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Marta and Don: Bait Cooler Contract

I. Have Marta and/or Don breached the bait cooler contract?

In order to determine whether Marta and/or Don have breached their contract we must first determine whether they entered into a valid, enforceable contract.

a. Is there a valid, enforceable contract?

i. Supply of goods contract: Uniform Contract Code (UCC)



In order to determine the parties' respective obligations we must first ascertain the subject matter of their contract. Here we are told that Marta ordered a new bait cooler from Don, so this contract involves goods. Marta operates a successful fishing shop so she is a merchant. It is not clear whether Don is a




merchant, although the facts do suggest that he is a retailer of sorts (in particular, as he has a supplier for the new bait cooler she has ordered from him). Contracts for the sale of goods are governed by the Uniform Contract Code ("UCC"), so in determining whether the contract is valid we will have to apply the UCC rules.

iii. Offer, Acceptance (mutual assent), and valid consideration

For a contract to be valid there must be mutual assent between the parties (offeror and offeree) and mutual consideration, in the form of a bargained for exchange.

Here, we are told that Marta entered into a valid written contract with Don to purchase a Bate Mate cooler (mutual assent) for \$5,500 (bargained for exchange).

iv. *Enforceability: Statute of Frauds satisfied* 

For contracts for the sale of goods of more than \$500, the Statute of Frauds (SoF) provides that the contract must be in writing and signed by the party to be charged. Here, we are told that the contract was valid and in writing (thus satisfying SoF). 

Conclusion: there is a valid contract between Marta and Don.


a. Don's possible breach: Prospective inability to perform or Anticipatory Repudiation?

In considering the issue of whether Don has breached the contract, we must consider whether he has fulfilled his end of the bargain, by complying with the terms set out therein. As the UCC applies to this contract, there are special requirements which will determine whether a breach has occurred.

Telephone call of February 15: Prospective inability to perform



The issue here is whether Don anticipatorily breached the contract during the discussions which took place on February 15 and/or by failing to respond to Marta's subsequent fax.

 If a party manifests expressly to the other party of a contract (by words or conduct) that they will not be able to perform their duties under the contract, the other party is entitled to treat that express confirmation as an anticipatory repudiation of the contract. They then have the option of treating the contract as repudiated and either immediately suing for damages, or waiting for the time for performance by their other party before suing. If the breaching party subsequently performs on time (thus withdrawing the anticipatory repudiation),


they will not be held in breach of the contract, unless the other party has already relied on their breach to their detriment.



Here, we are told that Don told Marta on February 15 that he was having difficulty procuring a cooler for her. Marta reminded him that she needed one by no later than April 15. Don responded in a doubtful tone and said "I'll see". This response by Don is not a manifest or express confirmation to Marta that Don would not perform, rather it is a suggestion of mere doubt as to Don's performance.



Failure to respond to Marta's fax: Anticipatory Repudiation

Where a party expresses mere doubts, this amounts to their perspective inability to perform, and the other party is entitled to seek assurances. Failure to provide such assurances may amount to anticipatory repudiation. 

We are told her that Marta sent a fax to Don after their call of February 15 as she was clearly having doubts that he would deliver the bait cooler to her on time. She stressed in her fax the importance of timely delivery and she asked Don to provide his suppliers guarantee that the unit would be available. On these facts, Marta was seeking further assurances from Don in response to his prospective inability to perform.



Where a party fails to respond to further assurances of their performance in these circumstances, they are entitled to treat a lack of response as conduct indicating an unwillingness or inability to perform (ie, anticipatory repudiation).

Here, we are told that Don did not reply to Marta's fax. Marta would argue that his failure to respond and provide her with his supplier's guarantee amounted to anticipatory repudiation (by virtue of his conduct). Don, on the other hand, would argue that he thought that Marta was overreacting and he did not appreciate that



she was doubtful as to his performance. He would also argue that he did not want to reveal his supplier's identity so he was unable to provide the supplier's guarantee that she had requested. He would say that failure to provide the supplier's guarantee was not a breach of the contract with Marta, as it was not a requisite term of the contract so he was not obliged to do so.




On these facts, it would appear that by failing to respond to the fax, Don's conduct amounted to an anticipatory breach of the contract, and thus Marta was entitled to treat the contract as breached.


b. Marta's possible breach:

i. Seeking another buyer



Don would argue that he did not repudiate the contract and by failing to accept delivery on April 16,  Marta breached the contract. However, for the reasons discussed above, Marta was entitled to treat Don's conduct of failing to provide her with a response to her fax as a total breach of the contract.



In the circumstances, Marta was entitled to mitigate her losses by seeking to obtain a cooler from another supplier. If Marta had not already found another supplier to sell her a cooler the day before, then Don's attempted delivery of the cooler on April 16 may have amounted to a withdrawal of the repudiation. However, as Marta had already detrimentally relied on the repudiation by sourcing a cooler from someone else, Don was estopped from withdrawing the repudiation on April 16. 

II. What damages may be recovered by the parties?

When a party breaches a contract the non-breaching party is entitled to Compensatory damages to put them in the position as if the contract had been performed. Compensatory damages includes actual and foreseeable damages, which are certain. The non-breaching party must also mitigate their losses, and may seek to recover any incidental expenses (such as shipping costs) in doing so.

As discussed above, we are told that Marta mitigated her losses by sourcing a cooler from another supplier. She paid \$5,500 for the replacement cooler, plus incidental delivery costs of \$2000 for next-day delivery. The contract with Don provided for a cooler at a price of \$5,500, which is the same as the replacement Marta obtained. So Marta did not ultimately pay more for the cooler. Her actual damages were mitigated by her ability to find another cooler in short notice. However, Marta was also required to incur substantial incidental shipping costs in order to do so. These costs would be recoverable from Don.

Don would argue that next day delivery was not really a necessary expense, given that Marta's fax was sent on February 15, so she had a month so look for a replacement cooler if she believed he had repudiated the contract. The court will look at whether the shipping costs were reasonable and foreseeable in the circumstances. It will consider the fact that Marta needed the cooler by April 15 so that it could be in place for the first day of the fishing season, and time was of the essence from her perspective.

Given that Don was having such difficulty obtaining a cooler for her from his supplier, Marta's incidental shipping expenses are likely to be awarded.



(Question 1 continued)

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