated damages agreed to by BCA and Corvo act as a penalty, since they are disproportionate to BCA's presumable loss. The Court will enforce a liquidated damages clause where liquidated damages are not so greatly disproportionate to presumable loss as to constitute a penalty. Banta v. Stamford Motor Co., 92 A. 665

(Conn. 1914). See also Sides Construction Co. v. City of Scott City, 581 S.W.2d 443 (Mo. Ct. App. 1979) (holding that "[p]rovisions for fixed per diem payments for delay in performance of such contracts are usually construed as stipulations for liquidated damages, and not as penalties . . . where the stated sum is a reasonable estimate of probable damages . . ."). In order to determine if the stipulated sum to be paid is an unenforceable penalty or enforceable liquidated damages, the law looks at the loss that the parties might reasonably have anticipated at the time the contract was made, rather than actual damages. Banta, 92 A. at 666 (holding that ". . . the law does not compare that sum with the loss the plaintiff actually suffered, but instead with the loss that the parties might reasonably have anticipated at the time the contract was made . . . .").

In Banta, the court awarded liquidated damages of $15 per day to Banta, for loss of pleasure, for each day that a boat builder was delinquent in delivering to him a commissioned boat. Banta contracted Stamford Motor Co. to build him a yacht for which he would pay in installments as the construction progressed. Stamford was aware of Banta's specific plan to use the yacht for a personal cruise of the Chesapeake Bay during the months of October and November, and for a later pleasure trip in Florida waters. The parties agreed that if the yacht was not completed by the stipulated September delivery date, Stamford would be liable to Banta for liquidated damages of $15 per day of delay. The Court determined that although Banta's loss of pleasure was difficult to calculate, the parties had beforehand agreed to an amount that would compensate Banta for his loss, and no fact indicated that this amount of $15 per day was disproportionate to that presumable loss. Id. at 666.

Unlike in Banta where the liquidated damages of $15 per day reasonably reflected Banta's expected loss (presumably for the purpose of renting a replacement yacht), the liquidated damages in the contract between BCA and Corvo do not reflect a reasonable presumable loss. BCA researched venues in comparably sized cities and found that their daily net profit averaged $1,500. Although BCA's estimate of $2,000 per day is a comparable amount since the $2,000 is a gross amount that represents profit before mortgages and salaries have been paid, BCA based its presumable loss on event schedules considerably more ambitious than its own. BCA's presumable loss estimate was based on the other venues' schedules of 12 to 15 events per month, which were greatly disproportionate to BCA's schedule of only one event in the Nutmeg Dome for the first month, during which time the breach occurred. This court in Norwalk Door Closer Co. v. Eagle Lock and Screw Co., 220 A.2d 263 (Conn. 1966), cited 5 Corbin, Contracts § 1063 when it quoted: "The probable injury that the parties had reason to foresee is a fact that largely determines the question whether they made a genuine pre-estimate of that injury; but the justice and equity of enforcement depend also upon the amount of injury that has actually occurred." Norwalk, 220 A.2d at 268.

Corvo agreed to what appeared to be a reasonable estimate of presumable loss, based on the information that BCA provided to them. However, Corvo would not have agreed to such an estimate if they knew that BCA planned far fewer events than the other venue's to whom BCA compared itself for the sake of stipulating liquidated damages. It was reasonable for Corvo to believe that at the time the contract was made BCA had planned an event schedule for the year, if only a preliminary schedule. Furthermore, it would not have shown good business sense on the part of BCA to plan

a limited schedule in anticipation of a delay in the venue's delivery date. Therefore, since BCA's event schedule was greatly disproportionate to those that it compared its own in order to stipulate reasonable liquidated damages, BCA's presumable profit loss was also greatly disproportionate. For this reason, the liquidated damages clause is invalid.

II. THE PLAINTIFF–APPELLEE'S *MOTION FOR SUMMARY JUDGMENT* WAS PROPERLY GRANTED BY THE TRIAL COURT BECAUSE THE CONTRACT'S LIQUIDATED DAMAGES CLAUSE WAS INVALID SINCE IT WAS DISPROPORTIONATE TO ACTUAL DAMAGES.

A. BCA can prove actual damages of only $22,000 for lost ticket sales, which is greatly disproportionate to the $52,000 amount sought for liquidated damages.

Just as the liquidated damages in the contract between BCA and Corvo are not proportionate to presumable loss, the stipulated liquidated damages are not reasonably proportionate to actual damages. Consequently, BCA is not entitled to liquidated damages based upon their actual damages. This court in Vines stated that: ". . . [T]he principal purpose of remedies for the breach of contract is to provide compensation for loss; and therefore, a party injured by breach of contract is entitled to retain nothing in excess of that sum which compensates him for the loss of his bargain." Furthermore, the court stated that it ". . . adhere[d] to the rule that **only** compensatory damages [were] to be awarded." Vines, 435 A.2d at 1026.

In Vines, the buyers, Mr. and Mrs. Vines, agreed to purchase a condominium unit from the seller, Orchard Hills, Inc. The contract stipulated a sales price of $78,800 and a down payment of $7,880. However, the contract did not include a liquidated damages

clause. Because of a work-related relocation the Vines breached the contract, and therefore, the seller retained the deposit as liquidated damages. The Vines sued Orchard Hills for the return of the deposit, stating that it was not, in fact, liquidated damages but merely a down payment on the purchase price of the condominium unit. During the time before the litigation, the seller sold the condominium unit for $160,000. The court refused to award damages to the seller, since the liquidated damages were in excess of the seller's actual damages. Similarly, BCA's liquidated damages claim of $52,000 is in excess of that sum which compensates it for its loss – $22,000 from lost ticket sales. Id. at 1025.

Furthermore, this Court in Sides looked at actual damages and so stated that "[p]rovisions for fixed per diem payments for delay in the performance of a contract are usually construed as stipulations for liquidated damages, and not as penalties . . . where the stated sum is a reasonable estimate of probable damages **or** is reasonably proportionate to actual damages." Sides, 581 S.W.2d at 443. See also Vines, 435 A.2d at 1022 (holding that ". . . it is not unreasonable to presume that a liquidated damages clause appropriately limit in amount bears a reasonable relationship to the actual damage suffered . . .") In Sides, the parties to the contract agreed to a liquidated damages amount of $50 per day for each day of delay, which was intended to compensate the city and the public "for loss to the Owner and the public due to the obstruction of traffic, interference with use of existing or new facilities, and increased cost of engineering, administration, supervision, inspection, etc. . . ." Sides, 581 S.W.2d at 444. The court found the liquidated damages clause to be enforceable, in

part, because Sides Construction Co. showed that its actual damages were reasonably proportionate to the stipulated liquidated damages.

Since BCA cannot prove either element of the rule from Sides, that liquidated damages were reasonably proportionate to presumable loss **or** reasonably proportionate to actual damages, BCA will be limited to recovering actual damages that they can prove. See also Hungerford Construction Co. v. Florida Citrus Exposition, Inc., 410 F.2d 1229 (5th Cir. 1969) (holding that ". . . when they [the parties] go beyond this, and . . . stipulate . . . a sum entirely disproportionate to the measure of liability which the law regards as compensatory, the courts will refuse to give effect to the stipulation and will confine the parties to such actual damages as may be pleaded and proved.").

B. Loss of reputation is not recoverable as liquidated damages because it is a speculative secondary use.

Whereas BCA's claim for lost ticket sales is recoverable as an actual damage loss of reputation is not recoverable. Where loss of secondary use is speculative, the court will not award liquidated damages. Hungerford, 410 F.2d at 1229 (holding that "[. . . this liquidated damages clause is an unenforceable penalty clause if used] as a basis for damages for loss of secondary use . . . ."). In Hungerford, the Florida Citrus Exposition, Inc. intended to use its facility primarily as a year-round office and for a citrus festival during February and March. Additionally, they hoped to rent the building secondarily for exhibitions and public tours of the building. However, because of a roof leak, several ceiling tiles were discolored, rendering the building unsuitable for the secondary uses the building owner intended. Consequently, the owner sought

liquidated damages for loss of secondary use of the facility. The Court denied the award of liquidated damages, stating that the evidence as to loss of secondary use was entirely speculative, as an auto show may have been lost, but there was no evidence to show the amount of rent that would have been derived. The Court further noted that there was no evidence that a significant number of people actually would have wanted to tour the building. Id. at 1230.

Similarly, BCA has no evidence to show that entertainment agents or the public were adversely affected during the time of the breach and by the breach. See Vines, 435 A.2d at 1029 (holding that "[t]he relevant time at which to measure the . . . damages is the time of breach."). Although the band AlSteCorp publicly criticized the Nutmeg Dome, complaining that they had to actually perform without the assistance of special effects, their criticism would be moot to many bands who need rely **only** on their performance. Moreover, as musical artists they represent only a fraction of the bookings into the Nutmeg Dome. Nonetheless, the problems about which AlSteCorp indirectly complained – the inadequate electrical and ventilation systems – were fixed just two days after their show.

BCA's claimed loss of reputation is unlike loss of pleasure in Banta. BCA intended to use the Nutmeg Dome primarily for concerts, such as the AlSteCorp show, sporting events, conventions, and community activities, and only secondarily for the company's administrative offices. Obviously, the primary purpose of the Nutmeg Dome is for profit, not reputation, whereas, the primary use of the boat for Banta was pleasure. Because BCA's loss of reputation claim represents a secondary use, and Banta's loss

of pleasure claim represented a primary use, Banta does not support BCA on this issue. See Banta, 92 A. at 667.

Furthermore, BCA could have booked a replacement event, which did not require the **exceptional** use of the Nutmeg Dome's electrical and ventilation systems, for the night of the AlSteCorp concert, or postponed the concert two days so that the repairs to the systems could be made.

Because BCA's claim for loss of reputation is speculative and constitutes a secondary use, BCA should not be entitled to recover liquidated damages based upon this claim.

III. THE PLAINTIFF–APPELLEE'S *MOTION FOR SUMMARY JUDGMENT* WAS PROPERLY GRANTED BY THE TRIAL COURT BECAUSE THE CONTRACT'S LIQUIDATED DAMAGES CLAUSE WAS INVALID SINCE ACTUAL DAMAGES SUFFERED AS A RESULT OF THE BREACH OF CONTRACT WOULD NOT HAVE BEEN DIFFICULT TO ASCERTAIN.

Actual damages suffered by BCA as a result of Corvo's breach of contract would not have been difficult to ascertain, because BCA would be able to employ one of, at least, two methods of determining damages. This court in Norwalk cited comment (e) of the Restatement, 1 Contracts § 339, when it quoted that "**. . .** [i]f the parties honestly but mistakingly suppose that a breach will cause harm that will be incapable or very difficult of accurate estimation, when in fact the breach causes no harm at all or none that is incapable of accurate estimation without difficulty, their advance agreement fixing the amount to be paid as damages for breach **. . .** is not enforceable." Norwalk, 220 A.2d at 263.

To determine actual damages resulting from a breach of contract, BCA could have easily calculated the total event profit by multiplying number of tickets available by the ticket price. Beforehand, the parties could have agreed to a percentage of the event total that would be paid as liquidated damages, or simply have assumed, for the sake of stipulation, that the event would have sold out. Using a different method, BCA could have determined an average event profit based on the event's profit history. For example, BCA could have looked at the ticket sales history of AlSteCorp to determine a percentage of tickets sold, at the same general price. A total profit loss could have been determined, using one of the above-stated methods, for each event that had to be canceled as a result of the breach. Since the parties, without difficulty, could have ascertained actual damages by employing a common-sense approach to calculating profit loss, the liquidated damages clause is invalid.

CONCLUSION

For all of the foregoing reasons, the Supreme Court should affirm the trial court's decision to grant Plantiff-Appellee's *Motion for Summary Judgment*.

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