Obligations Implied in Michigan CONSTRUCTION CONTRACTS

By William F. Frey

Introduction

Although contracts primarily exist to express the parties' intent, they frequently include obligations implied by law that arise even if the parties did not contemplate them. This article will briefly identify the implied duties arising out of construction contracts[1] as they affect the responsibilities of the owner and the contractor.[2]

Implied Duties of Both Parties

Duty of Good Faith and Fair Dealing

In Michigan, all contracts, except employment contracts, have been construed to include an implied duty of good faith and fair dealing.[3] Courts interpret this covenant to mean that neither party will commit any act that will have the effect of destroying or injuring the right of the other party to "receive the fruits of the contract."[4] Michigan courts, however, have refused to allow an independent cause of action for a breach of the covenant of good faith and fair dealing apart from a claim for a breach of the express contract.[5]

Nevertheless, the implied duty of good faith and fair dealing apparently influences the courts when they construe express duties. Indeed, although courts frequently hold that implied duties can be waived or excluded by the express language of the contract, a number of cases have limited this principle and have enforced an implied obligation to provide accurate and complete information, or to not intentionally interfere with the other party, despite express contract language intended to avoid such responsibilities.[6]

Implied Duties of the Owner

Michigan courts have identified several implied duties undertaken by the owner entering into a construction contract.

Implied Warranty of Plans and Specifications

Absent a contractual provision to the contrary, it is well established that the owner's plans and specifications carry an implied warranty that they are accurate and suitable for purposes of bidding and performing the contract.[7] Thus, in *Walter Toebe & Co v Department of State Highway,*[8] the court held that where the owner's schedule failed to identify the need to special order and fabricate certain material, the contractor could recover damages caused by the inability to timely install the material.

Duty to Share all Material Information

The owner has an implied duty to share all known material information that would be useful for the contractor to properly bid and execute its work. Thus, in *Valentini v City of Adrian,*[9] although the plans and specifications contained a disclaimer that the soil borings provided by the City were only "evidence" and that the bidder "himself must assume entire responsibility for any conclusions…he may draw," the Michigan Supreme Court held that the City was liable for the contractor's additional costs

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arising out of the City's failure to share information regarding the presence of quicksand and excessive subsoil water.[10]

Duty to Provide Access/Duty to Coordinate/ Duty Not to Interfere

The owner has a responsibility to provide access to the site so the contractor can timely perform its obligations under the contract and, on a project involving multiple prime contractors, the owner has an implied duty to coordinate the contractors' work to avoid substantial interference between contractors causing unreasonable delays.[11]

The owner also has an implicit duty not to actively interfere with the contractor's progress. In *Phoenix Contractors, Inc v General Motors Corp,*[12] the owner ordered the contractor to stop work to allow another contractor to perform its work. The contract had not identified this conflict, and the owner refused to grant the contractor an extension of time to complete its work. The contractor completed its work on time, but filed an acceleration claim, asserting that it had to expend additional resources to make up the lost time. Although the contract included a "no damage for delay" clause, the court allowed submission of the acceleration claim to the jury because there was sufficient evidence of "active interference," i.e., an "affirmative willful act in bad faith which unreasonably interfered" with the contractor's performance.[13]

Implied Duties of the Contractor

Contractors' implied duties appear generally as implied warranties. The cases vary depending on the facts, and courts sometimes use the terms inconsistently. A contractor in Michigan may be subject to claims arising out of (a) a common law implied warranty of fitness for a particular purpose, (b) a common law implied warranty of habitability, (c) a common law implied warranty of workmanlike construction, (d) a Uniform Commercial Code (UCC) implied warranty of fitness for a particular purpose, and (e) a UCC implied warranty of merchantability.

Implied Warranty of Fitness for a Particular Purpose or "Habitability"

Michigan courts have held that an implied warranty of fitness for the particular purpose applies to purchases of new residential dwellings. In *Weeks v Slavik Builders, Inc,*[14] the purchaser of a new home sued the builder for damage caused by a leaky roof, claiming, inter alia, a "breach of implied warranty of fitness for purpose." The court held that the doctrine of caveat emptor no longer applied to the sale of a new residence by a builder-vendor, and that such a sale includes an implied warranty of fitness for a particular purpose. The *Weeks* court justified this conclusion by noting that the individual buyer is not on equal footing with the builder and is not in a position to bargain successfully to obtain protective provisions in the contract.[15] Further, the court concluded that the public interest and justifiable reliance by the buyer requires the builder-vendor to be responsible for latent defects.[16]

Subsequent decisions further defined the implied warranty of fitness—renaming it an implied warranty of habitability. In *Plymouth Pointe Condominium Ass'n v Delcor Homes—Plymouth Pointe, Ltd,*[17] the court held that the implied warranty of habitability also applies to condominiums. Two 2006 decisions expressly limited the applicability of the implied warranty of habitability to claims involving new residences sold by a "builder-vendor." In *Smith v Foerster-Bolser Construction, Inc,*[18] the court held that where the purchaser hired a contractor to build a home on land owned by the purchaser, the purchaser could protect herself by including express warranties in the contract and the court would not imply a warranty of habitability. The court also noted that the purchaser could use ordinary negligence principles to recover for defective work.[19] Similarly, in *Kisiel v Holz,* the court held that a purchaser could not sue a subcontractor for breach of an implied warranty of habitability because the warranty only applied to a "builder-vendor."[20]

Implied Warranty of Workmanship

Every contract of employment—including construction contracts—includes an obligation, whether express or implied, to perform in a reasonably skillful and workmanlike manner.[21] Generally, this is interpreted as meaning that the contractor must perform in a manner consistent with the degree of skill and efficiency normally displayed by those of ordinary skill and competence in the trade or business in question. Failure to perform in a workmanlike manner may not only relieve the owner from payment, but may result in damages being recovered from the contractor.[22] However, Michigan courts have resisted allowing a separate claim for breach of implied warranty of workmanlike performance, but

rather have allowed the injured party to pursue either a breach of contract or a negligence claim to recover for negligent performance under a contract.[23]

UCC Implied Warranties

The UCC applies only to "transactions in goods."[24] Thus, the UCC will apply only if the contract is one solely for goods or, in the case of a "mixed" contract covering both goods and services, one in which goods predominate.[25] If the UCC applies, the UCC provides implied warranties, the remedies, the statute of limitations, and the defenses to those warranties.

UCC Implied Warranty of Merchantability

MCL 440.2314 establishes that, in a contract for the sale of goods by a "merchant," the sale of such goods will include an implied warranty of merchantability. This warranty provides, among other things, that the goods will "pass without objection in the trade," are of "fair, average quality within the description of the goods contained in the contract," and are "fit for the ordinary purpose for which such goods are used." Significantly, the statute also notes that "unless excluded or modified other implied warranties may arise from course of dealing or usage of trade."

A UCC implied warranty of merchantability frequently applies in a construction project when the goods are purchased in quantities and do not conform to the normal expectations of quality for such goods. For instance, in *Jetero Construction Co v South Memphis Lumber Co,*[26] spruce studs provided by a supplier that were of lower quality than those contracted for were held not "merchantable" as not of the "same fair, average quality as the description sample agreed on" and not fit for the ordinary purposes for which the studs were to be used.

UCC Implied Warranty of Fitness for a Particular Purpose

MCL 440.2315 provides an implied warranty of fitness for a particular purpose when the seller at the time of the contracting has reason to know of a particular purpose for which the goods are required and the buyer is relying on the seller's skill or judgment to select suitable goods. This implied warranty is narrower than the implied warranty of merchantability and depends on the purchaser's reliance and the seller's knowledge of the purchaser's particular needs. Consequently, when the owner specifies a particular product, he or she is not relying on the seller's judgment, and no implied warranty of fitness for a particular purpose is created. However, if the seller recommends a product for a particular purpose and the purchaser specifies it based on such recommendation, there may be an implied warranty of fitness for that purpose.[27]

Conclusion

The law provides significant support and boundaries for parties entering into construction contracts. An attorney advising a client regarding formation of a construction contract or regarding a client's rights and duties under an existing contract should be familiar with the implied duties that can greatly affect the performance of the contract and the resolution of any dispute arising out of the contract. ■

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FOOTNOTES

1. As used in this article, the term "construction contract" refers not only to the written contract, but to all other "contract documents," which frequently are defined in the contract to include the general conditions, plan, specifications, drawings, schedule, and bid package documents, among other items.
2. The principles discussed as applicable to the contractor are generally also applicable to subcontractors. The page limit for this article prevents any significant discussion of how the parties might exclude implied obligations from the contract.
3. See, e.g., *Hammond v United of Oakland, Inc,* 193 Mich App 146, 151–152 (1992); 2 Restatement of Contracts, 2d, § 205, p 99.
4. *Hammond, supra,* at 152.
5. *Belle Isle Grill Group v City of Detroit,* 256 Mich App 463, 476 (2003).
6. See, e.g., *Hersey Gravel Co v State Highway Dep't,* 305 Mich 333, 340 (1943); *Walter Toebe and Company v Dep't of State Highways,* 144 Mich App 21, 29–31 (1985).
7. *Id.; United States v Spearin,* 248 US 132 (1918).
8. *Walter Toebe & Co v Department of State Highway,* 144 Mich App 21, 36–37 (1985).
9. *Valentini v City of Adrian,* 347 Mich 530 (1956).
10. *Id.;* See also *W.H. Knapp Co v State Highway Dep't,* 311 Mich 186 (1945).
11. *E.C. Nolan Company, Inc v Michigan,* 58 Mich App 294 (1975); *Walter Toebe, supra,* at 30–32.
12. *Phoenix Contractors, Inc v General Motors Corp,* 135 Mich App 787 (1984).
13. *Id.* at 794; See also *John E. Greene Plumbing v Turner Constr Co,* 500 F Supp 910, 913 (ED Mich 1980).
14. *Weeks v Slavik Builders, Inc,* 21 Mich App 621, 626 (1970).
15. *Id.* at 625.
16. *Id.* at 626–627.
17. *Plymouth Pointe Condominium Ass'n v Delcor Homes-Plymouth Pointe, Ltd,* 2003 WL 22439654 (Mich App).
18. *Smith v Foerster-Bolser Construction, Inc,* 269 Mich App 424 (2006).
19. *Id.* at 425.
20. *Kisiel v Holz,* 272 Mich App 168 (2006).
21. *Nash v Sears, Roebuck and Company,* 383 Mich 136, 142 (1970).
22. *Id.* at 143.
23. See, e.g., *Co-Jo, Inc v Strand,* 226 Mich App 108, 114 (1997).
24. MCL 440.2102.
25. *Neibarger v Universal Cooperatives, Inc,* 439 Mich 512, 534 (1992).
26. *Jetero Construction Co v South Memphis Lumber Co,* 531 F2d 1348, 1352 (CA 6, 1976).
27. Cf. *Ambassador Steel Co v Ewald Steel Co,* 33 Mich App 495 (1971) (without seller knowing of particular purpose, there could be no implied warranty of fitness for that purpose).