QUESTION 3

Dirt, a large excavating company, recently replaced all of its gas-powered equipment with more efficient diesel-powered equipment. It placed the old gas-powered equipment in storage until it could sell it.

On May 1, Builder, a general contractor for a large office development, and Dirt signed a valid written contract under which Dirt agreed to perform all the site preparation work for a fee of $1,500,000. Dirt estimated its total cost for the job at $1,300,000. The contract states: "Dirt hereby agrees to commence site work on or before June 1 and to complete all site work on or before September 1." Because no other work could begin until completion of the site preparation, Builder was anxious to avoid delays. To ensure that Dirt would give the job top priority, the contract also states: "Dirt agrees to have all of its equipment available as needed to perform this contract and shall refrain from undertaking all other jobs for the duration of the contract."

On May 29, an unusual high pressure weather system settled over the state.

As a result, on May 30, in an effort to reduce air pollution, the state banned use of all diesel-powered equipment.

On June 2, Dirt told Builder about the ban and stated that it had no way of knowing when it would be lifted. Builder told Dirt to switch to its gas-powered equipment. Dirt replied that using its old gas-powered equipment would add $500,000 to its costs and asked Builder to pay the increased expense. Builder refused.

On June 4, seeing that no site work had begun, Builder emailed Dirt stating that their contract was "terminated."

On June 8, Builder hired another excavating company, which performed the work for $1,800,000.

Dirt has sued Builder for terminating the contract. Builder has countersued Dirt for the $300,000 difference between the original contract price and what it paid the new contractor.

1. Is Dirt likely to prevail in its suit? Discuss.

2. Is Builder likely to prevail in its countersuit? Discuss.

3)

1. D v B

At issue is whether D is likely to prevail over B in a breach of contract, anticipatory repudiation, or detrimental reliance claim. D must establish that there was an enforceable contract and prove damages from the breach of that contract. B can raise as defenses that there was never an enforceable contract, that D was responsible for the breach, D had reason to believe there was a mistake, that there was no time of the essence clause,

Applicable Law

The Uniform Commercial Code governs contracts for goods, whereas all other contracts are governed by common law. A good is defined as a movable object. Here the contract was for site preparation work, a service. The common law, not the UCC, is applicable here.

Unilateral Contract

While bilateral contracts are formed by mutual exchange, contracts requiring a party to promise future performance are unilateral contracts.

Statute of Frauds

The Statute of Frauds requires that contracts for an amount greater than $500 must be committed to a signed writing executed by both parties to be enforceable. The contract was for $1,500,000 in exchange for services. The Statute of Frauds applies here, but cannot successfully be raised as a defense because the contract meets its requirements.

Breach of Contract

A party breaches a contract when one of its contractual obligations have not been fulfilled. D agreed to commence site preparation work on or before June 1 and to complete the job on or before September 1. On June 2, D had not begun performance, but notified B that the unforeseeable ban on their diesel-powered

equipment prevented them from immediately performing. D offered to continue performance with its old gas-powered equipment if the resulting $500K in costs were covered, but B refused.

Anticipatory Repudiation

If one party expressly indicates they will not perform under the contract, the other party may have a cause of action under an anticipatory repudiation theory. The weather system, legislation, and D's nonperformance up to June 2 do not give rise to an anticipatory repudiation theory. But once D expressly stated it could not perform under the circumstances, B had a potentially actionable anticipatory repudiation claim against D. B would have to demonstrate that it could not reasonably substitute D's performance without suffering substantial harm, which is unlikely to succeed.

Time of the Essence Clause

In most cases, deadlines for services in contracts are not strictly enforceable unless the contract has a clause expressing that time is of the essence. B will argue that by having two deadlines -- rather than just a completion deadline -- it should have been apparent that the June 1 deadline constituted a time of the essense clause. D can raise as a defense that no express clause appears in the contract, and that if B really wanted to enforce the June 1 deadline, they could have imposed a liquidated damages clause for failing to meet the deadline. D is more likely to succeed as failure to meet deadlines is frequent in construction contracts, and B as a general contractor was well situated to make the deadline enforceable.

Detrimental Reliance

B might bring a claim for damages under a detrimental reliance theory. But B does not seem to have purposefully given up other opportunities in hiring D, so that's out.

Mistake

D is likely to raise as a defense that given the small margin between D's estimate -- not guarantee -- of the job cost at $1.3M and the offered fee of $1.5M, B should have suspected the possibility the agreement was too good to be true, or the high risk that the costs would exceed the offered fee, resulting in a frustration of D's purpose of performing its obligation. A court will likely agree that B, a general contractor, should have suspected the possibility issues would arise from accepting D's low bid.

Change of Circumstances

D seems to have already raised change of circumstances in its discussion with B as a defense to enforcing the original contract. A party may rescind a contract when unforeseeable change of circumstances make it impossible for them to perform their obligations under the original contract. Here D had no apparent way of foreseeing the arrival of a high pressure weather system and the eventual prohibition on its diesel-powered equipment. Even after the high pressure weather system settled on May 29, B is unlikely to be able to show this created a foreseeable expectation that D would not be able to perform. On May 30, the state prohibited use of all diesel-powered equipment. Because D provided its estimate based upon the reasonable expectation it would be able to use the more efficient diesel equipment, this situation seems satisfy the change of circumstances relieving D of its contractual obligations.

Damages

B is unlikely to show that it suffered any damages as a result of its business with D. B did not give up a comparable offer in order to contract with D, nor did the other excavating company apparently cost D more as a result of B's contracting with D. The completion deadline is months away, but even if it had passed, D would have to show it suffered damages resulting from the missed deadline. And nevertheless, D did not include a time-of-the-essence clause or impose liquidated damages.

2. B v D

Breach of Contract

B may have an actionable claim against D once B hired a different excavation company. The unilateral contract gave D until September 1 to complete the job. Although D did not perform by the initial deadline, the contract did not specify termination or revocation as a result of any delays -- for either intiating the project or completing it.

Detrimental Reliance

D can argue it relinquished opportunities by entering into a contract where it held out specifically for B. However, it's not clear whether D can establish any damages for lost opportunities or if that restraint is still binding under the circumstances.

Damages

D seeks the $300K difference between their original contract price and B's payment to the new contractor.

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