

## October 2016 Contracts Question #4

### 1. Can Owner prevail in her lawsuit against Contractor? Discuss.

#### **Valid Contract**

Owner wanted to turn her warehouse into a restaurant. She enters into a valid written contract with Contractor where he agrees to install an innovative solar heating system in exchange for two designated parking spaces for his son for a five year period and a price of \$35,000.

Therefore, there is a valid written contract.

#### **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 that Contractor was to start the job on November 17<sup>th</sup> and to complete the job by January 1<sup>st</sup>. Owners' payment to Contractor was expressly conditioned upon Contractor's installing the innovative solar heating system by January 1st. However, the only certified technician who works with Contractor, Tech, was injured in a car accident. Contractor notified Owner and advises her that the start of the work will be delayed because of Tech's accident. Thus, Owner will argue Contractor has not performed pursuant to the express condition in the contract since Contractor does not know when he can start, and can't promise that the installation will be completed by January 1<sup>st</sup>.

Therefore, if an express condition is found, Owner has no duty to pay Contractor.

#### **Express Promise**

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

Contractor will contend that the agreement stated "Timely performance by Contractor is important to avoid any delay in the opening of Owner's restaurant." That the term in the contract between Owner and himself was an express promise rather than an express condition allowing Contractor to perform timely and once he performed the installation of the innovative solar heating system he would be paid.

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

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

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

Contractor must install the innovative solar heating system before Owner's duty to pay Contractor arises. Owner will argue since Contractor did not start the installation on time, i.e. November 17<sup>th</sup>, Owners' absolute duty to pay Contractor was extinguished.

Therefore, Owner's duty was a constructive condition precedent.

### **Excuse of performance - Impossibility of Performance**

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

Contractor will argue because the State law requires all installations of the new solar systems be done by a certified solar technician, and the certified technician that he works with was in a car accident, it was impossible for him to start to install the innovative solar heating system. Contractor did notify Owner and told him that he did not know when he would be able to start. However, Contractor could obtain another certified technician since the one he always uses is not available due to a car accident. Therefore, his failure to start performance was not "objectively impossible" since he could obtain another certified technician to install the innovative solar heating system.

Therefore, impossibility of performance does not exist.

### **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.

Contractor will argue that the fact that his certified technician would be in a car accident and not able to install the heating system was not foreseeable at the time of making the contract by either Contractor or Owner. Furthermore, it was not the fault of Contractor that Tech, his technician was in a car accident.

However, Owner will argue Contractor's delay in starting the job did not inhibit Contractor from hiring another certified technician to install the heating system. Thus, Contractor will not be able to discharge his duty under the doctrine of impracticability. To hire another technician would not be impracticable and unreasonable under the circumstances.

Thus, impracticability would not excuse Contractor's performance.

### **Anticipatory Repudiation**

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

Contractor notified Owner that the start of the work will be delayed because of his certified installer, Tech, had been in a car accident. Owner stated "You know that on-time performance is crucial." Can you finish by the end of the year, and Contractor replied, I don't know. At that point Owner tells

Contractor she is terminating the contract. Owner's language is an unequivocal expression repudiating her intent to perform.

Therefore, Owner's anticipatory repudiation would excuse Contractor's condition to install the innovative solar heating system.

### **Voluntary Disablement**

Voluntary disablement is an anticipatory repudiation through conduct.

Owner told Contractor that the contract was terminated, and Owner did find an alternative supplier to install the solar heating system. Thus, she demonstrated she does not have the ability to perform through her conduct since she has hired another contractor to do the same job.

Therefore, Owner's conduct would excuse Contractor's condition to install the innovative solar heating system.

### **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.

Owner will argue at the time of entering into the contract with Contractor that it was not foreseeable by either Contractor or Owner that Contractor's certified technician would be involved in a car accident. In addition the car accident was not the fault of Owner. However, Contractor will argue Owner did not notify him of the primary purpose for which she needed to have the installation completed by January 1<sup>st</sup>. The fact that the city was giving special tax rates was not even known until November 15<sup>th</sup> after the contract was entered into. Thus, Contractor did not understand the purpose for which Owner will allege is frustrated, i.e. Restaurant opening on time in order to get the special tax breaks for business.

Therefore, frustration of purpose will not excuse Owner's performance under the contract.

### **Breach**

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

When Owner terminated the contract it established an unjustified failure to perform going to the essence of the contract.

Therefore, there was a major breach by Owner.

## **2. If so, can Owner recover**

a. **The \$10,000 in increased cost for the heating system? Discuss**

## **General damages**

Upon a breach Owner will be able to obtain the expectation under the terms of the contract.

If the court finds Contractor in breach of contract, Owner can get the difference between the contract price, i.e. \$50, 000 versus the actual price paid, \$60,000.

Therefore, Owner should be able to recover the \$10,000 as general damages.

### **b. The lost profits for the delay in opening the restaurant? Discuss**

#### **Special Damages**

A party can recover any loss resulting from a breach if the party had reason to know and the loss was foreseeable at the formation stage of the contract.

When Owner contracted with Contractor, it was stated in the contract Timely performance was important to avoid any delay in the opening of Owner's restaurant. Contractor knew that Owner was opening up a restaurant. Thus, based on Contractor knowledge it was foreseeable that if the restaurant did not open timely, that Owner would lose profit.

However, the loss of income for a new restaurant is speculative and Owner would not be able to recover.

Therefore, Owner should not be able to recover for her lost profit.

### **c. The values of the tax reductions? Discuss.**

#### **Special Damages**

Defined supra.

When Owner contracted with Contractor, it was stated in the contract Timely performance was important to avoid any delay in the opening of Owner's restaurant. Contractor knew that Owner was opening up a restaurant. However, the tax benefits were not announced until after the contract was entered into, therefore the tax benefit was not foreseeable at the formation stage of the contract.

Therefore Owner should not be able to recover for her tax benefit loss.

### **3. Can Son prevail in his lawsuit against Owner? Discuss.**

**Having Found a Valid contract between Owner and Contractor, Does It Raise Rights in Son as a Third Party Beneficiary?**

#### **Third Party Beneficiary**

A third party beneficiary contract is one wherein performance by the promisor will benefit a third party. Her status arises at the formation stage of the contract.

As part of the contract between Owner and Contractor, Owner agreed for a lesser price, to provide two designated parking spaces for Contractor's son for the use of five years. The performance of this promise was meant to benefit Contractor's son in exchange for charging Owner a lesser price for the installation of the heating system. Thus, the Owner-Contractor contract was an act to benefit Son, the third party.

Son's rights were created at the time the contract was formed. Son's status arose at the formation stage of the Owner-Contractor contract.

Therefore, Son has enforceable rights as a third party beneficiary.

### **Privity of Contract**

Privity of contract is the interest or relationship which exists between two or more contracting parties.

Owner will assert Son is not a party to the contract and, therefore, has no interest or relationship in the contract upon which to sue since Owner made her promise to provide the two parking spaces to Contractor and, not Son.

Son will rebut although he was not a party to the Owner-Contractor contract, privity is not required for him to assert his rights as a third party beneficiary under **Lawrence v. Fox**.

Thus, the lack of privity will not bar Son from asserting his rights.

### **Intent to Benefit**

Intent to benefit is defined as the promisee's intent to extract a promise from the promisor to benefit a third party.

Son will contend when Contractor extracted Owner's promise to provide two parking spaces for the term of five years for Son, Contractor intended to benefit Son. This promise was made at the time of the Owner-Contractor contract which further demonstrates Contractor's beneficial intent to Son.

### **Classification - Creditor Beneficiary**

If the promisee's primary intent is to discharge a duty owed to the third party, the third party is a donee beneficiary.

The Owner-Contractor contract was for the benefit of Son. Contractor wanted to benefit his son by having designated parking spaces for his son's business. Based on the agreement this demonstrated a gift to be conferred upon Son.

Therefore, Son would be classified as a donee beneficiary.

## **Vesting**

The Restatement Second states that the rights of any intended beneficiary, donee or creditor, vest when there is notice of and assent to the promisee, or he brings suit to enforce the promise or materially changes position in justifiable reliance thereon.

As argued supra, the court should rule Son was a donee beneficiary. However, Owner will argue Son had no notice and did not assent to the Owner-Contractor contract. Thus, there was no notice. In addition there are no facts to support that Son was aware of this agreement supporting that he did not materially change his position in justifiable reliance, which would make his rights vest as a third party creditor beneficiary.

Hence, Son rights did not vest and he can't sue Owner under the Owner- Contractor contract.