

Failure to Design According to the IBC Was Not Breach of Contract But Could be Malpractice

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Where compliance with the IBC 2000 was not an explicit contract requirement, design firm's failure to design a seismic retrofit in accordance with the IBC 2000 was not a breach of its contract. However, the firm's failure to meet the proper standard of practice for structural engineering when designing the retrofit was grounds for a malpractice claim. *, Inc.*, 127 A.D.3d 1377 (2015).

The plaintiff in this case operated a hospital in Otsego County, New York. In 2002, the hospital hired Cannon Design (Cannon) to provide design services including a seismic retrofit, which involved structurally enhancing one of the hospital buildings to protect it from earthquakes. Cannon designed the retrofit using four steel plate shear walls. Three of the shear walls were built during phase one of construction; the fourth was deferred until phase two due to interference with electrical systems that were scheduled to be replaced in phase two. However, prior to construction of the fourth wall, the hospital terminated its contract with Cannon.

The hospital subsequently sued Cannon for both breach of contract and malpractice (professional negligence), alleging that the design of the seismic retrofit was defective. The trial court determined that Cannon breached the contract and committed malpractice, and awarded the hospital damages of approximately \$1.7 million.

Cannon appealed the ruling; although the Appellate court reversed the trial court's ruling on the breach of contract claim, it agreed with the ruling on the malpractice claim. It also found that the damages awarded by the trial court were reasonable.

Professional Negligence (Malpractice)

To establish a claim of professional negligence in New York (and most other states), a plaintiff must prove that there was a departure from the accepted standards of practice of the profession in the relevant area and that the departure was a proximate cause of the plaintiff's injury. These elements are generally established through credible expert testimony. In this case, the hospital presented expert testimony from a structural engineer experienced in seismic engineering. The engineer testified that Cannon calculated the seismic load according to the 2000 IBC and distributed the load to the four shear walls. He also noted that the 2000 IBC does not address steel plate shear walls, so Cannon relied on an article in an engineering journal. While Cannon's reliance on the article was reasonable, Cannon did not adhere to the design approach discussed in the article. As a result, the three shear walls were not constructed properly, such that even with the fourth shear wall, the building would not have been protected from the magnitude of earthquakes that the seismic retrofit was intended to withstand. The engineer's testimony, which the trial court found was more credible than the competing opinion of Cannon's expert, was sufficient to establish that Cannon failed to meet the proper standard of practice for structural engineering.

As for proximate cause, the engineer opined that Cannon's failure to comply with the relevant standards resulted in a design that would not operate as intended, requiring remedial efforts to create a building that would withstand the magnitude of seismic events contemplated by the parties as the standard for the retrofit. The court found it irrelevant that the seismic threat level for Otsego County had been reduced and the building would not require a seismic retrofit under the current building code. Regardless of the code changes, the hospital did not receive the seismic retrofit design that it expected and that Cannon admitted it intended to provide.

Breach of Contract

The hospital alleged that Cannon breached its contract because the seismic retrofit did not meet the requirements of the then-current building code, the 2000 International Building Code (IBC). Cannon conceded that everyone involved considered the 2000 IBC to be the applicable design criteria. However, the IBC was not explicitly referenced in the contract and the contract prohibited oral modifications. The trial court could not alter the contract by adding a requirement for compliance with the 2000 IBC, thus the Appellate court found that the trial court should have dismissed the hospital's breach of contract claim.

The contract required Cannon's services to be provided "in a manner consistent with the standards of care and skill exhibited in its profession for projects of this nature, type and degree of difficulty." The Appellate court noted that this provision simply incorporated the common-law standard of care for a professional into the contract. Making ordinary obligations related to a professional's standard of care into express terms of a contract does not remove violation of the obligations from the realm of negligence, nor does it convert a malpractice claim into a breach of contract claim. A breach of contract claim based on the violation of this contract provision would simply duplicate the malpractice claim.

Measure of Damages

The hospital proved that the seismic retrofit it received, even if completed through the installation of the fourth shear wall, was defective because it would not provide the anticipated level of protection. The Appellate court rejected Cannon's contention that the hospital's proposed damages constituted economic waste. The court noted:

The proper measure of damages due to the defective design of a building is the cost to remedy the defect, unless such amount is "grossly and unfairly out of proportion to the good to be attained" by fixing the building. The defects here were not trivial, but were substantial as to the seismic function of the building, such that plaintiff was entitled to damages in the amount necessary to remediate the defects (less any amount that would have been necessary to add the fourth shear wall).

Comment

The distinction between a breach of contract claim and a professional negligence (malpractice) claim can be extremely significant to a design professional, despite the fact the claims may arise from the same set of facts. A negligence claim is likely to be covered by the design professional's Professional Liability policy (at least to the policy limits). A breach of contract claim would not be covered by Professional Liability policy. As codes become more complex, many design firms are turning to code compliance consultants to insure that their designs comply with both their contractual requirements and the professional standard of care.

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