With Business Contracts, Lost Profits (Not Lost Revenues) are the Proper Measure of Damages

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In late June, the District Court of Appeal of Florida, Fourth District, reiterated that in a breach of contract case, lost revenue alone is typically an improper measure of damages. In *HCA Health Services of Florida, Inc. v. CyberKnife Center of the Treasure Coast, LLC*, 2016 WL 3540956 (Fla. 4th DCA, June 29, 2016), CyberKnife entered into a contract with a hospital. Under the contract, CyberKnife was to provide equipment and the site to the hospital for radiosurgery treatments to patients for five years. The hospital agreed to pay CyberKnife $5,150 plus sales tax "per click" for each treatment.[2] The contract also provided that "in no event shall either party be entitled to consequential or punitive damages."

The contract term began in March 2007. In January 2008, the hospital terminated the contract because federal regulations implementing the Stark law would be making "pay-per-click" agreements illegal beginning October 1, 2009. Litigation ensued. At trial, CyberKnife's damages expert, relying upon volume projections and treatment estimates, opined that CyberKnife lost $1,842,392 in revenue from January 25, 2008 (the termination date) through October 1, 2009 (the effective date of the Stark law regulations). The trial court ultimately entered judgment on CyberKnife's breach of contract claim in favor of CyberKnife in the amount of $1,842,392.

On appeal, the hospital argued that the consequential damages waiver in the contract barred the damages CyberKnife sought and that CyberKnife failed to submit any proof on the proper measure of damages, which was lost profits and not lost revenues. The Fourth DCA disagreed with the hospital concerning the consequential damages waiver holding that CyberKnife's damages were general damages rather than consequential damages. This is because, contrary to popular belief, lost profits do not *always* constitute consequential damages. Lost profits are recoverable as general damages when they flow directly and immediately from the breach of contract. *Bird Lakes Dev. Corp. v. Meruelo*, 626 So. 2d 234, 238 (Fla. 3d DCA 1993). When the claimant seeks only to recover lost profits from the amount that the breaching party agreed to pay under the contract, i.e., the claimant seeks to recover the total value of the breaching party's promised payments less the cost of performance, the damages sought are general damages. *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 109 (2d Cir. 2007). Consequential damages do not arise within the scope of the immediate transaction "but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting." *Hardwick Props., Inc. v. Newbern*, 711 So. 2d 35, 40 (Fla. 1st DCA 1998). Because the *CyberKnife* parties' contract required the hospital to pay-per-click each time the equipment was used, CyberKnife's lost profits would have constituted general damages that flowed directly from the immediate transaction and, therefore, the consequential damages waiver did not bar CyberKnife's claim.

But CyberKnife made a fatal mistake. At trial, CyberKnife did not provide evidence of lost profits. CyberKnife provided only evidence of lost revenues. It always baffles me when I receive a demand from opposing counsel in a breach of contract case, where the other side was not required to perform and, as a result, did not incur the foreseeable expenses of performance; yet, the demand is for the full amount due under the contract. The

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[2] Pay-per-click agreements use an Internet advertising model to direct traffic to websites, in which an advertiser pays a website owner when the advertisement is clicked.

question becomes, "Did you incur the labor and materials cost that you would have incurred if you had performed the contract?" The answer should be "no." Then, do you think you will be entitled to recoup those costs at trial? The answer should be, again and of course, "no." Yet, apparently, such a demand occurred in *CyberKnife*, CyberKnife sought damages in the amount of projected revenues, without deducting projected expenses, and CyberKnife paid dearly as a result.

Despite the trial court finding that the hospital was liable for wrongful termination during the period between termination and the date pay-per-click agreements actually became illegal, CyberKnife will go home empty handed because it failed to properly prove its damages. When a party terminates a contract, preventing performance by the non-breaching party, the non-breaching party may choose between reliance damages or lost profits. *Del Monte Fresh Produce Co. v. Net Results, Inc.*, 77 So. 3d 667, 673 (Fla. 3d DCA 2011). Reliance damages are the costs and expenses of preparing to perform and are, essentially, the amount which will put the party back in the position it occupied before entering into the contract. *Id.* Lost profits damages are the benefit of the bargain or expectation interest of the non-breaching party and require specific proof of income less expenses. *Id.* at 674 n. 11; *Robert A. Huggins General Contractor, Inc. v. Willoughby*, 595 So. 2d 1003 (Fla. 5th DCA 1992). To compute lost profits damages properly, a plaintiff must deduct costs, which would have been incurred in performing the contractual services from contract revenue, including an appropriate allocation of overhead and personnel expenses.[3] *Del Monte Fresh Produce*, 77 So. 3d at 674. Evidence of loss of income or gross receipts, without specific evidence of the expenses, is not enough.[4] *E.T. Legg & Assoc., Ltd. v. Shamrock Auto Rentals, Inc.*, 386 So. 2d 1273, 1274 (Fla. 3d DCA 1980). This should be common sense to any business owner. You don't pocket gross revenues before paying expenses. Yet, CyberKnife failed to present any evidence of the expenses it would have incurred, had it performed, and failed to deduct those costs from lost revenues. CyberKnife only presented evidence of lost revenues, which alone is inadequate to prove lost profits. Perhaps CyberKnife was attempting to put the biggest possible damages figure up there before the trial court, in an effort to bolster the amount of its judgment. If that was the strategy, it worked at the trial level but backfired on appeal.

On appeal, CyberKnife argued that lost revenue was the proper way to measure damages because it constituted "unpaid rent under a lease agreement." Under landlord-tenant law, a landlord's damages are generally measured as the difference between stipulated rent and what the landlord is able to recover from reletting. *Kanter v. Safran*, 99 So. 2d 706, 707 (Fla. 1958). The *CyberKnife* court concluded that this measure of damages was not applicable to the case because, although the contract had some characteristics of a lease, the contract primarily involved the provision of services; the contract was not referred to as a "lease;" and payments were not referred to as "rent." Additionally, there was no stipulated rent, as there would be under a lease, because payments were conditioned upon anticipated treatments with third-party patients. As a result, the *CyberKnife* court concluded the proper measure of expectation damages was lost profits, not lost rent or lost revenue. Because CyberKnife failed to submit proof of lost profits at trial, it will collect nothing from the hospital even though the hospital terminated the contract almost two years before it actually could have under the contract.

This case illustrates that extreme care should be taken when determining the method of calculating damages in a business case. Throwing up the biggest number imaginable without first considering well-settled and more reasonable methods of damage calculation is clearly, not the best approach. As the plaintiff in *CyberKnife* found out, such tactics can have dire consequences or, as one of my mentors, Davisson Dunlap, Sr., used to say, "Pigs get fat. Hogs get slaughtered."

[3] A reasonable basis must exist for calculation of lost profits and there are various methods of proving lost profit damages, including the "before and after" theory, the "yardstick" test, contract sets forth specific profit margin and use of profit margins reported on tax returns.

[4] However, when a claimant can establish there would have been no additional expenses necessary to fully perform the contract, the entire contract price may be recovered. *Knight Energy Services, Inc. v. C.R. Int'l Enter., Inc.*, 616 So. 2d 1079 (Fla. 4th DCA 1993). Apparently, that was not the case here.

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