

BUT WHAT ABOUT MY EMOTIONAL DISTRESS?

By: Sharice B. Marootian
Abdulaziz, Grossbart & Rudman

Homeowners often ask, “but what about emotional distress damages? Can’t my contractor be liable for my pain and suffering?” Unfortunately for the homeowner, but fortunately for contractors and insurers, the answer is, no.

The California Supreme Court has held that emotional distress damages are not recoverable in negligent breach of a contract to construct a home case. In *Erlich v. Menezes*, Barry and Sandra Erlich hired John Menezes, a licensed general contractor, to build their “dreamhouse” on their ocean view lot. In December, they moved in; in February, the rains came. The house leaked like a sieve! The walls and ceilings were saturated, nearly every window leaked, and the living room filled with three inches of standing water. In some locations, the water poured in streams from the walls and ceilings.

Inspections confirmed defects in the roof, exterior stucco, windows and waterproofing. They also revealed serious errors in the home’s structural components including the risk of catastrophic collapse of three decks. Both spouses testified that they suffered emotional distress as a result of the extensive defects and Menezes’ unsuccessful repair attempts. Mr. Erlich was transported by ambulance after learning the full extent of the structural problems. He had a heart condition attributable in part to excessive stress, and had to resign from his job. Mrs. Erlich had a constant fear that the house would collapse and of her daughter’s safety. But no one was physically injured by the negligent construction, and the family continued to live in the house for five years.

The Trial Court had awarded the Erliches approximately \$400,000 for the cost of repairs. Each spouse was also awarded \$50,000 for emotional distress; Mr. Erlich received an additional \$50,000 for physical pain and suffering and \$15,000 for lost earnings. The Court of Appeal affirmed, but the California Supreme Court overturned the decision.

Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. Therefore, the cost of repairing the home, including lost use or relocation expenses, or the diminution in value, are recoverable. However, although the homeowners’ distress is real and serious, mental distress claims are not recoverable. The decision comes from a balancing of policy considerations, including the availability of insurance for builders. It is important to note that the Erliches could have recovered alternate housing expenses had they chosen to move out during repairs.

Some will ask, “what about all those cases we hear about where the plaintiffs are awarded emotional distress damages?” The answer is: recovery for emotional disturbance is excluded unless the breach or negligence also caused bodily harm or the contract or breach is of such a kind that serious emotional disturbance was a particularly likely result. For example, an infant injured during childbirth, misdiagnoses of venereal disease and subsequent failure of marriage, fatal waterskiing accident, failing to adequately preserve a corpse, cemetery’s agreement to keep burial service private and protect against vandalism to grave, and bailment of heirloom jewelry with great sentimental value justify emotional distress damages. In summary, where the scenario involves personal responsibility with unavoidable traumatic results, or where the controlling factor of the contract is the mental and emotional well-being of one party, the claims give rise to emotional distress damages. Building a home, where the emotional upset stems from an inherently economic concern, the Courts disallow additional unforeseeable damages.

As the Court put it, “[t]he Erlichs may have hoped to build their dream home and live happily ever after, but there is a reason that tag line belongs only in fairy tales.”



Sharice Marootian is an attorney and licensed real estate broker, practicing in the areas of construction and real estate law. Sharice assists contractors, subcontractors, and material suppliers in various construction disciplines prevent and resolve construction related disputes. She also counsels and represents owners involved in private construction projects and real estate disputes. Abdulaziz, Grossbart & Rudman provides this information as a service to its friends & clients and it does not establish an attorney-client relationship with the reader. This document is of a general nature and is not a substitute for legal advice. Since laws change frequently, contact an attorney before using this information. Sharice Marootian can be reached at Abdulaziz, Grossbart & Rudman: (818) 760-2000 or by E-Mail at sbm@agrlaw.com, or at www.agrlaw.com