

## Contracts Question # 1

### 1. Who breached the contract? Discuss

#### Completion by July 1

##### Mutual Assent

A valid contract requires a showing of mutual assent and consideration.

Painter and Developer entered into a contract under the terms of which Painter was to paint the interior of Developer's new apartment building at a price of \$40,000. All the essential terms of the contract evidenced mutual assent, namely, Painter's agreement to paint Developer's new apartment building, in exchange for Developer's agreement to pay \$40,000 to Painter.

Therefore, mutual assent is present.

##### Consideration

Consideration is that which is bargained for and given in exchange for a return promise requiring a benefit and legal detriment to all parties.

Developer bargained for Painter to paint the interior of his new apartment building. In return, Painter promised to paint the interior of the new apartment building in exchange for Developer's promise to pay \$40,000 to Painter. Painter's detriment was to paint and his benefit would be to receive \$40,000. Developer's detriment would be to pay for the interior painting and his benefit would be to receive his interior of his new apartment building painted.

Therefore, valid consideration exists.

##### Modification

A modification is a change in terms of an existing contract which requires mutual assent and new consideration.

On June 1, Painter was ready to start and Developer told Painter that because of problems with the drywall contractor, she could not start work until June 15. To avoid the possibility of losing her employees, who might quit if forced to take a two-week layoff, Painter took another job. Painter had no choice in the matter not to delay performance since the apartment building was not ready. Thus, there was not mutual assent to the change in terms.

Since Developer agreed to change the terms of the contract, at no additional compensation, Developer did not incur new detriment. Developer was already under a pre-existing duty to perform under the terms of the contract. Thus, there was no new consideration.

Therefore, the modification will fail.

### **Express Condition**

An express condition is explicitly stated in a contract and is where one party expressly conditions performance on the performance of the other party in the contract terms.

The contract expressly stated for the work to begin June 1 and to be completed on July 1. Painter on July 15 called Developer and told him that she could not finish painting the interior of the apartment building until August 15.

Therefore, an express condition did exist in the contract.

### **Express Promise**

An express promise is an undertaking to perform or refrain from performing some designated act specified in the parties' agreement.

Painter will argue that the term in the contract was not an express condition. The contract did not use the term "time for performance shall be of the essence." In construing the "time" term for the work to begin and be completed in the contract between Painter and Developer as an express promise rather than an express condition allows Painter to receive payment from Developer since she did perform half of the work under the contract, i.e., since Developer fired her. Further, if this was a time of the essence contract, Developer was not ready for Painter to start her performance on June 1 since there were drywall problems.

Therefore, under the circumstances, the court will likely construe the time provision as an express promise rather than an express condition to avoid the harsh effect of forfeiture upon Painter

Assuming that the court determines that there is an express condition is Painter's performance excused?

### **Anticipatory Repudiation**

Anticipatory repudiation is an unequivocal expression repudiating the intent to perform a contract.

On June 1<sup>st</sup> Painter was ready to start work when Developer told Painter that she would not be able to start painting the interior until June 15 since there was a drywall problem. Developer's language is an unequivocal expression repudiating his intent to perform.

However, based on Developer's statement Painter could start work on June 15.

Therefore, Developer did not anticipatory repudiate the contract. Thus, Painter is not excused from her performance. However, since she could not start until June 15 the express condition for completion by July 1 would be excused.

Developer would argue that the term in the contract was for the painting to be completed within 30 days, making the new time term date July 15<sup>th</sup>.

### **Voluntary Disablement**

Voluntary disablement is an anticipatory repudiation through conduct.

When Developer fired Painter it shows that Developer's conduct demonstrated his anticipatory repudiation through conduct, i.e. firing her.

Therefore, Developer's conduct would excuse Painter's condition to finish painting the interior of the apartment building by July 15th.

### **Implied-In-Law – Constructive Condition Precedent**

A condition is a fact or event in which the happening or non-happening of either creates or extinguishes an absolute duty to perform.

Painter must paint Developer's apartment building, an event which must occur first, before Developer's obligation to pay Painter arises.

Once Painter paints the apartment building interior for Developer, Painter's duty is extinguished and her act of painting the apartment building interior creates an absolute duty in Developer to perform on his promise to pay Painter.

Therefore, a constructive condition precedent exists.

Developer will contend that Painter informed him that she would not be able to complete the painting of the interior until August 15<sup>th</sup>. Thus, Painter repudiated the contract.

### **Impossibility of Performance**

Impossibility of performance is where a party's performance of a condition becomes objectively impossible.

Painter will argue that because she could not start to paint the apartment building interior until June 15, and she would lose her painting staff if they were forced to take a two week layoff, she and her staff had to take another job which was not completed until June 20<sup>th</sup>. Thus, it was impossible for Painter to complete the painting of the apartment interior in time. Painter did start painting on June 20<sup>th</sup>. If the parties agreed painting of the interior would take 30 days, Painter's notification to Developer that the painting would not be complete until August 15<sup>th</sup> is a 30 day delay, going well beyond the 30 day commitment. Painter could hire additional staff in order to complete the job in a timely manner. Then the job could be completed by July 20<sup>th</sup> if Painter hired additional help. Painter's failure to complete the job within 30 days shows her lack of performance is not "objectively impossible" to complete the interior painting, since she can hire additional help.

Therefore, impossibility of performance does not excuse Painter's performance.

### **Excuse of performance - Impracticability**

Impracticability requires that a party encounter extreme and unreasonable difficulty or expense that was not anticipated. A mere change in the difficulty or expense due to normal risks that could have been anticipated will not warrant discharge by impracticability.

Painter will argue that the fact that she was not able to start painting on time because of a drywall problem was not foreseeable at the time of making the contract by either Painter or Developer. Furthermore, Painter was not the fault of the dry wall issue and needed to take another job in order to keep from losing her employees.

However, Developer will argue the delay in starting the painting job did not inhibit Painter's ability to hire additional help in order to complete the job in a timely manner. Thus, Painter will not be able to discharge her duty under the doctrine of impracticability. However, if she did hire additional help in order to complete the job by August 1, this would reduce her profit under the contract. The contract price was \$40,000 and she was making a \$5,000 profit. To reduce her profit would be impracticable and unreasonable under the circumstances.

Thus, impracticability would excuse Painter's performance.

### **Excuse of performance - Frustration of Purpose**

A duty may also be discharged by frustration of purpose. This requires a supervening event that was not reasonably foreseeable at the time of entering into the contract, which completely or almost destroys the purpose of the contract and the purpose was understood by both parties.

Painter will argue that the dry wall problem was not foreseeable at the time of making the contract by either Painter or Developer. Furthermore, Painter was not the fault of the dry wall problem. In addition, Painter will argue that Developer did not notify her of the primary purpose for which she needed to have the painting complete when entering into the contract. Thus, both parties did not understand the purpose for which Developer will allege is frustrated, i.e. Apartment building being ready for university students to move into in August.

### **Breach**

A breach is an unjustified failure to perform which goes to the essence of the bargain.

Painter was fired and not allowed to complete the painting job. Thus, Painter did not finish the painting within 30 days of starting according to the express term of the agreement with Developer. Painter's conduct is an unjustified failure to perform. In addition, the "time of the essence" clause in the contract went to the essence of the bargain in that Developer duty to pay was conditioned upon Painter's timely completion of the job.

Therefore, Painter's unjustified failure to complete the painting of the apartment building in a timely manner is a major breach.

**2. Assuming Painter breached the contract, what damages, if any, would Developer be entitled to? Discuss.**

**General Damages**

General damages are damages that flow from a breach. The non-breaching party is entitled to expectancy damages under the terms of the contract.

Developer is able to receive the difference between the contract price and the new contract price. Painter and Developer's contract was for \$40,000. Developer had to pay another painter to complete the building. Based on the facts he paid Painter one-half of the contract price, thus, we can infer that the apartment was one-half painted. Developer had to pay an additional \$30,000 for the remaining one-half of the apartment building to be painted. This shows that Developer paid \$50,000 for the apartment to be completely painted. Thus, the general damages under the contract would be \$10,000.

**Special Damages**

Special damages are those damages that are foreseeable at time of contract and a probable result of the breach of those that naturally flow from the breach.

Developer will claim lost profits from lost rental income resulting from Painter's breach of contract. While Developer's lost profits are foreseeable at the time of contract since Painter knew she was painting an apartment building, Developer's lost income would be speculative since he will not be able to prove that the apartments would have been leased out to the university students.

Therefore, no special damages will be awarded.

**3. Assuming Developer breached the contract, what damages, if any, would painter be entitled to? Discuss.**

**General Damages**

Defined supra.

Painter's damages would be the expectation of the terms to the contract, \$40,000, less the monies already paid and saved on not buying paint.

Therefore, Painter is entitled to recover \$40,000 from Developer, less the \$20,000 paid.

### **Special damages**

Defined supra.

If painter is not the breaching party she can recover the lost profit, as it is foreseeable when you fire an independent contractor off a job that they would be losing their profit under the terms of the contract. Therefore, Painter should be entitled to \$5,000, the expected profit of the contract

### **Reliance damages**

If general damages cannot be recovered, a non-breaching party can get reliance damages.

Based on the facts if Painter is found to be in breach she may receive reliance damages in the amount of \$5,000 for the out of pocket expenses for the paint and supplies for the apartment building.