

The Saiber Construction Law Column: January 2023

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New Jersey courts recognize that every contract contains an implied covenant of good faith and fair dealing, which requires that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Last year, the Supreme Court of Nevada, which recognized that an implied covenant of good faith and fair dealing exists in all Nevada contracts, held that a contractor breached the implied covenant when it settled its claims with a city and, in doing so, waived all of the delay claims of a subcontractor on the project.

In *APCO Constr. Inc. v. Helix Elec. Of Nev., LLC*, APCO contracted with the City of North Las Vegas for a construction project and hired Helix for the project's electrical work. The project was completed nearly ten months late and, as a result, Helix incurred delay damages totaling \$134,724.68. APCO submitted the subcontractor's delay claim to the city, but the city rejected the claim because the city did not have a contract with Helix and, in addition, the city expected APCO to include Helix's delay claim as part of APCO's own claim for general conditions. APCO settled its claim with the city but neither included Helix's delay claim as part of the settlement nor told Helix that APCO had settled its own claim with the city. After APCO failed to pay Helix's delay costs, Helix filed suit.

After trial, the Nevada court found that APCO breached the implied covenant of good faith and fair dealing by not including Helix's delay damages claim as part of APCO's own damages claim and, further, by settling its own claim with the city but failing to notify Helix of that settlement. The Supreme Court agreed and held that when APCO settled with the city, "APCO acted contrary to the spirit and purpose of its subcontract with Helix by keeping its claim separate from Helix's claim and failing to preserve Helix's claim . . . APCO entered into a settlement agreement with [the city] without Helix's knowledge and waived all claims arising from the project delay, including Helix's delay costs." The Court was also put off by misrepresentations APCO made to Helix regarding the city's reasons for rejecting Helix's claim. Thus, the Court affirmed the trial judge's decision that APCO breached the implied covenant of good faith and fair dealing.

The *APCO* case was decided under Nevada law, so it is not binding on New Jersey courts. Still, it is instructive in demonstrating that contractors in New Jersey should deal fairly with their subcontractors and not attempt to deceive them in connection with the performance of their contract.

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Each issue's Legal Construction Column will discuss a recent decision by New Jersey courts or, like here, courts from other states which may be of interest to people in the construction industry.

The information in each article is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case. Every effort has been made to assure this information is up-to-date. The article is not intended to be a full and exhaustive explanation of the law in any area, nor should it be used to replace the advice of your own legal counsel.

For any question relating to this article, please contact Robert B. Nussbaum, Esq. at Saiber LLC at rnussbaum@saiber.com.