

The case of the concert that went on...and on...and on

IMAGINE YOU'RE INVOLVED in the world premiere performance of an oratorio at Lincoln Center's Avery Fisher Hall. The piece is extremely complex and involves multiple performing groups in addition to a full symphony orchestra and vocalists. Only three rehearsals ever took place, which are too few for this very complicated piece of music. The composer timed the total performance time at two hours and five minutes, but during the performance it becomes clear that this timing is totally inaccurate and the oratorio cannot be performed to completion within the allotted time frame. The third act of the performance is about to begin and it is clear that the producer, who is also the composer, has no money to pay overtime rates required by the union contract. What on earth do you do?

Well, the Brooklyn Philharmonic Orchestra's solution to this dilemma is the subject of litigation in the Supreme Court of Kings County that could likely result in a costly trial for both the orchestra and the producer.

Here's the story. In 2004, the Brooklyn Philharmonic performed a concert that included composer Nathan Currier's "Gaian Variations." As the piece started heading towards overtime, the Philharmonic suggested that the composer agree to cut a portion of the performance so that overtime would not result. While the composer did agree to cut three variations, the cut was not deep enough to prevent the occurrence of overtime. At the point that overtime would have commenced under the accepted interpretation of the collective bargaining agreement, the conductor, at the cue of the orchestra's personnel manager, ceased the performance, leaving four variations unplayed. The performance was the subject of a review by the New York Times in which the reviewer Alan Kozinn commented that he felt liberated by the early termination of the piece because "about half



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an hour earlier, during a disquisition on daisies, black clad dancers gyrated down the aisles and onto the stage, and I wondered if I had died during the afternoon and this was hell."

That was nine years ago. Why did this case take so long to be heard? The main reason is that Mr. Currier – the composer – waited almost five years to file his lawsuit. He claims that the termination of the performance was arbitrary, capricious and willful and that he was damaged because the audience was deprived of hearing the complete performance.

At the request of the Brooklyn Philharmonic's management two years ago, I took over the case. (I was substituted for the Philharmonic's prior counsel, who is primarily a bankruptcy specialist.) While this would normally present a conflict of interest for me – since I am also, of course, Local 802's counsel – I obtained proper conflict waivers from both Local 802 and the Philharmonic. Ultimately, in my view, defending the Philharmonic in this case is the same thing as defending the musicians, who are Local 802 members.

The Philharmonic was accused of breach of contract and bad faith conduct. My first strategy was to seek dismissal of the suit because, among other things, Mr. Currier had not proven any damages he had sustained due to the termination of the concert. Also, he had received the full allotted time that he had contracted for the use of the Philharmonic. Finally, the Philharmonic's conduct was not in bad faith.

On May 6, Kings County Supreme Court Justice David Schmidt partially denied my motion, holding that there were issues of fact concerning the possible breach of the contractual agreement between Mr. Currier and the BPO. See *Currier v. Brooklyn Philharmonic Orchestra, Inc.*, 39 Misc. 3d 1223(A). (The decision is online, if interested readers care to Google it.)

Now that the case may eventually go to trial, Mr. Currier will have to prove that there were actually damages that he suffered. But what could those damages be?

At his deposition, Mr. Currier failed to articulate any economic loss he had sustained due to the Philharmonic's failure to perform the entire piece.

Mr. Currier claims that he himself was damaged. What does this mean? It's a very interesting question from a metaphysical point of view. However, in my view, it is hard to fathom how Mr. Currier

was personally damaged in this respect. How would such damages be quantified?

Furthermore, the review he received from the New York Times was far from flattering and it cannot be proven by any legal means that it would have been more favorable had the complete piece been heard. At least it seems arguable that the review could have been worse!

Assuming the case doesn't settle, we will have to wait for a jury – and maybe the judge, too – to answer these epistemological queries.

In any event, I will appeal this decision to not dismiss the case, so next the Appellate Division will weigh in on this issue.

The court did note that the Philharmonic had acted in good faith, rather than having "malicious intent," and therefore dismissed Mr. Currier's second claim. The court held in this regard that "there is no evidence in the record that would show that BPO had terminated the concert in bad faith as a scheme to deprive Currier of the benefit of a full performance...Indeed the record shows that BPO was seeking to protect Currier from incurring overtime costs he represented he could not afford to pay."

This holding once again proves valid the old adage that the road to hell is paved with good intentions.

I'll keep readers posted about this lawsuit, as it develops.



The Brooklyn Philharmonic (pictured above at an outdoor concert last year) is being sued by composer Nathan Currier over its alleged failure to finish a 2004 performance of the composer's piece "Gaian Variations" at Lincoln Center.

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