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Choice of Law

This transaction deals with a service to do work on the land. Because it does not involve sale of goods, common law applies.

Whether any of the parties will succeed will depend on whether any of the parties committed a material breach of the contract.

Anticipatory repudiation (AR)

Anticipatory repudiation is unequivocal refusal to complete the performance and unequivocal intent to terminate the contract. AR is a material breach of contract that gives rise to the injured party to sue for breach.

Here, Dirt (D) and Builder (B) entered into a valid contract where D's job was to prepare the site. The contract was to run between June 1 and September 1. In order for D to prevail, he will argue that June 4 communication by B was AR.

Unequivocal repudiation

The project was supposed to commence on June 1. Because of the weather conditions and the ban on the use of diesel powered equipment that D was planning on using, D did not start on time. B's notice to terminate the contract can be argued by the parties differently. D will argue that the communication that the contract was "terminated" was a repudiation of the contract because it was followed by the hiring of the subsequent contractor to do the work. B's arguments will be based on the fact that D's failure to use gas-powered equipment amounted to breach of contract to proceed quickly as it was important for B to complete the work timely. However, D's contentions will prevail because asking for a change is an attempt to modify the contract and does not amount to a unequivocal repudiation. Furthermore, D will argue that even if the communication that contract was "terminated" was not initially unequivocal, hiring of the second contractor solidifies the repudiation of the contract by B. B

has not allowed D to complete the contract or have an opportunity to use the gas powered equipment. B will argue that since the cost increase of \$500,000 where the contract itself is valued at \$1,500,000 is cost prohibitive and B's assumption that D would not be able to proceed would be justified in B's view.

The court will most likely interpret the event as anticipatory repudiation by B.

Major or Minor Breach

The quality of the breach will dictate if performance by the other party is excused. Major breach takes place when the the suing party did not get a substantial benefit of its bargain. Because B repudiated the contract, D will argue that the repudiation was a major breach and D is excused from further performance and can sue for damages.

In the countersuit, B will argue that D was under the obligation to perform and asking for \$500,000 was the major breach excusing B's performance. Because, as discussed above, the court will likely find B as the party breaching the contract, B will likely not succeed in claiming major breach by D.

Can the performance of any party be excused?

Performance can be excused if there are conditions attached to the contract or a party cannot perform due to impracticability, impossibility or frustration of purpose.

Here, B will argue that the clause in the contract that "D agrees to have all of its equipment available as needed to perform this contract and shall refrain from undertaking any other jobsfor the duration of the contract" was a condition precedent to performance by B. As such, B would argue that because D had the gas-powered equipment available in the storage, but failed to use use it, D thereby breached the condition precedent to performance by B. B would argue

that the termination of the contract was warranted because of D's failure to perform. B will also argue that the clause stipulating that D would not take on any other jobs would equate to "time is of the essence" clause given the need to complete the project on time. However, B will likely fail because B cancelled the contract only 4 days after the start of the contract term and has not provided D with a reasonable opportunity to perform. The request to increase the amount by \$500,000 was a "request". The court will find that D has not failed to perform on the condition precedent because D, although had the equipment, has not been provided with an opportunity to perform.

Impossibility and impracticability

If the court finds that D was under the obligation to perform under the contract, D can raise the defense of impossibility or impracticability. This defense is available when there is an extraordinary and unexpected event that renders performance under the contract impossible or impracticable. D will argue that its performance, if any, was cut short by the weather pressure system that resulted in the use of all diesel-powered equipment. The impossibility claim will rise from the fact of having a ban, the impracticability claim will be based on the fact that it would cost substantially more to complete the contract. However, none of the claims will succeed because D had the availability of the gas-powered equipment that was, although less efficiency, but yet available. So, it would not be impossible to complete. The cost increase does not justify the impracticability because of D's duty under the contract.

1. Is D likely to prevail in its suit?

D is likely to prevail because the termination of contract by B would be viewed as AR. Court will construe the AR by B as material breach and D would be able to collect the expectation damages.

2. Is B likely to prevail in its counterclaim?

B is unlikely to prevail in its counterclaim that it did not repudiated the contract, but D failed to perform under the condition precedent, because the court will likely find that B did not provide D with reasonable opportunity to perform under the contract.

Question #3 Final Word Count = 976

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