

Possible Basis FOR Claim: Breach at Implied Duty Not to Hinder or Delay

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Owners and contractors realize that they must read the construction contract to determine their respective rights and obligations. But the express terms of the contract do not necessarily set forth the entire agreement. Courts have recognized that there are many implied obligations between contracting parties that are not included in the written words of the contract.

One obligation that exists in every contract is the implied duty to cooperate and not hinder performance. It is widely recognized that every contract includes an implied condition of cooperation; parties to a contract impliedly warrant not to hinder the other party's performance.

This duty is rooted in the well settled principle that every contract imposes upon each party a duty of good *faith* and fair dealing *in* its performance and *enforcement*. For example, Restatement (Second) of Contracts § 205 states:

“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”

In order to recover for breach of this implied duty, the contractor must prove that the owner's conduct during construction was unreasonable and the conduct caused actual delay. Whether an owner has breached its implied duty is determined by the reasonableness of the conduct under the circumstances. A contractor cannot recover if the owner's conduct is determined to be reasonable or justified.

Active Owner Interference

The duty can be breached by active owner interference. Courts have held owners liable for hindering or interfering with performance under many different factual scenarios. Examples include restricting the manner of performance; directing the contractor to perform in a specific way; taking action that damages the work site; removing the contractor's project manager; unjustifiably rejecting work; or overzealous inspection.

In *Lester N Johnson v. City of Spokane*, 22 Wash. App. 265, 588 P.2d 1214 (1970), for example, the owner admitted pumping raw sewage into the project site of a contractor hired to perform work on the owner's sewage system. The owner attempted to avoid liability by arguing that a contract

provision allowed the owner to perform work at or near the project site. The court rejected the owner's defense and ruled that the action of spewing raw sewage over the project site was not contemplated or provided for in the parties' agreement and therefore represented a breach of the warranty of cooperation.

Owner's Lack of Cooperation

The duty can also be breached by the owner's lack of cooperation. Examples include the owner failing to provide access to the project site; failing to respond to a contractor's request for information; delays in inspection; failing to timely review submittals; failing to process change orders in a timely manner; failing to help in formulating a solution to a construction problem; site availability; and failing to coordinate among other contractors on site.

Implied Duty Also Exists Between Generals and Subs

The implied duty to cooperate also exists between general contractors and subcontractors. In other words, in every contract between a contractor and subcontractor, the contractor impliedly promises not to do anything to prevent, hinder or interfere with the subcontractor in its performance.

In *United States ex rel. E & R Construction v. Guy H. James Construction Co.*, 390 F.Supp. 1193 (D.C. Tenn. 1972), for example, the court held that a subcontractor was entitled to damages as a result of a general contractor interfering with or hindering the subcontractor's performance. There, the subcontractor was required to stockpile impervious fill on the project at a designated location. After the subcontractor created two stockpiles but before the material was accepted or used, contractor contaminated the stockpiles by constructing a shot rock road across the entire length of the first stockpile and dumping waste rock on the second stockpile.

The *Guy H. James* court held that a general contractor had a duty to exercise care in its work as to not materially interfere with the work of the subcontractor. The measure of damages was the added cost involved in the unanticipated handling and hauling of material necessitated by the general contractor's conduct