

QUESTION 3

Rick Retailer owns all pieces but the queen of a chess set carved by Anituck, a famous artist who carved 15 chess sets. No one today owns a complete Anituck chess set.

Six existing Anituck queens are owned by collectors. The last one was sold in 1983 for \$175,000. The current owners have refused to sell their queens to anyone.

If Rick could exhibit a complete Anituck chess set, he would draw people worldwide who would buy memorabilia with pictures of the full chess set and other products. It is impossible to know exactly how much Rick would make, but a complete Anituck chess set could be worth in excess of \$1 million.

Last week, Sam Seller brought to Rick an Anituck queen he found in his attic and asked if it was worth anything. Rick asked what Sam wanted for the queen. Sam asked whether \$450 would be fair. Rick replied that \$450 would be fair and offered to write a check immediately. Rick and Sam entered into a valid contract. Sam agreed to hand over the queen the next day.

The next day, Sam called Rick and said, "I learned that you defraud people out of expensive antiques all the time and that the queen is worth thousands of dollars. I am going to sell the queen to another collector."

Rick has sued Sam for specific performance for breach of contract, and has sought a temporary restraining order and a preliminary injunction.

What is the likelihood that Rick will obtain:

1. A temporary restraining order? Discuss.
2. A preliminary injunction? Discuss.
3. Specific performance? Discuss.

QUESTION 3: SELECTED ANSWER A

(1) TEMPORARY RESTRAINING ORDER

The issue is whether or not Rick will likely be successful in obtaining a temporary restraining order.

TEMPORARY RESTRAINING ORDER

A temporary restraining order (TRO) is an order granted in equity that preserves the status quo until a preliminary hearing on the matter can be heard. They are generally granted in emergency situations. For a TRO to be granted, the party seeking the TRO must show: (1) **irreparable harm** will occur in the absence of awarding the TRO; (2) **balance of hardships** favors granting the TRO; and (3) the party seeking the TRO is **likely to prevail on the merits**. While a TRO may be granted *ex parte* (without opposing counsel's presence), courts will generally require a strong showing of a good-faith effort to notify the opposing party or a strong showing of why notice could not be effectuated. TRO's are awarded for a short duration, typically 10-14 days, depending on the jurisdiction. Some courts also require a showing that damages are inadequate.

Here, Rick is seeking a temporary restraining order in order to prevent Sam from selling the Anituck queen to another collector. We do not know when Sam will find a collector or when the sale will be executed. Rick will likely be excused from providing **notice** of the TRO to Sam because Sam, agitated, may decide to expedite the sale to another collector. If the jurisdiction requires a showing that **damages are inadequate**, Rick will be successful because the chess piece is unique (there are only 15 chess sets made, 6 possessed by collectors who are refusing to sell). Moreover, as discussed further below, Rick's damages are speculative with respect to how much he would make if he had the complete chess set. Thus, the notice and inadequate damage elements are satisfied)

In all jurisdictions, in order to be successful, Rick must satisfy the elements:

(1) **Irreparable Harm:** irreparable harm may occur because it is possible that Sam will sell the queen to another collector before the preliminary hearings. If Sam sells the queen to another collector, Rick will suffer irreparable harm because there are only 15 pieces made in the entire world, 6 owned by collectors and all other current owners have refused to sell their queens. Thus, this factor leans in favor of a finding that Rick will suffer irreparable harm.

(2) **Balance of Hardships:** The balance of hardships must favor granting a TRO, which means that the party seeking the TRO will be substantially harmed if the TRO is not granted during the period before a hearing can be had. Rick will argue that the balance of hardships favors approving the TRO. If Sam does not go through with the sale, Rick will be prevented from obtaining another queen piece. Because Sam does not currently have an expiring offer from another collector, the court will likely find that the balance of hardships favors granting Rick a TRO until a full hearing on the merits can be had.

(3) **Likely to Prevail on the Merits:** While it is true that Rick will likely not be successful in being awarded specific performance (see below), the court does not analyze the parties defenses when granting a TRO. On its face, there appears to be a valid contract and Sam is repudiating on the contract: Rick offered to buy and Sam agreed to sell the chess piece for \$450. Thus, it appears that Rick will likely prevail on his action for specific performance. At the later hearing, the court will consider defenses and other equitable remedies. Thus, the court will likely find that Rick will prevail on the merits.

CONCLUSION

Because the court does not consider defenses in granting a TRO, the court will likely grant Rick a TRO to restrain Sam from selling the piece until a hearing could be had on

the matter. If Sam fails to comply with the courts order, he will be held in contempt.

(2) PRELIMINARY INJUNCTION

The issue is whether or not Rick will likely be successful in obtaining a preliminary injunction.

PRELIMINARY INJUNCTION

Similar to a TRO, a preliminary injunction is an injunction issued to preserve the status quo until a full hearing on the merits can be had granted by equity courts. In addition to the elements of the TRO (irreparable injury, balance of hardships, likelihood to prevail on the merits, and in some jurisdictions, inadequate legal remedies), in order for a preliminary injunction to be granted, the opposing party must have notice and an opportunity to be heard at the hearing and no defenses may apply. Additionally, the court may require the plaintiff (here, Rick) to post a bond in case Rick is ultimately not successful in his claim for specific performance.

(1) **Irreparable Harm.** See above.

(2) **Balance of Hardships.** See above.

(3) **Likelihood of Prevailing on the Merits.** See above.

(4) **Inadequate legal remedy.** See above.

(5) **Notice.** Rick must give notice to Sam and give Sam an opportunity to be heard at the hearing for the preliminary injunction. At that point, Sam will be able to raise all of his defenses (see below). If Rick fails to give Sam notice, then the court will deny Rick's preliminary injunction.

(6) **Bond.** The court may require Rick to post a bond to cover any losses to Sam in the event Rick ultimately loses the claim for specific performance. Courts are more relaxed on this requirement if the plaintiff is indigent. There are no facts with respect to Rick's current earnings, thus it is not possible to ascertain whether the court will excuse Rick from the bond requirement.

(7) **No Defenses.** In order for the court to grant a preliminary injunction, there must not be any viable defenses raised by the defendant. Here, Sam will likely be successful in defending against the grant of the permanent injunction by claiming **unclean hands**.

Unclean Hands: Unclean hands is an equitable defense. Under this defense, a plaintiff who acted unfairly with respect to the current action will be barred from recovery because they too have "unclean hands." Here, Sam will likely successfully argue that Rick materially misrepresented the value of the chess piece. The last chess piece to be sold was for \$175,000 and Rick knew this. Thus, it would be inequitable for him to buy the piece for \$450, knowing the true value of the piece, and representing to Sam that \$450 is a fair price. Rick will argue that he did not know the true value of the goods. However, this argument will likely fail because Rick understood and appreciated the value of the full set (\$1,000,000) and how much money he could make selling memorabilia pictures of the full chess set and other products. Because injunctions are granted in equity, it will be unfair to allow Rick to recover when he was not acting fairly. Thus, the court will likely find the defense of unclean hands applies.

Laches: Laches is another equitable remedy in which case the plaintiff's unreasonable delay in bringing a claim caused substantial prejudice to the defendant. Here, Rick is seeking the preliminary injunction immediately after learning that Sam is repudiating on the contract and thus the laches defense does not apply.

Misrepresentation. See below in damages section.

CONCLUSION

The court will likely not grant the preliminary injunction because Sam will likely successfully raise an unclean hands defense.

(3) SPECIFIC PERFORMANCE

In order for Rick to be entitled to specific performance, there must be a breach of contract.

GOVERNING LAW

The UCC governs contracts for the sales of goods, which are tangible, moveable things. Common law governs all other contracts, including service and real estate contracts. Here, because the queen set is a good (tangible, moveable thing), the **governing law** is the UCC.

ANTICIPATORY REPUDIATION

Under the UCC, if a party unequivocally expresses their intent to not perform their obligation under the contract, the party has anticipatorily repudiated, which entitles the other party to stop performance and sue immediately. Here, under the terms of their contract (which was valid, see below), Sam was obligated to sell Rick the chess piece for \$450. Sam called Rick and told him that he was going to sell the queen to another collector. Because Sam only had one queen piece, this expression evidences Sam's refusal to perform.

Accordingly, Rick is entitled to stop performance and sue Sam for damages or for specific performance.

SPECIFIC PERFORMANCE

The issue is whether or not Rick will likely be successful in obtaining specific performance.

In contracts, specific performance is a remedy in which the court orders the defendant to perform his obligations under the contract. This is usually available only for unique goods and for real estate transactions. In order for the court to grant specific performance, the following elements must be met: (1) valid contract with clear and definite terms; (2) inadequate legal remedy; (3) feasibility of enforcement; (4) mutuality of performance; and (5) no defenses.

VALID CONTRACT

In order for the court to order specific performance, there must be a valid contract with definite and certain terms. To be valid, a contract must have assent (offer and acceptance) and be supported by consideration. Here, because the queen set is a good (tangible, moveable thing), the **governing law** is the UCC. Under UCC principles, there was a valid contract formed, at least on its face: there was an offer (offer to buy the chess piece by Rick); there was acceptance (Sam agreed to sell the chess piece), and there was consideration (\$450 in exchange for the good).

Additionally, because the contract price was for \$450, evidence of the oral agreement did not need to be in writing because the Statute of Frauds does not apply.

Moreover, the facts state that the contract was valid. Thus, this element is satisfied.

However, as discussed below, Sam will likely be successful in raising defenses to the contract formation, including misrepresentation and unilateral mistake.

INADEQUATE LEGAL REMEDY

Money damages must be inadequate in order for a court to grant specific performance. Here, Rick will likely be successful in satisfying this element because the queen set is unique -- there are only 15 sets made and the current owners are refusing to sell their queens to anyone. Moreover, money damages are speculative. Rick does not know how much he would make if he has the full chess set -- he believes that people all over the world would come to him to take memorabilia pictures and purchase other products. He also speculates that the value of the entire chess set would be about \$1,000,000. However, these calculations are entirely speculative. Because the goods are unique, the UCC will allow specific performance.

FEASIBILITY

This element refers to whether or not a court can enforce the specific performance. This is usually not a problem in situations where the court is ordering the defendant not to do something (negative) because of the court's power of contempt. Ordering behavior may be more difficult if the defendant is in another jurisdiction and there are oversight issues. Here, that doesn't seem to be the case. The court can order Sam to perform his contract obligations (sell the queen to Rick for \$450), and if he fails to do so, the court can hold him in contempt.

MUTUALITY OF PERFORMANCE

Mutuality of performance requires each party to the contract to be willing and able to perform their obligations. Here, this element will be satisfied because Rick has the \$450 to pay for the chess piece, and Sam still has the chess piece in his possession.

DEFENSES

Both equitable and legal defenses are available because specific performance is an

equitable remedy, but because it requires the existence of a valid contract, contract defenses also apply.

Misrepresentation. Misrepresentation is a defense in which case the party seeks to either rescind the contract or argue that the contract never existed because there was no meeting of the minds. Misrepresentation applies where a party (1) makes a misrepresentation; (2) about a material fact; (3) with the intent to induce reliance; and (4) the other party actually and justifiably relied. Here, Sam will likely be successful in invalidating the contract on this ground. Rick misrepresented the true and fair value of the chess piece, telling Sam that the offering price was fair. However, chess pieces are worth thousands of dollars. The material fact element is satisfied because the price is a fact of the basis of the bargain--the selling price. Rick intended to induce Sam's reliance into believing it was worth only \$450 so that Sam would sell it to him for that price. Sam did enter into a contract on that basic assumption, and thus the elements are satisfied. Thus, Sam will likely be successful in defending this contract.

Unilateral Mistake. Unilateral mistake is generally not a defense to a contract. A mistake exists where the party is mistaken about a material fact that is a basic assumption of the contract. If the non-mistaken party knew or should have known that the other party was mistaken, the court will allow the contract to be rescinded. If the other party knew the other was mistaken, then the court will allow the contract be reformed to reflect the intention of the mistaken party. Here, Rick will argue that the court should not prejudice Rick just because Sam failed to do his research and learn the true value of the chess piece. This argument will likely fail because, as previously indicated, Rick knew, or at least should have known, of the true value of the chess piece and that Sam was mistaken. Here, Sam asked Rick if the asking price (\$450) was fair... demonstrating his reliance on Rick's response. Thus he was mistaken.

Unclean Hands. See above.

Laches. Will not apply (see above).

CONCLUSION

The court will likely not grant Rick specific performance.

QUESTION 3: SELECTED ANSWER B

1. Temporary Restraining Order ("TRO")

A TRO is a temporary injunction ordered by the court to maintain the status quo until a hearing for a preliminary injunction, and then ultimately a hearing and trial on the merits, can be heard. A TRO lasts no longer than necessary to have the hearing on the preliminary injunction and should not last longer than 14 days. In order to get a TRO, a plaintiff must show they will suffer irreparable harm in the amount of time it takes to wait for a preliminary injunction hearing and that they are likely to succeed on the merits of their case. Typically, the plaintiff must give defendant notice of the TRO and there should be a hearing, unless the plaintiff can show that he tried to notify defendant and failed, or notifying defendant may lead to the irreparable harm. In such case, a TRO hearing may be done ex parte. Here, there are no clear facts showing Rick attempting to notify Sam about a TRO hearing, but he may argue it would be counterproductive because Sam may sell the queen after being served notice of a hearing.

Irreparable Harm

Here, Rick is likely to suffer irreparable harm unless the court grants the TRO preventing Sam from selling the Queen. A TRO is necessary because Sam could likely sell the valuable queen in the amount of time it would take to wait for a preliminary hearing, and if he did so, Rick would be unable to retrieve the queen and unable to replace it because of how rare the Anituck queen piece is. The harm would be irreparable since there are only six existing Anituck queens and the last one was sold 20 plus years ago. Therefore, Rick can likely establish irreparable harm requirement for a TRO.

Likely to Succeed on the Merits

Rick must show/demonstrate a probability that he will be successful on the merits. Here, there was a contract to sell the queen piece between the parties, and the facts state there was a valid contract. Although Sam has many defenses, he can ultimately raise on the merits as to the validity of that contract, the showing of an agreement to enter the contract is likely sufficient to establish the likelihood of success for a TRO.

Balancing of Hardships and Placing of Bond

The court will also balance the hardships in determining whether to grant a TRO. The court will balance the hardship to the plaintiff (extent of the irreparable harm) without the TRO and the hardship to the defendant should the TRO be ordered. Here, the hardships clearly weigh in favor of Rick. Should the court deny the TRO, Sam may sell the queen. The last time a queen was for sale was 1983 and there may not be another opportunity to buy one for years. Moreover, the potential losses if this occurs are monumental, as the completion of the set with the queen could be worth millions to Rick. Meanwhile, the delay in selling the piece in the event that Rick loses on the merits is of very little effect on Sam. He will still possess the queen piece and be able to sell at just a high price. Therefore, the court should grant the TRO preventing Sam from selling the queen piece.

The court should, however, require Rick to post a bond to insure against any injuries that Sam may suffer in the amount of time it takes to have a preliminary hearing should Sam be wrong and lose on the merits.

2. Preliminary Injunction

The process and requirements for a preliminary injunction are almost identical to the requirements for a TRO. The preliminary injunction preserves the status quo for the time it takes to hear the case on its merits in trial. A preliminary hearing may never be

done ex parte, and so defendant must be given notice of the hearing. Like a TRO a plaintiff must show irreparable harm and likelihood of success on the merits. Here, for the reasons stated above, the court should grant Rick's request for a preliminary injunction preventing Sam from selling the rare Anituck queen until after a trial on the merits. Again, the court may require Rick to post a bond to cover any potential injuries Sam may suffer from a result of having to wait to sell until after the trial should Rick lose.

3. Specific Performance

Governing Law

The UCC governs all contracts for the sale of goods. Here, the contract is for the sale of a queen piece of a chess set, which is a movable, tangible thing, and therefore goods. Therefore, the UCC governs.

Specific Performance

Specific performance is an equitable remedy in which the court compels a party to a contract to perform his duties under the contract as he promised. A court will grant specific performance when (i) there is a valid, enforceable contract with certain and definite terms (ii) the plaintiff has already performed or is ready, willing and able to perform his duties under the contract, (iii) legal remedies are inadequate, (iv) enforcement of the contract by the court is feasible (v) and the defendant has no defenses to the contract.

(i) Valid, Enforceable Contract with Certain and Definite Terms

A court will not enforce a contract unless there is a valid contract and certain and definite terms so the court knows what to enforce. Here, the facts state Rick and Sam entered a valid contract. Moreover, the terms are certain and definite, the sale of the

queen in exchange for \$450. Although it is not clear if there was a writing, the statute of frauds does not apply here because the contract is for the sale of goods for less than \$500 since the price was set at \$450.

(ii) Plaintiff is Ready to Perform

To receive specific performance, the plaintiff seeking performance must have been ready to perform himself. Here, Rick offered to write Sam a check immediately, thus indicating he was willing to perform his side of the contract.

(iii) Inadequate Legal Remedies

In order to receive specific performance, the plaintiff must show that legal remedies, typically damages, are inadequate. In the case of contracts for property, legal remedies may be inadequate if the property is rare or unique. Here, the chess piece is nearly a one of a kind. There are only six in the world and rarely do they become available for sale. Therefore, damages are inadequate because Rick could not use money to cover by going out and buying the queen somewhere else. Therefore, legal remedies are inadequate.

(iv) Enforcement is Feasible

A court will only grant specific performance if enforcement of the contract is feasible. The court enforces orders of specific performance through its contempt power, so the court must have jurisdiction over either the property or the person. Here, so long as Sam and Rick are before the court, there should be no issues of feasibility of enforcement. If Rick wins, the court will simply order Sam to perform under the contract and sell the queen piece to Rick or else be held in contempt of court, subjecting himself to civil and potentially criminal penalties. Therefore, the specific performance is feasibly enforced by the court.

(v) Defenses

The court will not grant specific performance if the defendant has a viable defense. Since specific performance is an equitable remedy, equitable defenses are available to the defendant. Here, Sam has multiple defenses he may raise against Sam to prevent specific performance.

Misrepresentation

A misrepresentation occurs when one party makes a false statement intended or reasonably known to induce action by the other party and the other party justifiably relies on that statement to his detriment. Here, Sam asked Rick if \$450 was a fair price. Sam replied to Rick that \$450 would be a fair price, even though he knew this was false. He also knew that Sam was likely to rely on this false statement because he had asked Rick if it was a fair price and clearly did not know for himself. Also, Rick clearly intended his response that it was fair to induce Sam to sell at that price. Sam may not have been justified in depending on Rick without seeking his own valuation, especially considering what Sam later learned about Rick's practice of swindling people. However, the court would likely find that Sam did in fact rely on the false statement by Rick, and that this misrepresentation would prevent a granting of specific performance.

Unilateral Mistake

A contract may be voidable by a mistaken party if the mistake was concerning a material fact of the bargain, the mistake had material effect on the bargained for exchange, the unmistaken party knew or should have known of the mistaken party's mistake, and the mistaken party did not assume the risk of the mistake. Here, Sam was mistaken as to the value of the queen piece. He asked for \$450 when the queen was in reality worth thousands of dollars. This is a material fact and has a material effect on the bargained for exchange since it impacts how much Sam would have asked for the

queen and agreed to sell it for had he known its true value. Moreover, Rick had reason to know of Sam's mistake because he knew the piece was worth thousands of dollars as a collector of chess pieces and someone looking for the queen. When Sam suggested \$450, Rick would have known he was mistaken as to its value. Finally, the risk is likely not one Sam assumed. Typically both parties assume the risk of a bad deal and over or under valuing the property. However, here Sam specifically asked Rick if \$450 was a fair price and Sam had reason to know that Sam was relying on Rick's evaluation. As such he was not assuming the risk of being wrong. Therefore, the court may void the contract due to Sam's unilateral mistake.

Unclean Hands

Unclean hands is an equitable defense that prevents the court from granting equitable remedies when the one seeking performance has exercised some misconduct in the transaction at issue in the case. Here, Sam lied to Rick about the fairness of the price. As such he likely did not come to court with clean hands and will not be granted remedy in a court of equity.

UCC Good Faith and Fair Dealing

The UCC implies a duty of good faith and fair dealing in all contracts for sale of goods. Here, Rick breached this duty by lying to Rick. Therefore, it would not be enforced under the UCC.