

OFFICE MEMORANDUM

TO: Valerie Bateman, Esq.

FROM: Tyme

DATE: April 13, 1995

RE: Bridgeport Cultural Authority, Contract Dispute

ISSUE

Will Bridgeport Cultural Authority ("BCA") be able to recover from Corvo Construction Company ("Corvo") liquidated damages of \$52,000 for breach of contract in constructing the Nutmeg Dome, or will recovery be limited to a lesser amount?

BRIEF ANSWER

The Court is likely to award BCA only actual damages of \$22,000, since the accrued liquidated damages amount of \$52,000 is disproportionate to presumable loss, and disproportionate to actual damages. Consequently, the liquidated damages would serve as a penalty rather than a means to put BCA in the place where they would have been before the breach. Furthermore, the Court is not likely to consider BCA's damages claim for loss of reputation because this claim is highly speculative and may be considered a secondary use.

FACTS

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 ("AISteCorp"), the band scheduled to perform on July 25. (This was the first scheduled event in the Nutmeg Dome.) Throughout July, local media reported that AISteCorp may not be able to use their specialized effects at this concert. This show was AISteCorp'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. AISteCorp performed the show 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."

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

DISCUSSION

Introduction

In this matter, the breach of contract is not in dispute, as Corvo admits that the electrical and ventilation systems in the Nutmeg Dome were not installed according to the specifications set out in paragraphs 23 and 28 of the contract, and as a result, the inadequate systems would not safely support AISteCorp's fog and laser effects. While the deficient electrical and ventilation systems inhibited the exceptional use of the systems, they did not inhibit the safe use of the systems under normal conditions, as was evident by the AISteCorp concert that took place without the special effects. Consequently, the only loss to BCA was that of unsold tickets, as a result of the scaled-back show, and possible loss of reputation to the Nutmeg Dome.

Liquidated Damages as a Penalty

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 delayed in delivering to him a commissioned boat. Banta contracted with 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 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. Banta, 92 A. at 665.

Unlike in Banta where the liquidated damages of \$15 per day reasonably reflected Banta's expected or presumable loss, 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. Therefore, 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. However, BCA's presumable loss estimate was based upon an average schedule, from other venues, of 12 to 15 events per month, which is disproportionate to BCA's schedule of only one event in the Nutmeg Dome for the first month. Given BCA's booking schedule the stipulated liquidated damages in the contract are an unreasonable reflection of BCA's presumable loss, and consequently, constitute a penalty.

Actual Damages

Just as the stipulated 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 will not be awarded liquidated damages based upon their actual damages. In Sides, the Court 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. 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. . . ." Id. at 444. Furthermore, the Court stated that ". . . [a]lthough we doubt . . . that any proof of actual damages were necessary to bring the liquidated damages provision to life, the defendant has shown damage by the necessity of having to hire additional engineering personnel to inspect the project; by being inconvenienced by the regrading of the parking lot; and, by the loss of interest on its capital investment during the delay period in question." Id.

The liquidated damages clause in the contract between BCA and Corvo does not meet the first condition of the Sides rule, as it is not a reasonable estimate of probable damages, nor does it meet the second condition of being reasonably proportionate to actual damages. BCA can claim only actual damages of \$22,000 for unsold tickets, assuming it can show that the Bridgeport AISteCorp concert would have sold out as had AISteCorp's eight previous concerts, had the local media not reported that the band would be unable to use their special effects. However, BCA will claim damages for loss of reputation. However, since BCA cannot prove either condition of the rule from Sides, 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.").

Loss of Reputation

In considering the liquidated damages clause, the Court likely will not award BCA liquidated damages for loss of reputation, as this claim is speculative. Where evidence of loss of secondary use is speculative, the court will not award liquidated damages. Hungerford, 410 F.2d at 1229. In Hungerford, the plaintiff sought liquidated damages for possible loss of business because of defective construction. Because of a roof leak, several ceiling tiles were discolored. The plaintiff claimed that because of this defective construction a prospective auto show may have been lost as well as potential profit from an admission price for public tours of the building. The Court found that the evidence of such loss was entirely speculative, since there was no evidence to the amount of rent that the auto show might have generated. Regarding the public tours, the Court noted that there was no evidence to show that a significant number of people would actually have wanted to tour the building. Id. at 1230.

While BCA makes no claim for loss of secondary use, such as office space, the Court might apply the rule from Hungerford to the extent that it addresses speculative damages. In addition, Corvo might contend that loss of reputation is a secondary use, and as a result, BCA's claim for loss of reputation would be denied as a matter of law because of its speculative nature. See Id. at 1231. And, similar to Hungerford, in the BCA matter, there is no evidence to support the

claim that event participants or entertainment industry agents have been or will be adversely influenced by the negative remarks made by AISteCorp.

Albeit, proving loss of reputation will be difficult, if not impossible, counsel may refer to the primary authority of Banta where the Court awarded liquidated damages to Banta for loss of pleasure, considering the loss of pleasure to be an actual damage, although difficult to ascertain. See Banta, 92 A. at 667. Moreover, BCA may be required to prove that loss of reputation occurred during the breach period in order to pursue damages. See Hungerford, 410. F.2d at 1230. Even though the law in Banta is primary authority, the Court is not likely to be persuaded by BCA's argument that the cases are similar enough to apply the law from Banta because profit was the main purpose of the Nutmeg Dome, whereas pleasure was the main purpose of the boat for Banta.

Primary Use

BCA seeks liquidated damages from Corvo for loss of primary use of the Nutmeg Dome. The Court will not enforce a liquidated damages clause where the liquidated damages sought are for a speculative loss of secondary use of a facility. 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. Likewise, the Court noted that there was no evidence that a significant number of people actually would have wanted to tour the building. Id. at 1230.

Unlike the building owner in Hungerford, BCA seeks liquidated damages from Corvo for loss of primary use of the Nutmeg Dome and makes no claim for loss of secondary use. BCA intends to use the Nutmeg Dome primarily for concerts, such as the AISteCorp show, sporting events, conventions, and community activities, and secondarily for the company's administrative offices.

Corvo might argue that loss of reputation is a secondary use and therefore not recoverable as liquidated damages because of its speculative nature. To this, BCA would claim that loss of reputation represents a primary use in this matter just as loss of pleasure was a primary use in Banta and recoverable as liquidated damages as a matter of law. See Banta, 92 A. at 666.

CONCLUSION

Due to Corvo's breach of contract, BCA likely will recover only actual damages of \$22,000 for unsold tickets to the AISteCorp concert, along with any other actual damages that they can prove resulted from the breach and that occurred during the breach period. The damage award will be limited to actual damages since the stipulated liquidated damages are disproportionate to presumable loss. Although the liquidated damages gross amount of \$2,000 per day was comparable to other venue's estimated daily net profit of \$1,500, the estimated monthly event schedules were not comparable. Because BCA's event schedule was less ambitious than those of the other venues, the profit comparisons are misleading and therefore do not reflect a reasonable presumable loss.

Likewise, the stipulated liquidated damages are disproportionate to the actual damages suffered by BCA because of Corvo's breach of the contract. BCA can show only actual damages of \$22,000 for lost ticket sales from the AISteCorp concert. While loss of reputation to the Nutmeg Dome is a legitimate concern for BCA, the Court likely will not consider this claim for damages, as it is highly speculative and possibly considered a secondary use.

Written for Legal Writing class at University Of North Carolina At Chapel Hill, 1995.

(If you steal this, at least email me and tell me what grade you received...it better be an A+!)