

Homeowner vs. Builder

MEMORANDUM

Date: May 15, 2018
To: Supervising Attorney
From: Altioem Legal Services
Subject: Homeowner vs. Builder – Elements of Legal Claims: Negligence and Breach of Contract.

Per your instructions, I have analyzed the elements for the Negligence and Breach of Contract claims Mr. Homeowner has against Builder. Supporting evidence has been included to prove that (a) Builder was negligent, and (b) that he breached his contract with the Homeowners.

FACTS

Horatio Homeowner and his family bought a property in Logan, Utah; they wanted to build a house on the property. Bob T. Builder offered to build the home for half of the average estimate of the other contractors.

During the construction process, Horatio tried to check in with Bob T. Builder from time to time to get updates of the project's progress. Both Horatio and Beatrice emailed Bob and left telephone messages on several occasions, but received no response. Horatio even made several trips from Preston to Logan, about an hour's drive each way, to check on the progress of the project. Horatio observed that very little progress had been made, and that the construction was behind schedule.

On August 25, 2016, after work, Horatio drove his family to the construction site and took them on a self-guided tour around the site. As he was walking around, he stumbled on a small pile of 2x4s and fell onto one of the newly poured concrete footings. In the process, he impaled himself (in the abdomen, just to the side of his spine) on rebar and knocked the footing out of alignment. Beatrice called the paramedics, and Horatio was rushed to the hospital and admitted to emergency surgery. After several hours, he was finally considered in stable condition, but he was still vulnerable to the risk of infection. Horatio is looking at many months of recovery ahead of him. Throughout his recovery, Horatio has been unable to work at his job as a pharmacist, because the job requires him to stand for extended periods of time, which he is unable to do while recovering from the impalement.

Bob T. Builder did not know that the footings had been shifted out of place; he, therefore, moved forward in the construction process by pouring the foundation. It was only after the foundation had dried and cured that Bob realized the defect, and that construction could not continue with a faulty foundation. Bob reached out to the Homeowners and explained that the foundation had to be torn out and replaced. Bob also told them that due to recent economic troubles, he could afford to pay for the materials or labor to repair the damage and finish the project. Bob demanded extra funds, as well as an extension on the deadline for completing the project. Bob also stated that he would not complete any more work on the project until his demands were met. Horatio is now furious and wants to sue Bob for breach of contract and negligence, claiming that Bob should now pay all Horatio's medical bills and lost wages. He also wants his home built according to the original contracted price.

NEGLIGENCE CLAIM

A cause of action for negligence encompasses four elements:

1. The defendant has a **duty** to conform to a certain standard of conduct;
2. The defendant **breached that duty**;
3. A causal relationship exists between the breach of the duty of care and **the resulting injury**; and
4. The plaintiff incurred **actual loss or damages**.

What follows are (1) the duties owed by Builder to the Homeowners, (2) the ways in which Builder breached those duties, (3) the resulting injuries sustained by Mr. Homeowner, and (4) the actual damage incurred by Mr. Homeowner.

I. DUTIES

Builder owed the Homeowners an implied duty of good faith and performance; this duty included keeping in touch with the Homeowners on a regular basis, keeping the project on schedule, and a duty to regularly inspect the project.

Pursuant to Chapter 33 of the International Building Code (IBC),¹ which is used by the State of Utah as the "construction standards to be applied to building construction, alteration, remodeling, and repair, and in the regulation of building construction, remodeling and repair,"² Builder had the duty to keep the construction site safe, which included the duty of storing the construction material in a place "so as not to endanger the

¹ International Code Council. "CHAPTER 33 SAFEGUARDS DURING CONSTRUCTION." 2015 International Building Code. October 2015. Accessed May 16, 2018. <https://codes.iccsafe.org/public/document/IBC2015/chapter-33-safeguards-during-construction>.

² Utah Code Ann. § 15A-2-103(1)(a): "[T]he following construction codes are incorporated by reference . . . and are the construction standards to be applied to building construction, alteration, remodeling, and repair, and in the regulation of building construction, alteration, remodeling, and repair in the state: the 2015 edition of the International Building Code, including Appendix J, issued by the International Code Council."

public,”³ and to remove all waste material in a “manner that prevents injury or damage to persons.”⁴

Builder owed (and still *owes*) the Homeowners the duty to mitigate the damages caused by his actions;⁵ in addition to Mr. Homeowner’s bodily injuries, damages include the abandonment of the project and the costs associated thereto. Furthermore, some of the economic damages done to the project could have been avoided had Builder initially offered a responsible bid⁶ to the Homeowners. Builder's unprofessional conduct additionally resulted in a failure to demonstrate financial responsibility as a licensed contractor,⁷ which is apparent by his financial inability to finish the project.

II. BREACH OF DUTIES

Builder breached his implied duty of good faith and performance by:

1. failing to regularly communicate with the Homeowners or even respond to their repeated attempts of contacting him (in itself demonstrating his unreliability, *poor* faith, and a *lack* of performance);
2. not keeping the project on schedule, as became more apparent every time Mr. Homeowner visited the project; and
3. failing to regularly inspect the project on a regular basis, which was made obvious by his delayed realization that the footing had shifted; indeed, was only after the foundation had dried and cured that Builder realized the defect and that construction could not continue with a faulty foundation.

Builder breached his duty to safeguard the construction site in a manner which satisfied the requirements of the International Building Code; he failed to safely store the small pile of 2x4s on which Mr. Homeowner eventually tripped over, causing him to become impaled by the rebar, which was also not satisfactorily safeguarded so as to prevent the foreseeable risk of injury. Builder’s negligence in this regard is the clear proximate cause of Mr. Homeowner’s injuries.

Builder has caused additional damages to the project—and by extension, to Mr. Homeowner—by refusing to do any more work until his demands for more funds are met.

³ IBC § 3301.2 - Storage and Placement: “Construction equipment and materials shall be stored and placed so as not to endanger the public, the workers or adjoining property for the duration of the construction project.”

⁴ § 3302.2 - Manner of Removal: “Waste materials shall be removed in a manner that prevents injury or damage to persons, adjoining properties and public rights-of-way.”

⁵ Model Utah Jury Instructions, Second Edition - CV2243 Mitigation of damages: “[Builder] has a duty to mitigate . . . the damages caused by [his actions].”

⁶ CV2204 - "Responsible bid" defined: “A ‘responsible bid’ is a bid made by a party who has the capability, integrity and reliability to fully perform the contract requirements in good faith.”

⁷ Utah Code Ann. § 58-55-502 - Unprofessional conduct: “Unprofessional conduct includes: failing to establish, maintain, or demonstrate financial responsibility while licensed as a contractor under this chapter.”

Builder's blatant display of poor faith in this regard explicitly breached his duty to mitigate the damages caused to Mr. Homeowner and the project. Pursuant to Utah Code Ann. § 58-55-502(4)(a), Builder's unprofessional conduct constitutes a breach of his contractual duties, as his conduct displayed a "willful, deliberate, or grossly negligent departure from or disregard for plans or specifications, or abandonment or failure to complete a project without the consent of the owner." This breach additionally shows clear negligence on the part of Builder.

III. CLEAR CAUSE OF INJURIES

Builder's repeated breaches of duty are likely the actual and proximate causes of Mr. Homeowner's injuries; but for Builder's breach of his duties to (1) regularly communicate with the Homeowners, (2) keep the project up to schedule, (3) supervise the project, and (3) safeguard the construction site, Mr. Homeowner would not have needed to visit the project on multiple occasions, and would consequently not have suffered the horrific injuries he indeed suffered. Furthermore, had Builder taken appropriate precautions to safeguard the construction site, Mr. Homeowner would likely not have been impaled by the rebar.

IV. DAMAGES

Mr. Homeowner's horrific injuries caused him to be rushed to the hospital and admitted to emergency surgery. His physical damages include, *inter alia*, (1) becoming vulnerable to infection, (2) the months of recovery he underwent, and (3) the permanent damages caused by the injuries he sustained.

Mr. Homeowner suffered lost wages due to the fact that he was unable to work his job as a pharmacist. The job requires him to stand for extended periods of time, which became impossible for him to do while recovering from the impalement. The medical bills he has had to incur have taken a significant toll on his economic stability.

Builder's negligence caused damages to the project and to Mr. Homeowner himself. Builder neglected to inspect the foundation before it cured, causing an additional cost for the repairs to the faulty foundation. His refusal to continue working on the project has added additional economic strain to Mr. Homeowner.

Mr. Homeowner's special damages include:

1. Hospital bills;
2. Lost wages; and
3. The cost of repairs to the project.

Mr. Homeowner's general damages include:

1. Pain and suffering;
2. Loss of consortium;
3. Loss of enjoyment of life; and
4. Permanent physical and mental repercussions of the injuries.

BREACH OF CONTRACT CLAIM

Model Utah Jury Instructions, Second Edition. CV2103 – Creation of a contract:

A contract is an agreement between two or more parties. It can be either oral or written, or a mixture of both. To create a contract, what the parties have promised to do for each other has to be spelled out well enough that they can tell what it is they have each promised to do for the other. If [one] cannot tell what it is they have promised to do for each other, then there is no contract.

It is important to determine that there indeed was a valid contract between the Homeowners and Builder. The Homeowners and Builder understood and agreed to the following terms: (a) Builder is to build the Homeowners' house, (b) the Homeowners will pay Builder for building the house, and (c) both parties agreed to be bound by an implied duty of good faith and performance, in addition to other contractual terms.

CV2102 – Elements for breach of contract:

In order to recover damages, [plaintiff] must prove each of these four things: (1) that there was a contract between [plaintiff] and [defendant]; (2) that [plaintiff] did what the contract required [him] to do, or that [he] was excused from performing [his] contract obligations; (3) that [defendant] breached the contract by not performing [his] obligations; and (4) that [plaintiff] was damaged because [defendant] breached the contract.

There was a contract between Mr. Homeowner and Builder; therefore, element 1 is satisfied. (2) Mr. Homeowner appears to have done what the contract required of him, which was to pay Builder for the job finished. (3) Builder breached the contract by not performing his obligations to build the house in a manner which satisfied his implied duty of good faith and performance. (4) Mr. Homeowner subsequently suffered damages because of this. Therefore, there was a breach of contract on the part of Builder.

Case Law:

Beck v. Farmers Ins. Exch., 701 P.2d 795, 1985 Utah LEXIS 846.

- **Issue:** How can a party's inaction breach an implied obligation of good faith and performance?
- **Rule:** U.C.C. § 1-304(1)⁸
- **Application:** Plaintiff motorist filed claim against defendant insurer for refusing to investigate and settle insurance claim; the defendant, without explanation, refused to investigate. Defendant moved for summary of judgement; however, the facts suggested that defendant's flat rejection of plaintiff's settlement offer was sufficient to prove breach of an implied obligation of good faith performance to diligently investigate and evaluate plaintiff's claim.

⁸ U.C.C. § 1-304(1): "This section sets forth a basic principle running throughout the Uniform Commercial Code. The principle is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties."

- **Conclusion:** Defendant's summary judgement was reversed and remanded.

In *Beck v. Farmers Ins. Exch.*, Defendant was found to have breached its duty of good faith and performance due to the flat rejection to investigate plaintiff's claim. Similarly, Builder's rejection to continue construction and mitigate damages would likely also be considered a breach of his implied duty of good faith and performance.

SAMPLE
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