

QUESTION 3

County planned to make improvements on one of its roads. To that end, on May 1, County entered into a contract with Installco containing the following terms: County agreed to repave the road by June 1; Installco agreed to install new guardrails, which was expected to take three weeks, after County had completed repaving; and County agreed to pay Installco \$200,000.

On June 15, Installco learned that County was far from completing the repaving of the road. It sent County an email stating: "The June 1 start date for the installation has passed. You knew when we signed the contract that we have another large guardrail installation job starting on August 1 and do not have enough equipment to do both jobs simultaneously. Please advise immediately as to your schedule for completion of the repaving."

On June 18, County responded with an email stating: "We are doing our best."

On July 1, County had not yet completed the repaving of the road. Installco received an offer to do a two-week guardrail installation job beginning immediately. Installco sent County an email stating that it no longer intended to perform the contract because of County's failure to complete repaving.

On August 10, County finally completed repaving the road. It located another company to install the guardrails, but had to pay \$300,000.

1. What arguments can County reasonably make that Installco breached the contract? Discuss.
2. What arguments can Installco reasonably make that it did not breach the contract? Discuss.
3. Who is likely to prevail? Discuss.

QUESTION 3 – SELECTED ANSWER A

1. What arguments can County reasonably make that Installco breached the contract?

U.C.C. V. COMMON LAW:

The Uniform Commercial Code, or UCC, will govern all contracts for the sale of goods which are identifiable and movable at the time of sale. Contracts for services will be governed by the common law.

This is a contract for the installation of guardrails. The providing of the guardrails is just incidental to the service of installing them. Therefore, this contract will be governed by the common law.

This agreement will be governed by the common law.

FORMATION:

Formation is created by mutual assent. Mutual assent is often shown by an offer and acceptance, supported by sufficient consideration.

On May 1st, County and Installco showed present contractual intent by entering a contract with the following terms.

Quantity: Guardrails for the new road.

Time for Performance: To be completed within three weeks of the County finishing paving the road on June 1st.

Identity of Parties: County and Installco

Price: \$200,000

Subject matter: Installing guardrails.

There is valid consideration because County is giving \$200,000 to Installco in exchange for the legal benefit of Installco installing the guardrails.

Therefore, there were clear and definite terms on the part of the contracting party. And as both parties showed a present contractual intent by entering into this agreement, there has been a valid contract formed.

DEFENSES TO FORMATION:

Parol Evidence Rule:

Statements, whether written or oral, made prior to or contemporaneously with the formation of a contract will not be allowed by the courts to enter the contract if the contract is fully integrated.

County will argue that Installco's statement of June 15, showing that County knew that Installco had previous business agreements and that time was of the essence if County wanted Installco to perform, that the court should not allow this statement to enter into the contract because it was made after the formation of the contract.

However, Installco will argue that it falls under one of the exceptions to the Parol Evidence Rule. Installco will argue that because the written email shows a condition precedent to the formation of the contract, the court should allow it in.

Therefore, since this statement falls under one of the exceptions to the rule, it will not be barred from entering into the contract.

BREACH:

Anticipatory Repudiation:

County can argue that Installco breached the contract by stating on July 1st that it would not perform the contract. Installco will defend that County did not fulfill a condition to the contract, and thus Installco was not in breach.

Actual Breach:

County will argue that Installco breached the contract when they did not perform after County finished paving the road on August 10. However, Installco will counter that they were not in breach, because their duty to perform under the contract never arose due to the non-occurrence of a condition precedent to the existence of a contract.

Prospective Inability to Perform:

County will argue that by accepting the contract for another project that was two weeks long and started immediately showed a prospective inability to perform on Installco's part. However, if that project went as planned, it was finished before County finished paving the road. Therefore, it would not have hindered Installco's ability to perform. Thus, County will not succeed in this instance.

2. What arguments can Installco reasonably make that it did not breach the contract?

CONDITIONS:

A condition is an act or event not certain to occur which if excused or satisfied gives rise to or extinguishes a duty to perform under the terms of a contract.

Installco will argue that the County's agreement to finish paving the road by June 1st was a condition precedent to Installco's duty to install the guardrails. This is likely a

condition, because it is an event not certain to occur, and if County does not finish the road on June 1st, Installco's duty to perform does not arise under the terms of the contract.

Excuse/Satisfaction of Condition:

County will argue that when Installco sent the email on June 15th inquiring how long it would take for County to complete the project they were waiving the condition to finish by June 1st.

However, Installco will show that it clearly stated in the communication that it had another job to perform that County knew of when it entered into the contract with Installco.

Therefore, when County sent the email in reply that "We are doing our best," the condition to complete the paving on June 1st was not waived by Installco.

Non-occurrence of a condition precedent:

Installco will therefore be able to argue that because the condition precedent was never fulfilled, satisfied, or excused, its duty to perform under the terms of the contract never arose, and that it is thus not in breach.

Time is of the Essence Clause:

Installco will argue that there was a time is of the essence clause in the contract, and that if County didn't finish paving on June 1st, their duty to perform would not arise. Installco will show that they had a previously existing contract which County knew about, and that was a reason the County job was to start on June 1st, so it could finish the job for the County before moving on to its other project.

3. Who is likely to prevail?

County will probably lose in this action. First, time is of the essence is in this contract to enable Installco to perform. Second, Installco's duty to perform under the contract did not arise unless County finished paving the road on June 1st. County did not finish paving until August 10, almost a month and a half after their speculated date of completion.

Therefore, County will not be able to recover from Installco the \$100,000 extra it had to pay to get another contractor to install the guardrails.

QUESTION 3 – SELECTED ANSWER B

COUNTY (C) v. INSTALLCO (I)

GOVERNING LAW

The UCC will govern contracts for the sale of goods while the common law will govern all other contracts.

Here, the contract is for the installation of guardrails. Although it could be argued that because guardrails are a good, the UCC should govern this contract. However, what C is really bargaining for here is the installation of the guardrails. In fact, as their name indicates, their specialty is a service of installation and not just merely a provider of goods.

Additionally, because the contract involves the installation of equipment which must be installed on a busy highway in such a specialized manner, it is likely that the court would find that it was the installation that was the predominant factor of the contract.

This contract will be governed by the common law.

FORMATION AND DEFENSES

a) Offer

An outward manifestation of present contractual intent, clear and definite in its terms and communicated in such a way so as to create in a specific offeree the reasonable expectation that the offeror is willing to enter into an agreement.

Here, C wanted I to install guardrails and offered to pay I \$200,000 to do so.

Thus, the terms of the offer were sufficiently definite as follows:

Quantity: Enough guardrail to complete the roadway repaved by C.

Time for Performance: By three weeks after C repaved the road, but no later than the first week of August.

Identity of the Parties: I and C.

Price: \$200,000

Subject Matter: Installation of Guardrail.

Further, a reasonable person in I's position would interpret this as an offer.

There has been an offer.

b) Acceptance

An outward manifestation of unequivocal assent to the terms of an offer.

Because I and C "entered into a contract" it would appear that I accepted the terms of the above offer.

There has been acceptance.

c) Consideration

The bargained-for exchange involving a legal detriment and benefit to both parties where each party views his performance as the "price" to be paid for return performance.

Here, I will suffer the detriment of having to perform the installation and provide the guardrail, while incurring the benefit of receiving payment from C, while C will suffer the detriment of having to pay I while incurring the benefit of their roads being repaired.

There is sufficient consideration.

d) Defenses to Formation

None.

CONDITIONS AND COVENANTS

A condition is an act or event, not certain to occur, which if excused or satisfied, gives rise to or extinguishes a legal duty to tender performance under the terms of a contract. A covenant is simply a promise to perform.

a) Express Conditions

The contract specified that before I's duty to perform the installation arose, C would repave the road. C agreed to do this by June 1st.

Thus, C had a duty to repave the road by June 1st. I will argue that because C did not do so their duty to install the guardrails never arose.

C will argue that this was merely a promise and not a condition.

When there is a doubt as to whether a clause is a covenant or a condition, the courts will look to the intent of the parties as demonstrated through the words used.

Here, the words used are that C "agreed" to repave the road and that I "agreed" to install the guardrails.

I is going to argue that this was a condition. C is going to argue that this was a promise.

Before entering into the contract, the facts indicate that I and C had a conversation that I would have another job starting on August 1st and that, because they would need three weeks from when the repaving was done to finish the installation, that C's repaving would need to be done no later than the first week of June; otherwise the contract would not be valid.

Such conversations are considered parol evidence. I will seek to enter parol evidence to show that this was a condition and not a promise.

b) Parol Evidence

Statements whether written or oral which are made prior to or contemporaneously with the formation of a contract cannot alter or vary the terms of an integrated contract.

C will argue that because this conversation took place prior to the actual agreement, it cannot be introduced into evidence.

c) Exceptions to Parol Evidence

I will argue that, because the conversation dealt with a condition precedent to legal effectiveness of the contract itself, it should be admitted.

d) Any Relevant Evidence Test

Even if this argument fails, I will argue that because any relevant evidence should be allowed to show the intent of the parties in regards to whether a contract is intended to be an integrated contract, and because such a conversation would be relevant, he should be able to testify about the conversation.

The parol evidence will likely be allowed into evidence to show that there was a condition precedent to legal effectiveness of the agreement.

Therefore, because the parol evidence will be allowed this clause will likely be viewed as an express condition and thus I's duty to perform never arose.

e) Implied-in-Fact Conditions

The parties have an implied condition that they will act in good faith.

I may argue that C's failure to repave the road shows that they were not acting in good faith.

However, C's e-mail of June 18th indicates that they were "doing their best".

This condition has been satisfied.

f) Implied-in-Law, aka Constructive Conditions

The court will imply that longer performance comes before shorter performance. Therefore, I's duty to install the railing will be a condition precedent to C's duty to pay.

g) Prospective Inability

On June 15th, when I realized that the road had not been paved yet, and that their deadline to begin the work without losing the other job had passed, they asked C for assurances that the road would be paved. Their request for assurances was met with a response that C was "doing their best". This statement by C was NOT adequate assurance.

Because of this, I is entitled to suspend performance and sue for breach.

DISCHARGE OF DUTIES

As stated supra, C's duty to repave was not performed and therefore I's duty to install did not arise.

Additionally, even if the court rejects the Parol Evidence argument, it is likely that because C did not perform this will be viewed as a breach.

C would argue that this would be a minor breach; however, in light of the time factors and that I had another job which it had to complete, this argument will likely fail.

I had not breached their duty because their duty did not arise.

a) Repudiation vs. Mitigation of Damages

However, C will argue that I's acceptance of the other job was a repudiation of the contract.

I will counter that because they had requested but not received assurances, and because they had put C on notice prior to the contract formation that they had another job which they would have to start no later than July 7th (three weeks prior to August 1st), they were entitled to repudiate the contract in order to mitigate their damages, and rightfully did so on July 1st.

C will argue that I was obligated to give them until July 7th to finish the repaving. However, this argument will fail, because they did not respond to I's request for assurances.

b) Prevention

Additionally, I will argue that by failing to pave the road, C prevented them from performing under the contract.

c) Impossibility of Performance

I will also argue that because C failed to pave the road, it was objectively impossible for them to perform their duty under the contract.

Additionally, C had breached their duty because they did not pave the road.

BREACH

As discussed supra, C will argue that I breached but, in fact C breached. C's breach goes to the heart of the contract because it prevented I from performing. Therefore, it will be considered a major breach.

REMEDIES

a) General Damages / Expectation Damages

I will argue that it is entitled to the benefit of its bargain from the contract. This would include the profit that it expected to receive from the project.

C will argue that because it never received any benefit of the contract, it should not be entitled to pay these damages.

Further, C may continue to argue breach by I, in which case it would ask the court to allow it to recover the difference between the contract price of \$200,000 and the amount they had to pay another contractor to install the railing (\$300,000) for a total of \$100,000, plus incidental and reliance damages.

b) Special Damages / Consequential Damages (Hadley v. Baxendale)

Because I properly mitigated its damages, by requesting assurance and then repudiating the contract, it did not suffer any consequential damages.

Conclusion

For the reasons stated above, I is likely to prevail.