

# Court of Appeals Rules That Delay Damages Not Recoverable

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If you are the victim of a breach of contract, the law requires that you exercise reasonable care and diligence to minimize or lessen your damages. And damages that could have been avoided cannot be recovered. The Colorado Court of Appeals, in *Westec Construction Management Co. v. Postle Enterprises I, LLC.*, 68 P.3d 529 (Colo. App. 2002), cert. denied (April 21, 2003), addressed how this concept precluded a project owner from recovering delay damages against its contractor. This case is also another example of the importance of making, and keeping records of, communications on a construction project.

The basic facts as explained in the case are as follows: Westec Construction Management Company ("Westec") contracted to build a fast-food restaurant for Postle Enterprises I, Inc. ("Postle"). Under the contract, Postle was responsible for marking the property boundaries. But Westec hired a surveyor to set the property pins. The surveyor erred, and, as a result, Westec ended up building the foundation in the wrong place. In fact, part of the foundation was placed on the neighboring property. Westec disclaimed any liability for the mistake, but the surveyor acknowledged its error. After discovering the problem, Westec stopped work completely.

Westec refused to recommence work unless Postle signed a change order adding both time and money to the contract. The surveyor offered to Postle to pay for the cost of demolishing and relocating the foundation, with consequential damages to be negotiated later. Postle rejected this offer, and refused to sign Westec's proposed change order. Ultimately Westec completed the project 27 months behind schedule. The foundation was relocated, and the surveyor ended up purchasing part of the neighboring land, which was later conveyed to Postle.

The dispute went to court. And on Postle's claim for breach of contract against Westec, the trial court found in Postle's favor, and awarded Postle damages for the relocation of the foundation, staffing costs, and lost profits. But the trial court found that Postle failed to mitigate the delay, and therefore refused to award Postle damages for the 27-month delay. The Court of Appeals agreed with the trial court's decision.

Some of the factors important to the courts were: Postle's refusal to accept the change order; Postle's failure to issue any other form of notice to proceed to Westec; Postle's failure to object to the form of the change order proposed by Westec; Postle's failure to give the surveyor information about its claimed expenses; and evidence that Postle delayed the matter in an effort to receive the conveyance of the neighboring property that the

foundation encroached upon.

Postle did not believe that it should be made to agree to pay more money and extend the project deadline because of a mistake made by the surveyor, a subcontractor to Westec. The courts did not explain why, or even state that, Westec was justified in stopping work on the project in the first place, and insisting that Postle agree to sign the change order. But they did address Postle's apparent failure to adequately communicate to both Westec and the surveyor about its objections to Westec's proposed change order, and its reasons for not accepting the surveyor's offers.

According to the Court of Appeals, Postle did not give Westec any other form of notice to proceed, nor did it negotiate or object to Westec's change order. It also failed to indicate to the surveyor that the change order was the reason for its refusal to give Westec a notice to proceed, and it failed to provide requested documentation to the surveyor for its claimed expenses. In short, Postle "refus[ed] to authorize the relocation of the foundation without making any effort to do so under terms it considered to be satisfactory . . . ." This, according to the courts, was unreasonable.

The lessons learned from this case may seem obvious, but they warrant repeating. First, if a party fails to take reasonable steps to stop a delay on a project from continuing, that party may be precluded from recovering delay damages, no matter who initially caused the delay. Second, make sufficient communications on the project, be responsive to the other parties' communications, and record and retain copies of these communications. When a dispute arises, let your file do the talking.

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