

Question 5

Paula, a recent art-school graduate, was trying to establish a reputation as an art acquisition agent, i.e., one who finds works of art for collectors interested in buying particular works. It is a business where reliability and confidentiality are critical.

Paula's first commission was to find for City Museum ("Museum") any one of the three originals in a series of paintings by Monay, titled "The Pond." Museum agreed to pay as much as \$300,000 for it and to pay Paula \$15,000 upon acquisition. The works of Monay are rare and held by private collectors, and none had been on the market in recent years.

Paula eventually tracked down Sally, a private collector who owned the three originals of Monay's "The Pond." After some negotiations, in which Sally expressed offhandedly how proud she was that she only sold to private collectors, Sally orally agreed to sell to Paula for \$200,000 whichever of the three paintings she selected. Paula agreed that, as soon as she could make the selection, she would transfer the purchase money into Sally's bank account. Paula immediately called the curator at Museum, who told her to select the first of the three in the series, and the curator immediately caused Museum's bank to wire-transfer \$200,000 into Sally's account to cover the purchase.

The next day, when Paula went to tell Sally which painting she had selected and to pick it up, Sally declined to go through with the sale. Sally accused Paula of deceit, saying it was only when she learned that the money for the purchase had come from Museum, that she realized the painting would no longer be held privately. Sally tendered to Paula a certified check, which she had signed and drawn from her bank account, refunding the \$200,000. In the notation line of the check, Sally had written, "Refund on 1st of Monay Pond series."

Paula refused to accept the check and insisted on getting the painting. She explained that she had not disclosed her principal's identity because she was bound by confidentiality and that, unless she could deliver the painting to Museum, her budding career as an art acquisition agent was over. Sally told Paula, "That's too bad. Our contract wasn't in writing, so you can't force me to sell the painting. Besides, you deceived me about why you wanted to buy it."

Can Paula obtain specific performance of Sally's agreement to sell Paula the painting? Discuss.

Answer A to Question 5

Applicable Law

The common law governs contracts for the services and the sale of real property. The Uniform Commercial Code (UCC) governs contracts for the sale of goods. Because this contract was for the sale of a painting, it is governed by the UCC. The UCC also has provisions that apply only to merchants. Merchants are those who regularly deal in the goods that are the subject of the contract. Here, Sally is not a merchant because she is a private collector who does not appear to regularly sell her paintings; however, Paula is likely becoming a merchant (she just started).

Specific performance is an equitable remedy and for the court to award it, which requires that (1) The Contract is Valid; (2) The Terms are Certain and Definite; (3) Any Conditions are Satisfied; (4) A Remedy at Law is Inadequate; (5) There is Mutuality in Enforcement; and (6) There are no Defenses.

(1) The Contract is Valid

A contract requires a valid offer, a valid acceptance, consideration, and certain and definite terms, which are discussed below. Assuming the terms are sufficient, a valid contract was formed between Sally and Paula when Sally agreed to sell Paula whichever of the three paintings for \$200,000.

Statute of Frauds

The statute of frauds requires that a contract for the sale of goods of \$500 or more must be in writing. Here, the contract between the parties was only oral, thus the SOF is not satisfied. Thus, Sally will assert the SOF as a defense to the enforcement of the contract.

Exceptions to the SOF

Full Performance

Full performance by one party can also serve as an exception to the SOF. Here, Paula would argue that she performed by selecting the painting she wanted and transferring the money into Sally's account.

However, the UCC has tended to apply full payment when the performance is the delivery of the goods, not just mere payment. The rationale is that if payment alone could satisfy the SOF, then most parties could likely get out of the requirement by making a payment; whereas, delivery of goods is more indicative that a contract actually existed between the parties. Thus, the court would likely not find that full payment by Paula was sufficient to waive the writing requirement.

Judicial Admission

The UCC also recognizes a SOF exception when one party admits the contract in a judicial proceeding or writing. While P may attempt to argue that Sally recognized the contract by writing “Refund on 1st of Monay Pond series,” this writing was merely on a check, not in any judicial proceeding.

Estoppel

Some courts allow estoppel as a valid defense to SOF, which requires that the party detrimentally rely on the other party’s promise. Here, Paula would argue that she relied on Sally’s promise to sell the painting and the reliance was detrimental because she told the museum she could get the painting. More specifically, the reliance was detrimental to Paula because reliability is critical in her line of work; thus Paula would argue that by telling her client that she obtained the painting, then informing them that she no longer could get it, her reliability and career would be damaged.

As Paula is seeking an equitable remedy, a court might be more willing to apply estoppel; however, the contract clearly does not satisfy the SOF and the detriment to Paula requires a series of inferences; thus a court may also decline to apply it.

Merchant’s Confirmatory Memo

The UCC also recognizes an exception to the SOF when one party sends a confirmatory memorandum that is signed. However, this provision only applies to merchants. Thus, because Sally is not a merchant, P could not argue that her writing on the check suffices as a confirmatory memorandum.

(2) The Terms are Certain and Definite

Even more so than with regular contracts, the remedy of specific performance requires that the contract terms be definite and certain. Under the UCC, the contract must specify the quantity. Here, this term is satisfied, because the parties agreed that Paula could select one painting.

Sally would argue that the terms are not definite and certain because the parties did not agree on the actual painting that would be sold and Paula had complete discretion in selecting the painting. However, if the parties have agreed to the price, the UCC allows other terms to be agreed upon and the parties will be expected to do so in good faith. Moreover, because the paintings are part of a series and appear to be equal in value, it does not appear that the lack of specificity as to which painting would be purchased negated the parties from reaching a meeting of the minds.

(3) Any Conditions are Satisfied

A condition is an event, the occurrence or non-occurrence of which must occur, if it occurs at all, for a performance to be done. Conditions are strictly construed and a failure

of a condition does not result in breach, but merely excuses performance. A condition precedent is one which must occur before performance from another party is due.

Here, Paula selecting the painting she wanted was a condition precedent to having to pay. Moreover, Paula's payment of the \$200,000 is a concurrent condition, as the payment and exchange of the painting each would give rise to the other performing.

Paula will argue that she satisfied all of the conditions because she made the payment and she decided which painting she wanted and went to tell Sally. Sally, however, will argue that Sally declined to go through with the sale before Paula told her which painting she wanted because the facts are unambiguous as to whether Paula in fact told Sally (it merely states that "she went to tell Sally which painting she wanted"). However, even if this was the case, Sally cannot assert her own preventing of a condition to assert failure of a condition. Moreover, it appears that Paula did tell Sally because Sally wrote "Refund on 1st of Monay Pond series" on the check. Thus, all of the conditions were satisfied.

(4) A Remedy at Law is Inadequate

Because specific performance is an equitable remedy, the courts require that a remedy at law must be inadequate.

Unique Goods

Normally, a remedy at law is adequate with breach of contract because the parties can seek expectancy damages. However, the courts have held that specific performance is available when it is a contract for real estate or unique goods.

Here, the Monay painting would clearly be considered a unique good because Monay's works are "rare," "held by private collectors," and "none had been on the market in recent years." Thus, specific performance would be proper under these circumstances.

Uncertainty of Damages

Moreover, a remedy at law would be inadequate because, to recover legal damages, a party must prove: 1) foreseeability; 2) certainty; 3) unavailability; and 4) causation. If Paula sought legal damages, she would have an extremely hard time proving certainty because she had just started in the business. Thus, while her failure to perform on a contract after informing her client that she could would invariably affect her future business and relationship with that client, the damages she would suffer are extremely speculative. In this sense, Paula's business is a new business and courts have traditionally held that a new business cannot recover future lost earnings because they are too speculative. For example, Paula might have turned out to be the best acquisition agent or the worst and, while some courts will now allow use of comparable businesses to prove lost future profits, a court would likely be more hesitant when it is a business such as art acquisition, where the success is heavily dependent with the individual agent.

Feasibility of Enforcement

Additionally, the courts will not specifically enforce contracts when the judgment would not be feasible to enforce, such as in personal services contracts. Here, this contract would be simply to enforce and does not require continued oversight because the judgment would require: 1) Sally to deliver the painting to Paula; and 2) Paula to ensure the \$200,000 was delivered or return the refund check if she eventually accepted it.

(5) There is Mutuality in Enforcement

Courts traditionally require that, for a party to seek specific performance, the party they are seeking it against must also be entitled to specific performance. Here, it is less likely that Sally would be able to seek specific performance because her damages would have been her lost profits on the sale. Still, a court will award specific performance despite the mutuality requirement if it is confident the plaintiff will perform. Here, Paula wants to perform, thus the court would likely be confident she will and the court could also require her performance in the judgment.

(5) There are no Defenses

Sally will assert several defenses to enforcement of the contract:

Unclean Hands (UH)

Unclean hands is an equitable defense that applies to equitable remedies when the plaintiff has acted unjustly with regard to the specific transaction, thus resulting in the maxim that the court will not use equity to aid a person with “unclean hands.” Here, Sally will argue that by making Sally believe that Paula was a private buyer when Paula knew Sally did not want to sell to a private buyer, Paula acted unjustly.

Paula will claim that she owed a Duty of Confidentiality to her principal because confidentiality is critical to the business. Whether a court would agree with Paula on this issue is debatable because, unlike lawyers, art agents do not automatically owe a Duty of Confidentiality to their principals. However, agents do owe a Duty of Loyalty to their principals and also must follow the directions of the principal, thus if the museum had made clear that it wanted its identity confidential, then the court would likely determine that Paula was not acting unjustly in following her duty as an agent.

Misrepresentation

A misrepresentation is a negligent statement of material fact or a fraudulent statement of fact that is said to induce an action in the other party, which the other party does actually rely on and suffers damages because of reliance. While Sally will argue that Paula’s silence amounted to a misrepresentation, nondisclosure does not amount to a misrepresentation unless there is a duty to disclose facts. Thus, Paula did not have a duty to correct Sally’s misunderstanding and, therefore, misrepresentation would not be an

adequate defense.

Unilateral Mistake

Unilateral mistake, where one party is materially mistaken about a term of the contract, is usually not a defense; however, it can be a defense when one party is mistaken and the other party knew or had reason to know of that party's mistake. Here, Sally could successfully assert unilateral mistake because Paula knew that Sally only wanted to sell to a private buyer and Paula knew that Sally thought she was selling to a private buyer because Sally expressed "how proud she was that she only sold to private collectors." Paula, however, will argue that this statement was only "offhandedly" and never referred to the actual transaction. Still, especially because Paula is seeking equity, a court would likely find that this means that Paula should have known that Sally thought she was selling to a private buyer because Sally said she only sold to private buyers.

Frustration of Purpose

Lastly, frustration of purpose is a defense where both parties know of the purpose of the contract at the time of the contract and the purpose is frustrated by an unforeseeable event. Sally could assert this, however she did not make it clear that her purpose was to sell to a buyer, thus her better defense is under unilateral mistake because, under that defense, she can argue that Paula "should have known" of her mistake; whereas she cannot argue that Paula "should have known" of her purpose to assert frustration of purpose.

Answer B to Question 5

Specific Performance for Paula

Type of Contract

The UCC applies to the sale of goods, whereas the common law applies to all other contracts. Here, the contract between Sally and Paula was for the sale of a painting, which is an item of tangible or intangible personal property. In other words, a painting is a good. Therefore, the UCC applies.

Standard for Specific Performance

In order for a plaintiff to receive specific performance under a contract, the following elements have to be met: there must be a valid contract, the plaintiff must have performed or be ready to perform any required performance under the contract, the remedy at law must be inadequate, there used to be a requirement of mutuality but it is no longer required, and there must be no valid defenses to enforcement of the contract of specific performance.

Valid Contract – Offer, Acceptance, Consideration

In order to form a valid contract, there must be an offer, an acceptance, and consideration. An offer requires that the offeror communicate to the offeree, the terms of the offer are clear and definite, and a reasonable person in the offeree's position would believe that the offeror intends to be bound if the offeree accepts. Acceptance is a manifestation on the part of the offeree to accept the offer. Under the common law, this required the offeree to accept the offer exactly as is. Under the UCC, additional terms can be mentioned in the acceptance, although where there is at least one non-merchant, the additional terms must be separately accepted.

Here, Sally orally agreed to sell to Paula the first of the three Monay paintings for \$200,000. Sally agreed to sell and Paula agreed to buy, which illustrates an intent by both to be bound. The terms are clear because they agreed that Paula could pick one of the three paintings for the amount of \$200,000. Although the painting was not already picked out, it was Paula's choice when the time came, and Sally will be bound to that provision. Therefore, there has been a valid offer and acceptance between the parties.

There is also valid consideration. Consideration requires bargained-for legal detriment, which can involve both performance and forbearance. Here, both parties are promising to perform. Sally's legal detriment being suffered is giving up the painting, and Paula's legal detriment being suffered is the payment of money. Therefore, there is a valid contract, unless one of the defenses to formation discussed below applies.

All Conditions of Performance Satisfied

Paula must have satisfied any performance that she is required to perform. Or, if she

cannot yet perform or the other party refuses to perform, she must be ready and willing to perform.

Here, Paula has already performed her end of the contract because she transferred \$200,000 to Sally. Sally has tried to return the money, but Paula did not take the money and stated that she wants the picture. This illustrates that Paula wants to continue with the contract and has the money to do so, even if the money is returned to her.

Therefore, this requirement has been met.

Inadequate Remedy at Law

A remedy at law may be inadequate if the item at issue is unique, the damages are too speculative, or there will be a multiplicity of suits. In addition to evaluating the inadequacy of the remedy at law, the courts are also concerned with the feasibility of enforcing the contract. Generally, specific performance is not granted very often in contracts unless it's real estate. In the sale of goods, specific performance will often only be granted if the item is unique or custom made.

Here, the item is a one-of-a-kind Monay painting. The museum informed Paula that most Monay paintings are held by private collectors and are extremely rare. In this case, Paula was looking for one of three paintings that were all held by the same person, which means Paula could not go elsewhere to find them. This is also evidenced by the fact that one of the paintings has been on the market for years. Because the painting is so unique and the original will not be found anywhere else, the court will be willing to grant specific performance. Using its contempt power, it can force Sally to give up the painting.

Since the contract could be feasibly enforced by the court and the item is unique, there is an inadequate remedy at law and Paula could recover by specific performance.

Mutuality

The common law used to require mutuality of performance to ensure that the court could make everyone perform. However, this requirement is no longer needed. Therefore, Paula could recover through specific performance regardless of mutuality.

Defenses

Statute of Frauds

The Statute of Frauds requires any contract for the sale of goods that is \$500 or more to be in writing and signed by the party against whom it is being enforced.

Here, Sally will argue that the contract is not enforceable because it is for the sale of goods worth \$200,000 and there is no writing. Paula would argue that either part performance has satisfied the statute of frauds or that estoppel applies.

In the sale of goods, full performance will always satisfy the Statute of Frauds. However, part performance will usually only satisfy the Statute of Frauds to the extent of the performance. This generally means that there will be an enforceable contract to the extent of any goods delivered. Here, Paula will argue that she transferred \$200,000 to Sally, which means that she has fully performed her portion of the contract. Paula also arrived at Sally's house where she was supposed to pick up the painting. Paula could argue that Sally had satisfied her end of the bargain because once the money was transferred, Sally's delivery obligation had been performed since Paula had to come and pick it up. This is a weak argument, however, because there is no evidence that Sally wanted to give the painting or that the parties had agreed, which is why part performance through delivery of goods generally works. The seller would not have sent the goods if a contract did not exist. Most likely, Paula's part performance argument would not work.

Paula would also argue that estoppel applies and satisfies the Statute of Frauds requirements. Estoppel is the reasonable, foreseeable and detrimental reliance of the representation of the other party. Paula had already informed the Museum that she had obtained the picture and had transferred the money to Sally. If she had known she could not get the picture, she would not have told the Museum. Due to Sally's retraction, Paula's reputation will be tarnished and the Museum will most likely not want her services any longer. The business of art acquisition requires reliability and confidentiality. Specifically, the requirement of reliability will be negated if Paula is not able to enforce the contract, which puts her in a much worse position than if the contract had not been made. Sally would argue that Paula has not changed her position in reliance on the contract in any way because Paula still has the same amount of money that she had before and has not made any preparations for the painting that would amount to detrimental reliance.

Due to Paula's transfer of the money and her representations to the Museum that she had bought the piece, Paula's estoppel argument will most likely be upheld and Paula will be able to overcome the Statute of Frauds.

Misrepresentation

A misrepresentation is any false assertion or intentional concealment of material information. The assertion can be made knowingly or not.

Here, Sally expressed a desire during negotiations only to sell to private collectors. Paula made no reply to this comment and continued with the negotiations. Sally would argue that since Sally had made it clear that she only wanted to sell to private collectors, Paula was knowingly concealing a material assertion underlying the negotiations. On the other hand, Paula would argue that Sally never asked Paula if she was a private collector nor did she make it a term of the contract. Paula did not conceal any information from Sally,

but the parties simply negotiated without ever discussing Sally's desire to only sell to private collectors.

Paula's argument will most likely win and Sally will be unable to void the contract on the grounds of misrepresentation.

Unilateral Mistake

Generally, unilateral mistake by one party does not make a contract unenforceable. However, if the other party knew or should have known of the mistake, the contract is void.

Here, Sally will argue that Paula knew that Sally wanted only a private collector to buy the painting. Because Paula knew Sally's intent, Paula knew that Sally had the mistaken belief that Paula was a private collector. One of the material underlying assumptions of the contract in Sally's mind was that Paula was a private collector. Paula will argue that the mistake was not material to the contract because Sally never made it a part of the contract. In addition, Sally made the comment offhand, which means that Paula did not know that Sally had mistaken Paula for a private collector.

Under the circumstances, the court would most likely find that there was a unilateral mistake that was known by the other party. Therefore, the contract is not enforceable and therefore not specifically enforceable.

Unclean Hands

Sally will also argue that Paula has unclean hands, and therefore, cannot get specific performance. Unclean hands applies when the plaintiff has acted unlawfully or in bad faith in retaliation to the same contract.

Here, Sally would argue that by not asserting that she was there on behalf of the Museum, Paula had acted in bad faith before Sally repudiated the contract. By failing to tell Sally that she was only acting as an agent, Paula misrepresented who she was and the purpose of the contract.

This argument will most likely not win, since once the contract was formed, Paula did nothing to impede the contract. Parties are free to contract for the terms and Sally did not require that Paula be a private collector.

Overall, Paula will be able to get specific performance as long as unilateral mistake does not apply.