

In Nevada, when a contract has a liquidated damages provision, does the non-breaching party have a duty to mitigate damages?

While it does not appear that Nevada has addressed this issue, other jurisdictions have held that a person seeking to enforce a provision for liquidated damages¹ is not required to show that he attempted to mitigate his damages.

In general, a person seeking to enforce a provision for liquidated damages is not required to show that he attempted to mitigate his damages.² Courts have reasoned that liquidated damages differ fundamentally from mitigation of damages. Mitigation is part of a court's determination of actual damages that have resulted from a breach of contract, while liquidated damages clauses are the remedy the parties have determined to be proper in the event of breach. Accordingly, when parties to a contract stipulate damages in the event of breach that is a reasonable sum, that sum replaces any determination of actual loss.³ The 7th Circuit noted the distinction between liquidated damages and the duty to mitigate by stating:

“[M]itigation of damages is a doctrine of the law of court assessed damages, while the point of a liquidated-damages clause is to substitute party assessment; and that point is blunted, and the certainty that liquidated-damages clauses are designed to give the process of assessing damages impaired, if a defendant can force the plaintiff to take less than the damages specified in the clause, on the ground that the plaintiff could have avoided some of them.”⁴

It should be noted that mitigation might still play a role in determining whether a liquidated damages provision will be enforced. While Nevada courts have held that liquidated damages provisions are generally prima facie valid, the breaching party may challenge the enforceability of the provision.⁵ To prove that the provision is unenforceable, the breaching party must establish that the provision amounts to a penalty.⁶ And, in order to prove that such a provision constitutes a penalty, the challenging party must persuade the court that the liquidated damages are disproportionate to the actual damages sustained by the injured party.⁷ Accordingly, the ability to mitigate may be looked at when determining the actual damages.

An over view of the law of Public Contracts and the law of liquidated damages.

However, the general rule as stated above, is not necessarily applicable when it comes to public contracts. Little law exists in Nevada interpreting liquidated damages provisions in a construction

¹ “Liquidated damages are the sum which a party to a contract agrees to pay if he fails to perform, and which, having been arrived at by a good faith effort to estimate the actual damages that will probably ensue from a breach, is recoverable as agreed-upon damages should a breach occur.” *Joseph F. Sanson Investment v. 268 Limited*, 106 Nev. 429, 435 (1990).

² *Ramseth v. City Agency, Inc.*, 118 N.W.2d 219 (Minn. 1962); *Lake Ridge Academy v. Carney*, 613 N.E.2d 183 (Ohio 1993); *Circuit City v. Rockville Pike*, 829 A.2d 976 (Md. 2003)

³ The reasonableness of the amount of liquidated damages is important as if the provision appears to be a penalty it will be unenforceable.

⁴ *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1291 (7th Cir. 1985)(The court found that the contractual clause at issue was invalid as a penalty.)

⁵ *Mason v. Fakhimi*, 109 Nev. 1153 (1993).

⁶ *Id.* citing *Haromy v. Sawyer*, 98 Nev. 544, 546 (1982).

⁷ *Haromy v. Sawyer*, 98 Nev. at 547.

context. However, one important case has recognized that a nexus between a party's contractual liquidated damages and its actual damages is not required where the liquidated damages provision "plain[ly] and unambiguous[ly]...manifests an intent that liquidated damages compensate only for delay in performance". *Spinella v. B-Neva, Inc.* 94 Nev. 373,376, 580 P. 2d 945,947 (1978). The contract at issue in *Spinalla* contained two important provisions that are important in the world of construction law. First, the liquidated damages were to be assessed on a *per diem* basis. Second, the provision made sure to stat that *time was of the essence*. *Id.* at 375, P. 2d at 946. These factors distinguish *Spinella* from the real estate cases which form the matrix for the vast majority of liquidated damage cases.