



Bulletin

Liability of a Prime Contractor for Interference with a Subcontractor

NOTE: The court decision discussed below focuses on a serious problem which subcontractors encounter from time-to-time—a prime contractor's interference with the ability of a subcontractor to perform his work.

Typically, when a subcontractor is in a contract relationship with a prime contractor, there are certain activities that the prime contractor can do because of the terms of the contract. However, that does not mean the prime contractor can interfere with the subcontractor. Some courts have held that the prime contractor cannot reasonably hinder another party's performance, the prime contractor has an implied good faith and fair dealings, and in the future, could collect tort damages from breach of contract action.

In *H.H. Robertson Company, Cupples Products Division v. V.S. DiCarlo General Contractors, Inc.*, the Eighth Circuit Court of Appeals upheld a jury verdict in which DiCarlo, the prime contractor, was held to have breached its subcontract with Cupples by interfering with Cupples' ability to perform its work in a timely manner and in a logical sequence.

DiCarlo was the prime contractor for construction of a high-rise office building in Kansas City, Missouri, and

was responsible for the construction of the concrete skeleton of the building. DiCarlo awarded Cupples the subcontract for the installation of glass curtain walls and strip windows.

The subcontract and its riders required Cupples to begin layout of the work on January 27, 1986, and to begin erecting curtain walls after DiCarlo had finished its work on five floors and had removed most of the from those floors. Cupples was required to substantially complete its work within 28 weeks with two key conditions to their contract obligations: 1. that at least three floors of precast work had to be ready within 30 days after Cupples began erecting the curtain wall, and 2. that DiCarlo had to make available to Cupples one additional floor every two weeks for curtain wall work.

The entire project was not completed on time. DiCarlo blamed Cupples for failure to enclose the building and render it watertight within the stated 28-week period, which DiCarlo calculated from the date Cupples began layout work. DiCarlo withheld Cupples' last progress payment and Cupples subsequently

sued for breach of contract, alleging that DiCarlo had delayed and disrupted the performance of its work. The jury awarded Cupples \$373,039.46 on its breach of contract claim and \$25,664.94 on its quantum merit claim and rejected DiCarlo's counterclaim.

In support of its breach of contract and quantum merit claims, Cupples presented evidence that: 1. it had performed work outside the scope of its contract; 2. it had to help another subcontractor fix layout lines to facilitate the proper installation of precast panels; 3. some of the concrete panels had been installed incorrectly; and, 4. as a result of DiCarlo's mismanagement of the project, these items hampered Cupples' efficiency and contributed to the delay in completing the project.

The Eighth Circuit Court of Appeals upheld the jury's verdict in favor of Cupples. The court found that DiCarlo had a duty not to unreasonably hinder another party's performance under the contract and that DiCarlo had breached this duty by failing to provide Cupples with timely access to the work areas and by failing to coordinate its own and other subcontractors' work in a manner which would have allowed Cupples to perform its work in its normal, logical sequence. DiCarlo essentially maintained that under the contract, Cupples was required to adjust its schedule to fit DiCarlo's. The court rejected that argument and upheld Cupples argument that a contractor has a duty not to unreasonably hinder its subcontractor's performance.¹

While the decision came down in favor of the subcontractor, please be aware

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that many general Contractors and owners often attempt to contractually protect themselves from these types of delay damages by inserting a "no damage for delay" clause into the contract. While some States have started to enact legislation holding that "no damages for delay" clauses are void and unenforceable, some states will enforce such clauses.

In *Scherer Construction v. Hedquist Construction*, the Supreme Court in Wyoming ruled in favor of a subcontractor stating that the contractor did not deal in "good faith and fair dealing." In this decision, the court held that in all construction contracts, there is an implied good faith and fair dealings. An implied provision is something not directly stated in a contract but is implied by the courts of arbitration panels to address equity and address fairness and avoid injustice. Note: many states do not recognize a separate cause of action for the breach of good faith and fair dealing and it must be combined with another cause of action under a breach of contract theory.

Scherer was a subcontractor who subcontracted with Hedquist, the general contractor, to provide special rubberized asphalt paving work for a street renovation project.

The subcontract stated that Hedquist could order extra work from Scherer or make changes by altering, adding to, or deducting from the work, and the price would be adjusted accordingly.

Before the project started, Hedquist approached the owner and requested to change the asphalt paving to concrete. The owner agreed and signed a change order. Because of this change, Scherer's contract was changed from approximately \$448,240 to a \$105,093 project, along with an unrecoverable equipment cost of \$35,000. Despite the

contract language, Scherer sued for breach of an implied covenant of good faith and fair dealing.

The court found that Hedquist's act of seeking a pavement material change to concrete from the owner while under contract with Scherer was a breach of implied covenant of good faith and fair dealings.

The court has recognized an implied duty of good faith and fair dealing in commercial construction contracts permitting a court to go beyond the "four corners" of the negotiated contract document in adjudging the parties' conduct for breach. In Wyoming, this will have a big impact on contracting parties and in other states, contracting parties will use this argument as persuasive authority.

Other examples of the implied covenant of good faith and fair dealings are: overbearing or excessive administration of a contract, coercive withholding of payments, failure to provide site access, retaliatory or overzealous inspections.

In another case, *Kishmarton v. William Bailey Construction, Inc.*, the supreme court in Ohio held that tort damages were available in a breach of contract action without a tort action. In *Kishmarton*, a home purchaser was awarded emotional distress damages in their breach of contract action against the builder.

Typically in construction cases, damages in tort (emotional distress damages are tort damages) are not awarded. However, in this minority decision, the court held that to continue to disallow emotional distress damages unfairly exposes innocent persons to harm.

This supreme court case is significant to the whole construction industry because it may "open the door" to other parties injured by a breach of contract. Therefore, in the future, this holding might evolve so that any party in the construction industry (including prime contractors) that contracted with another party have a potential claim for tort damages by bringing a breach of contract action. However, many courts have limited tort damages to matters involving personal injury or property damage and will deny recovery for purely economic loss in a breach of contract setting.

This bulletin is not intended to be legal advice. A person should seek local counsel for specific information regarding the information found in this bulletin.