

Essay 4 – 55

Donor comments:

Missed condition, parole evidence, adequate assurances. Not organized well. No damages cluster.

1)

Carl's Rights and Remedies against Ben

I. Is there an enforceable contract between Carl and Ben?

Governing Law

If a contract is for the sale of goods over \$500, the UCC will be applied. Otherwise common law will govern. If the contract has a mixture of goods and services, the predominating factor will determine the applicable law.

Here, this contract is for construction services and delivery of a residence. The amount of payment is \$200,000. It can be argued whether this money is for a good, a house, or if it is for the services of constructing that house. Because the house has not been pre-fabricated and the details of the agreement primarily involve the construction and the date by which said construction must be completed, the services aspects of the contract seem to dominate. The common law will apply.

A contract requires offer, acceptance and consideration. An offer is a manifestation which creates the power of acceptance and allows acceptance to complete the bargain. Acceptance is notification that the offeree agrees to the terms of the deal. Consideration is the mutually induced, bargained for exchange that binds the parties together in contract. In the absence of consideration, promissory estoppel may allow the enforcement of a promise if there was reasonable expectation of reliance, reliance in fact, and harm from that reliance.

Here, all of the details of offer, acceptance, and consideration are detailed in the writing. Ben offers Carl \$200,000 to construct a residence using solar panels and related electrical equipment manufactured by Sun Company ("Sun"). and to complete construction by Thanksgiving. Carl agrees to the execution of the written instrument, indicating his acceptance. The consideration is mutually

inducing. Carl gets \$200,000 to comply with the terms; Ben gets satisfaction of the terms for his \$200,000. Promissory estoppel need not be enforced because there is valid consideration. This is a valid common law agreement.

Statute of Frauds

In certain instances, the contract must satisfy the Statute of Frauds or it will be deemed invalid. If it must satisfy the Statute of Frauds, it must be in writing, be signed by the party against whom enforcement is sought, and describe the material provisions of the contract. A contract governing marriage issues, contracts for a term of years, for the sale of land, executorship, guarantees, or for the sale of goods over \$500 must satisfy the Statute of Frauds.

Here, the contract could only arguably fall into the last category. If it were determined that the sale of a home dominated over the construction as the primary purpose of the agreement, the Statute of Frauds would be satisfied (presuming that "executed a written agreement" indicates signature by the parties). The contract describes the material provisions, is signed by the party against whom enforcement is sought and is in writing.

II. Is there a Valid Modification of the Contract to include Sun as an intended beneficiary?

The issue is whether Ben's oral indication that Carl must use Sun for solar panels and related electrical equipment because the owner of Sun is Ben's brother constitutes a valid modification to add Ben's brother (Sun) as an intended beneficiary of the agreement.

Under common law a provision requiring modifications to be written will generally be unenforceable because modifications require consideration only and can be made orally. Under the UCC, modifications do not require consideration, but must be in writing. An intended beneficiary is one who, through agreement of the

parties, will receive an explicit benefit from the bargain and whose rights to enforce the bargain vest when an explicit representation is made that they are an intended beneficiary.

Here, if this were to be considered a modification to include Sun as a beneficiary, the clause would fail as a modification. Under common law, the modification fails because there is no consideration for the modification in the agreement to treat Sun as an intended beneficiary. Under the UCC, the modification was not made in writing. Either way, Sun would not be added as an intended beneficiary.

II. Is there a breach of the contract between Carl and Ben

Breach of Contract

A party breaches a contract when they fail to fulfill a condition of the agreement. Liability may not be imposed if there is excuse for the failed condition via mistake, impossibility, impracticability or frustration of purpose. Mistake can be unilateral or mutual. Unilateral mistake is when one party is mistaken as to a material fact of the agreement, but is generally not grounds for excuse from the contract. Mutual mistake is when both parties are mistaken as to a material fact of the agreement and the burdened party may void the contract. Impossibility is when it has become objectively impossible for the contract to be performed due to circumstances outside the control of either party which were not anticipated upon commencement of the agreement, the non-occurrence of which was an assumption of the parties at the time of contract. Both parties are excused. Impracticability is when it has become unreasonably burdensome for one party to perform the contract and the burdened party is excused. Frustration of purpose is when the reason for which the contract was entered into is frustrated, and that frustration is material. The frustrated would be excused.

Here, Carl did not use solar panels from Sun because they were temporarily out of stock. By the terms of the agreement, Carl has breached the contract. Carl

does not have a valid reason to be excused from performance. There was no mistake of fact and there are no facts to indicate that Carl or Ben could argue otherwise. Performance was not objectively impossible because he could have waited for Sun to replenish stock of solar panels, seeing as Carl finished work before Thanksgiving. Carl may argue that compliance with the terms was impossible since Sun did not have stock, however completion of the home within a reasonable time after Thanksgiving still would have been acceptable under common law and the UCC. Performance was not impracticable because, Carl was under no undue burden to continue performance due to unforeseen circumstances. Carl may make arguments that lack of Sun's stock was unforeseen, however depletion of stock of any company is generally foreseeable. The primary purpose of the contract seems to be construction of a residence, which is not frustrated by the type of solar panel used in its construction. Ben may argue that the primary purpose was to promote his brother's solar panel business, but the terms of the agreement do not indicate such.

Carl will be found to have breached, the parties will not be excused from the agreement.

III. What Rights and Remedies for Carl against Ben?

When there is a breach of a condition of a contract, the court may look to see if the breach was material or if there was substantial performance. A material breach will entitle the non-breaching party to pursue remedy, the breaching party will pay any damages owed, and will not be entitled to any remedy. Substantial performance allows the breaching party to recover for the performance rendered up to the breach; however the breaching party may still have to pay any damages suffered by the non-breaching party.

Here, Carl will argue that he substantially performed, and that his breach is non-material. He finished construction prior to Thanksgiving and delivered the home

with solar panels of equal grade to those manufactured by Sun. Carl will argue that the fact that he did not use Sun's panels, because of their lack of stock, is non-material and he is entitled to restitution for the benefit conferred upon Ben (the \$200,000 for the residence that was delivered). Ben will argue that the use of Sun equipment is material because it is the first term listed in the agreement, and because Carl knew that Ben wanted to use Sun because Ben's brother was the owner. Generally a court will deem a breach non-material and to be substantial performance where an adequate substitute of materials is used in a construction contract because the materials requested were not available. An adequate substitute is a material of equal or superior quality. Here Carl satisfies this test and most courts would find this to be a substantial performance. While Ben would have preferred that his brother's Sun panels be used, Carl cannot be faulted for Sun being out of stock. Carl will likely be able to recover the \$200,000 for the work completed.

Ben will argue that he paid Carl \$25,000 for an assurance that Carl would complete construction by Thanksgiving, and that he is entitled to a return of that money.

When a party fears repudiation, it may seek an assurance or it may immediately file for damages instead of having to wait until actual breach. Repudiation occurs when a performing party affirmatively indicates that it will not perform.

Here Carl never affirmatively indicated he would not perform. He will further argue that this money was given as a "bonus" and should be qualified as a gift to him, which Ben cannot recoup. Ben will argue that "completion" meant that he would also use Sun panels, however additional money offered for the same consideration does not strengthen the consideration. Ben cannot double bind Carl. By the terms, Ben called the \$25,000 a bonus for on-time completion. Based on his use of bonus, the \$25,000 is likely a gift and Carl is entitled to keep it. Ben may argue that Carl is unjustly enriched by keeping the bonus without using Sun panels, however if the court finds that the use of other panels of equal

quality satisfies the agreement, Ben's argument will fail.