



Ohio appellate court awards consequential damages for contractor's failure to achieve substantial completion due to recklessness

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When a contractor indicated indifference to executing a project on schedule and failing to meet the substantial completion date, an Ohio appellate court found that the contractor's actions constituted recklessness and, based on the terms of the contract, triggered the award of consequential damages.

This [case](#) arose out of a contract between Jay Bakhshi, sole owner and representative of Miami Valley Construction Group, LLC (MVCC) (Contractor), and Rick Baarlaer, owner of Marick, LLC (Tenant). The contract was formed for the purpose of renovating property in Springboro, Ohio, where the Tenant leased space intending to open a local tavern.

In July 2016, before any written contract was signed between the parties, the Tenant gave the Contractor \$58,000 in order to allow the project to get started after delays in getting the plans drawn and approved. It was not until September 2016 that the parties entered into a written contract for \$193,805.41, with an estimated completion date of October 17, 2016. At the same time the parties signed the contract, the Tenant issued a cognovit promissory note and security agreement, agreeing to pay the Contractor \$40,000 for "value received."

Due to delays, the parties executed a change order in November 2016 pushing the estimated completion date to December 8, 2016, and increasing the contract price by \$4,600.

The project was not completed until March 2017, despite the Contractor's continued assurances that it would be completed by December 8, 2016.

In June 2017, the Contractor initiated a suit against the Tenant and his company, arguing that he was owed \$62,927.99 under the contract. The Tenant countersued for breach of contract asserting that the promissory note was void.

The trial court found in favor of the Tenant on his breach of contract claim and in favor of the Contractor on his unjust enrichment claim for work performed outside the contract. Both the Tenant and Contractor then filed cross appeals, and the Ohio Court of Appeals heard the case on several issues.

The appellate court first considered the issue of substantial completion. The Contractor argued that he did not breach the contract because his company substantially completed its obligations by December 8, 2016. The contract between the parties did not define substantial completion, so the Court of Appeals looked to [Ohio Revised Code \("O.R.C."\) Section 2305.131](#), which statutorily defines substantial completion in the context of statute of limitations as "the date the improvement to real property is first used by the owner or tenant of the real property or when the real property is first available for use after having the improvement completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first." The Court of Appeals found "no question" that the Contractor failed to substantially complete the project because, among other concerns, drywall and fire-retardant panels were not installed until just before Christmas and only the rough electrical and plumbing were complete by December 8, 2016, the contractual date for substantial completion.

Next, The Court of Appeals examined the issue of recklessness. The Court noted that the Tenant did not need to prove that the Contractor wanted to harm him, and instead cited the Ohio Supreme Court's definition of recklessness as "conduct characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." The Court of Appeals agreed with the trial court that the Contractor was reckless. To determine this, the court considered factors such as the fact that the Tenant's project was the only project the Contractor was working on at the time and the Contractor took multiple vacations during the project without leaving plans for work to be done in his absence. Additionally, the Tenant testified that he went to the project site on many occasions and there was no one working. The Court found that the Contractor's actions indicated a "complete indifference to the obvious risk that [the Tenant] would be harmed by [the Contractor's] failure to perform the contract in a timely manner" and concluded this amounted to recklessness.

The issue of recklessness was not only introduced by the Court for analysis, but was an integral part of the original contract signed by both parties on September 9, 2016. The contract stated in relevant part, "In no event shall either party hereto be liable to the other party for any consequential, indirect, incidental, special, exemplary, punitive, enhanced damages or lost profits relating to this agreement [except for liability arising, directly or indirectly, from reckless or willful acts of a party]." As such, effectively any claim to consequential damages was waived unless reckless or willful action was taken by either party.

Because the Court of Appeals found the Contractor's actions to meet the recklessness standard, the award of consequential damages was appropriate under the contract terms and the Tenant was thus rightfully awarded consequential damages for the Contractor's reckless conduct.

Finally, the appellate court considered the Contractor's argument that consequential damages were not appropriate in this action because his actions were not willful. The trial court previously awarded \$27,278 to the Tenant in consequential damages calculated by the Tenant's expert, who analyzed lost profits. The appeals court restated that "lost profits may be recovered by the plaintiff in a breach of contract action if profits were within the contemplation of the parties at the time the contract was made, the loss of profits is the probable result of the breach of contract, and the profits are not remote and speculative and may be shown with reasonable certainty." Finding that lost profits were considered and agreed to by the parties, as evidenced in their contract, the appellate court agreed with the trial court that the Tenant was entitled to damages for lost profits as a result of the Contractor's failure to complete the project by the agreed-upon completion date.

The Contractor's failure to demonstrate the project was substantially complete by the amended project completion date, along with his perceived indifference to executing the project on schedule, led to a seemingly clear-cut decision by the appellate court

that the Contractor failed to perform his responsibilities under the contract.

Authors

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