

Music Promoter Hears Sour Note When Pursuing Lost Profits' Claim

by

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A music promoter can recover consequential damages but not additional lost profits in a lawsuit against its contractor when a metal concert stage and roof failed to perform. The case is *Catropa v. Metal Building Supply, Inc.*, 2008 WL 4705605 (Mo. App. S.D.), decided October 28.

Metal Building, a manufacturer of metal building components, agreed with Backyard Concerts, a music promoter of 35 years, to the construction of a metal stage and corrugated metal roof over it.

Metal Building subcontracted with Wolf Construction to build the stage. Metal Building supplied the building materials. The total cost was about \$12,000.

Before approaching Backyard Concerts about building the stage, Backyard Concerts had scheduled a concert with heavy-metal bands Skid Row and Slowvein. The music promoter informed Metal Building that the stage had to be completed before the concert, which did in fact happen. However, the ridges on the stage's roof ran horizontally instead of vertically as specified.

Of course, it rained on concert day. The water built up in the ridges and began leaking through the seams onto the stage. This shorted out the bands' electrical equipment. Both bands would not perform and Backyard Concerts had to cancel the concert.

Backyard Concerts' problems continued. Metal Building acknowledged that the stage was built improperly. It placed a second corrugated metal roof over the original with the ridges this time running vertically.

Metal Building did not, however, connect the two roofs, thereby causing the new one to be lifted up and off in high winds. Backyard Concerts claimed this to be a design defect in that the purlins—to which the roof was attached—ran vertically instead of horizontally to the roof's pitch.

Backyard Concerts sued Metal Building for breach of contract seeking \$181,380 in total damages. This included \$36,380 for lost profits from the rained-out concert and \$10,000 for costs to repair the stage.

Backyard Concerts also sought consequential damages, future lost profits and a refund of the \$12,000 initially spent for the stage given its present, unusable condition. These costs included \$6,000 for the Skid Row band, \$700 for the Slowvein band, advertising in the Joplin newspaper of \$1,300, ticket printing for \$900, Johnny on the Spots for \$300, ice for \$300, and BBQ for cooked meat and buns for \$2,000. There were other costs as well.

For labor, Backyard Concerts asked for compensation of \$1,800 for security, plus additional money for cooks, bartenders, ticket takers, stage loaders, cancellation explainer and JT Huff Sound for a total of \$18,820.

Then there were projected sales for advanced tickets and door tickets and liquor and food sales for an additional amount of \$18,000. In total, Backyard Concerts asked for an additional \$36,380 for projected sales minus cost and some repairs.

From all this, the trial court awarded \$26,620 plus court costs as total damages.

The appellate court stated that Backyard Concerts in its breach of contract lawsuit can pursue three types of damages: actual, consequential and benefit-of-the-bargain. Also, these three damages are not necessarily inconsistent with each other. The plaintiff, however—in this case Backyard Concerts—cannot recover more than one hundred percent for its damages.

Actual damages are compensatory and involve the loss or injury sustained. Consequential damages are those damages naturally and proximately caused by the commission of the breach and those damages that reasonably could have been contemplated by the defendant at the time of the agreement. Benefit-of-the-bargain damages—also known as lost profits damages—are the net profits a plaintiff would have realized had the contract not been breached.

Regarding lost profits, the Southern District noted that the parties focused in their appellate arguments in one case “extensively” and in the other case “exclusively” on entitlement to lost profits. Lost profit damages must be shown with “reasonable certainty” and cannot be based on speculation.

Lost profits damages can be based on an estimate of lost revenue minus overhead expenses. Lost profits may be imprecise as long as they are based on established facts and reasonable extrapolations from those facts.

In this case, while Backyard Concerts sufficiently showed lost liquor sales of \$12,000, it could not support the costs for the liquor. There were other examples of losses where the costs were not shown. Thus, Backyard Concerts could not show in total more than \$18,680 in lost profits and since this was less than the consequential damages of \$19,120, the appellate court decided that Backyard Concerts was not entitled to any damages for lost profits.

As for actual damages of \$12,000, the court described them to be the reasonable cost of building the roof to the actual specifications. The court concluded that the testimony of \$12,000 paid for the stage and roof, alleged to be “useless,” was not sufficient to establish the “reasonable cost of conforming the stage roof to the contract specifications.” Backyard Concerts received nothing for this.

As for consequential damages of \$19,120 for cancelled band concerts, advertising costs, and other items, Backyard Concerts testified that Metal Building knew the concert was to go forward “rain or shine.” Thus, the losses were foreseeable and Backyard Concerts could recover for them.

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