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Appeals court reinstates failed restaurant’s elusive breach of implied covenant of good faith and fair dealing claim against commercial landlord - by Dave Viens

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Every contract entered into in Massachusetts, be it a lease, construction or employment contract, is deemed under our law to contain the “implied covenant of good faith and fair dealing,” even though it is not expressly included as a written provision in the contract. Under this “implied covenant,” contractual parties are deemed to owe each other a duty to act in good faith in the performance of their obligations and to refrain from conduct that would injure the other’s right to receive the “fruits of the contract.” The implied covenant is recognized so that parties can realize their reasonable

expectations and the objectives of their contract. A party may not invoke the implied covenant, though, to create substantive rights and duties not otherwise provided for or contemplated under the existing contractual relationship.

The recent Massachusetts Appeals Court case, *Classic Restaurant Concepts, LLC v. President and Fellows of Harvard College (Classic Restaurant)*, demonstrates one of the myriad contexts that may implicate a breach of the implied covenant of good faith and fair dealing. That is, the commercial landlord and tenant relationship, and in particular, where a tenant's business operations are interrupted or damaged by construction activities controlled by the landlord. The case also demonstrates how trial courts sometimes miss the mark in initially adjudicating these often-elusive claims.

Classic Restaurant Case

Classic Restaurant Concepts, LLC (Classic) was a commercial tenant of the President and Fellows of Harvard College (Harvard), which operates Harvard University and owns extensive real estate in Cambridge. Classic leased space from Harvard on Holyoke St. in Harvard Sq., Cambridge, where Classic opened the high-end restaurant En Boca in the fall of 2016 after undertaking extensive renovations to transform the space into a fine dining concept. Unfortunately, the restaurant failed not long after opening. Classic blamed Harvard for the failure in a lawsuit it filed claiming that a construction project for a Harvard student center across the street created a "war zone" around the restaurant and limited the public's access to the business in its early days because of an extended street closure needed for the project, ultimately dooming the new business. Classic's lawsuit was dismissed before trial, though, because the trial judge essentially determined that nothing in the parties' lease explicitly required Harvard to prevent any street closure relative to its other construction or university activities.

On appeal, the Appeals Court revived Classic's claims, including its implied covenant of good faith and fair dealing claim. In reversing the case dismissal, the Appeals Court noted that Classic never claimed that Harvard was required under the lease to prevent the closure of Holyoke St. Rather, Classic asserted that Harvard was required to refrain from itself causing the closure of Holyoke St., an important distinction, to an extent that would harm Classic's right under the implied covenant "to reap the benefits prescribed by the terms of the [lease]." The Appeals Court also criticized the trial court judge's overly broad construction and application of the well-established notion that "[t]he purpose of the covenant of good faith and fair dealing is not to supply contractual terms that the parties are free to negotiate." In this regard, the Appeals Court aptly explained "[i]f the failure to negotiate an express term preventing [an] employer or the lessor from taking such [adverse] action rendered the implied covenant inapplicable, the implied covenant would be a nullity" and that "[t]he very phrase 'implied covenant,' however, contemplates an obligation that is not express in the contract."

Key Takeaways

Classic Restaurant illustrates the importance of the implied covenant of good faith and fair dealing and that contractual disputes will not always be "open and shut" cases where there is not a clear breach of a specific or explicit contractual term. The case reinforces that this implied covenant exists

in every contract to ensure that neither party acts to injure the other's rights to receive its reasonably expected benefits of the contract.

In the commercial landlord-tenant context, landlords routinely undertake construction activities relative to other units in multi-unit properties, as well as involving other nearby owned property, which may adversely affect other existing tenants. As highlighted by this case, such property owners should take caution to be fully transparent with prospective tenants (and existing tenants at renewal time) concerning known, planned construction activities that may affect the tenant's ability to reap the full benefits of a proposed lease.

Additionally, Classic Restaurant further illustrates that litigants and even trial court judges may have difficulty grasping and adjudicating implied covenant claims given their unusual (albeit often over-pled) nature. Landlords that own multiple units or properties that are likely to necessitate known construction activities that may affect other tenants should clearly and explicitly spell out the parties' understandings, expectations, rights and obligations in their leases. Doing so may avoid a later and costly dispute involving an alleged violation of the powerful, if elusive, implied covenant of good faith and fair dealing.

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