

## Question 4

Peter responded to an advertisement placed by Della, a dentist, seeking a dental hygienist. After an interview, Della offered Peter the job and said she would either: (1) pay him \$50,000 per year; or (2) pay him \$40,000 per year and agree to convey to him a parcel of land, worth about \$50,000, if he would agree to work for her for three consecutive years. Peter accepted the offer and said, "I'd like to go with the second option, but I would like a commitment for an additional three years after the first three." Della said, "Good, I'd like you to start next week."

After Peter started work, Della handed him a letter she had signed which stated only that he had agreed to work as a dental hygienist at a salary of \$40,000 per year.

After Peter had worked for two years and nine months, Della decided that she would sell the parcel of land and not convey it to him. Even though she had always been satisfied with his work, she fired him.

What rights does Peter have and what remedies might he obtain as to employment and the parcel of land? Discuss.

## ANSWER A TO QUESTION 4

### What rights does Peter have?

The first issue is what law should apply. The UCC applies if the contract is for sale of goods. The common law applies if in all other circumstances, including a contract for services or land. In this case, there is an employment contract that contemplates the payment of a salary and a land conveyance in exchange for services. Thus, the common law applies to this contract.

The second issue is whether there is a valid contract. A valid contract requires offer, acceptance, and consideration. An offer exists if the offeror offers the offeree a deal and signals that acceptance will conclude the deal. An acceptance occurs if the offeree agrees to the terms of the offeror and gives the offeror notice of his assent. Consideration exists if there is a bargained-for exchange and legal detriment (which involves perform [SIC] in a way that one is not legally required to perform). Acceptance only exists if the offeree consents to the exact terms of the offeror, also known as the mirror image rule. If the offeree attempts to change any terms of the offer, then there is an effective rejection and counteroffer. Della advertised for a dental hygienist. Advertisements are not usually considered offers and Della's advertisement did not indicate that anyone who responded would be hired. The need to conduct an interview suggests that Della's advertisement was an invitation to make an offer, not an actual offer. Della interviewed Peter and offered him a job. She gave him a choice of being paid \$50,000 per year, or being paid \$40,000 per year and the conveyance of a \$50,000 parcel of land at the completion of three years of work. This might have been an offer because it signaled to Peter that the deal would be complete if he chose either option. However, it would more likely be considered preliminary negotiations since Peter could still choose which option he preferred. Peter said, "I'd like to go with the second option..." If there was an offer, and he had left his statement at this, then this would constitute acceptance because it gave Della notice that he was accepting her offer. However, Peter attempted to modify the terms of the deal by adding a commitment for

an additional three years after the first three years. Thus, Peter's attempted acceptance was ineffective because it altered the terms of Della's offer and does not meet the mirror image rule. Rather, Peter effectively made a counteroffer to Della (or an offer if Della's original options were considered preliminary negotiations). Della accepted Peter's counteroffer when she said, "Good, I'd like you to start next week." The exchange of six years of dental hygienist services for a \$50,000 parcel of land and a \$40,000 per year salary constitutes consideration. Because there was an offer, an acceptance, and consideration, there is a valid contract.

The third issue is whether the statute of frauds makes the service or land contract unenforceable. The statute of frauds requires some contracts to be in a writing signed by the party against whom enforcement is sought. Contracts for land and contracts that cannot be completed within a year are both included within the statute of frauds. Contracts for land must adequately identify the parties and the parcel of land to be conveyed. The contract between Della and Peter was for six years of employment. Peter could not complete his performance of six years of services within one year, thus this contract falls within the statute of frauds. The contract between Della and Peter also contemplated the conveyance of an interest in land. Della did sign a contract with Peter, but the contract only specified that Peter agreed to work as a dental hygienist for a salary of \$40,000 per year. The conveyance of land was not considered within the signed contract, nor was the length of the term of employment. Thus, the contract Della signed cannot be used to overcome the statute of frauds. The employment contract for a term of years and the land conveyance are both unenforceable under the statute of frauds.

The fourth issue is whether Peter can overcome the Statute of Frauds defense via the doctrine of part performance or equitable estoppel. Part performance in a land conveyance requires that the party who seeks to enforce the contract must have engaged in partial performance, which is usually evidenced by possession or payment of the purchase price. Equitable estoppel requires that the party who seeks to enforce the contract show that there was a promise and that the party reasonably relied upon

that promise to their detriment. It will probably be difficult for Peter to show partial performance since he has not taken possession of the land or paid the full purchase price. He might be able to argue that he has "paid" a substantial portion of the purchase price since he worked for two years and nine months, which is the equivalent of 75% of the service he was to perform before receiving the land. However, equitable estoppel is probably a better argument for him to make. The fact that Della offered Peter two options suggests that \$40,000 was less than the market rate for dental hygienists. Peter chose the option that gave him less yearly salary in reliance on Della's promise that he would be employed for six years and would receive a \$50,000 parcel of land. He received less salary than he otherwise would have, so his reliance was detrimental. Peter may be able to overcome Della's Statute of Frauds defense under the doctrine of equitable estoppel.

The fifth issue is whether there was a breach of contract. A breach occurs when one party fails to perform as obligated under the express and implied conditions in the contract. Assuming that the court finds a valid and enforceable contract, then Della committed a breach when she fired Peter before the six years were complete. She also committed an anticipatory repudiation when she decided to sell the land instead of convey the land to him. She also potentially breached her implied duty of good faith by firing Peter when she was satisfied with his work.

### **What remedies might Peter obtain?**

The first issue is whether Peter can receive expectation damages. The general measure of damages in a contracts case attempts to put the plaintiff into the position he would have been in if the contract had been fully performed. A plaintiff does have a duty to mitigate, which requires that he make a reasonable effort to find similar employment. He does not have to settle for lesser employment or move to a distant location to find employment. Assuming that the court finds there was an employment contract for six years, the court would award three years and three months worth of the \$40,000 per year salary if Peter cannot find similar employment. If Peter can find similar

employment, the reward will be reduced based on whatever his new salary is. Assuming that the court finds there was a contract to convey land, Peter could sue for the value of the land, which was \$50,000. If the court finds that there was an employment contract, but no contract to convey land, then Peter might be able to receive more than the \$40,000 per year salary award if he can show that he took a reduced salary in reliance on the promise that he would receive a land conveyance.

The second issue is whether Peter can receive restitutionary damages. Restitutionary damages are only awarded when a benefit has been bestowed and it would unjustly enrich the other party if they are not required to pay for that benefit. A plaintiff cannot receive restitutionary remedies if they receive expectation damages. Restitutionary damages would probably not be Peter's best option. However, Peter might be able to receive the difference between his salary and the market rate salary for a dental hygienist if he can show that he took the lower salary in reliance on the promise to receive land.

The third issue is whether Peter can receive specific performance. Specific performance is awarded when there is a definite and certain contract, an inadequate legal remedy, enforcement of specific performance is feasible for the court, and there is mutuality. The party attempting to avoid specific performance can do so by raising various defenses, such as laches or unclean hands. Assuming Peter overcomes the statute of fraud objections, Peter will not be able to seek specific performance for the employment contract. Attempting to enforce an employment contract, which is a contract for personal services, is not feasible for the court. Personal service and employment contracts require individuals to work together in a cooperative environment; it is not feasible for the court to monitor the relationship between the parties. Peter probably will not be able to seek specific performance for the land contract. There was a definite and certain contract to convey a parcel of land worth \$50,000, though there may be some issues with this element if it is not clear which parcel of land Della intended to convey. Land is considered unique, so a legal remedy of \$50,000 would be inadequate. It would be feasible for the court to enforce the specific performance. Under the common law

doctrine of mutuality, both parties must have been able to request specific performance. In this case, Della could not have sought specific performance if Peter breached. However, under the modern theory, the requirement for mutuality is met if one party can sufficiently assure performance. The court would have to decide if the two years and nine months was enough to constitute full performance, but this is only 75% of the total performance required. Peter may be willing to work the remaining three months, but the court cannot require him to do it. Thus, there is no mutuality and Peter cannot successfully obtain specific performance.

## **ANSWER B TO QUESTION 4**

### **What Rights Does Peter Have as to Employment and the Parcel of Land**

#### **I. The Contract, if Valid, Is Governed By Common Law**

The issue is what law governs the contract, if valid, between Peter (P) and Della (D). The UCC governs contracts involving the sale of goods. Contracts which are for services or are land contracts are governed by the common law. Here, P and D are contracting for employment and possibly land. This is a contract for services and land and therefore the contract is governed by common law principles.

#### **II. There is Likely a Valid Contract Between Peter and Della**

The issue is whether Peter and Della actually entered into a valid contract. For a contract to be valid, it must contain offer, acceptance, and consideration. An offer is an outward manifestation by the offeror that creates the power of acceptance in the offeree. An advertisement can be a valid offer if it is made to a particular person, outlines the specific details of the offer, and presents the recipient of the advertisement with instructions as to how acceptance can be made. Acceptance is an outward manifestation by the offeree that he accepts the terms of the offeror. Acceptance must mirror the terms of the offer. If acceptance does not mirror the terms of the offer or, in itself, alters the terms of the offer, it is a counteroffer and effectively rejects the original offer. However, a mere inquiry is not a counteroffer. Consideration is a bargained-for legal detriment. (i.e., A works for B in exchange for a salary).

Here, P responded to an advertisement from D, a dentist, who was seeking a dental hygienist. The advertisement was not a valid offer because there are no facts that it was sent directly to P, there are no facts that it contained the details of any potential employment contract, and there are not facts that it told P how he could accept. However, when D interviewed P, she presented him with a valid offer to be her hygienist for three years in exchange for either (1) working for \$50,000 per year; or (2) working for \$40,000 per year and she would agree to convey to him a parcel of land,

worth about \$50,000. When P accepted, he said "I'd like to go with the second option, but I would like a commitment for an additional three years after the first three." This acceptance by P does not mirror the terms of the offer by D and therefore acts as both a rejection of the offer and a counteroffer. Della said, "Good, I'd like you to start next week."

Peter will argue that Della's comment of "Good, I'd like you to start next week," is her acceptance of his counteroffer. He will argue that the terms of the deal are that he works for Della for 6 years at \$40,000 per year and is conveyed the parcel of land after the first three years. When P started to work and D handed him the letter stating only that he had agreed to work as a hygienist for \$40,000 per year, P will argue that this letter is merely a documentation of the salary he is to receive and nothing more.

In conclusion, Peter's counteroffer is the controlling offer and D accepted it by saying, "Good, I'd like you to start next week." The consideration is that Peter work for 6 years at \$40,000 and will receive the parcel of land at the completion of the first three years. The consideration is valid. There is likely a valid contract between P and D.

### III. The Letter D Presented to P Is An Invalid Modification

The issue is whether the letter D presented to P is an invalid modification. Under the Common Law, a modification to a contract must be supported by consideration. The pre-existing duty rule prohibits the modification of any contractual duties which have been agreed to absent consideration because the party is attempting to modify something that he/she is currently obligated to do.

Here, D attempted to modify the existing when she presented P with a letter, which she signed, documenting P would work as a dental hygienist for \$40,000 and no other elements of the deal between P and D were documented. There was no consideration paid by D to P to enforce this modification and it is invalid.



In conclusion, the modification is invalid because D is obligated to have P work for 6 years at \$40,000 and convey a piece of land to him after 3 years of work. To reduce her obligations to only paying him \$40,000 per year without consideration is in violation of the pre-existing duty rule.

#### IV. Della Can Assert the Defense of Statute of Frauds (SOF)

The issue is whether D can assert a SOF defense. The SOF requires that certain contracts be in writing. The categories are contracts regarding marriage, contracts which cannot be performed within one year, land sale contracts, executor agreements, guarantees or suretyships, and contracts for the sale of goods for over \$500. A contract which cannot be performed within one year is determined at the time of the contract execution and is measured by whether there is any possibility performance can be completed within one year. The writing that will satisfy the SOF must contain the essential terms of the contract and be signed by the party to be charged.

Here, P's contract is for 6 years, or, at the least, 3 years, and is clearly not performable within one year. This contract is subject to the statute of frauds. The parties did not sign a written contract for P's services to D. Further, part of the deal is a land conveyance which is also subject to the SOF. Neither of those terms were ever written down and D can assert that the contract fails under the SOF. Peter will argue that the letter D gave to him after he started working is a writing confirming their contract because it says he gets paid \$40,000 and it is signed by D. However, this is not the same contract to which they agreed.

In conclusion, it is likely that D can assert a valid SOF defense because the contract was not in a writing which comports with the requirements of the SOF.

## V. P Can Assert The Defense of Estoppel and Likely Partial Performance to the SOF Requirements.

The issue is whether P can assert the defenses of estoppel or part performance to the SOF requirements. As stated above certain writings are subject to the SOF. There are four defenses to the enforcement of the SOF: (1) Partial or Full Performance, (2) Estoppel, (3) Judicial Acknowledgement of Contract, and (4) Merchant's Confirmation Memo. There has been no acknowledgement in a judicial proceeding and the merchant's confirmatory memo is only for UCC contracts with a merchant, so neither apply. However, Partial or Full Performance and Estoppel may apply.

### **Partial or Full Performance**

A party may not comply with the requirements of the SOF if he partially or fully performs his contract and the other party accepts the benefits of the performance. Here, P worked for D for 2 years and 9 months. At the very least, D was under the impression that P was going to be working for her for 3 years, even though the final accepted offer was likely for 6. There are no facts which say she failed to pay him so she very likely was performing her obligations under the contract. She was accepting his benefit of being a hygienist in exchange for her payment. Therefore, under the doctrine of part performance, P has a meritorious defense to the requirements of the SOF.

### **Equitable Estoppel**

A party may not comply with the requirements of the SOF if he can assert a defense of estoppel. Equitable estoppel occurs when a party says or does something that foreseeably creates action in another person, the other person relies on the party's previous statement or action, and it would be unjustly prejudicial to the relying party. Here, P has fully relied on D's statement of acceptance to his counteroffer. He began working for her and has been working for her for almost 3 years. D has reason to know that he was working for her based on their discussions of the \$40,000 and land conveyance. P may not have started working for D without the provisions agreed to in his counteroffer and therefore it would be unfairly prejudicial not to enforce his contract.

In conclusion, P has a likely defense of partial or full performance of the SOF and may have a meritorious defense of Estoppel.

#### VI. If A Valid Contract Exists, It is A Contract For Term and Not an At-Will Contract

The issue is whether the contract is a contract for term or an at-will contract. In a contract for term, an employee has a property right in the job and may not be terminated without cause. Conversely, an at-will contract allows the employer or employee to terminate employment for good cause, bad cause, or no cause.

Here, P will argue that this is a contract for terms because the terms of his counteroffer were that he worked for D for 6 years. Further, he will argue that even if her original job offer is controlling, that offer was for a 3 year term. Either way, it is not an at-will employment. Since it was not at will, she was not able to fire him because she had always been happy with his work. Della will argue that her letter modifying the contract has no language regarding term and therefore it is an at-will employment and she can fire him for any reason.

In conclusion, this is a contract for term and P may not be fired absent cause.

In conclusion, P and D have a valid contract for 6 years at \$40,000 per year. Further, D is obligated by the contract to convey P the parcel of land upon completion of his 3rd year. Peter has a right to seek remedies for breach of contract.

#### **What Remedies Can Peter Seek**

#### VII. Peter May Seek Expectation Damages and Reliance Damages

The issue is whether Peter may seek expectation damages and reliance damages for his contract with Della. Legal remedies are available if the plaintiff can clearly estimate the damages incurred with specificity. Legal damages are in three categories, expectation, reliance, and restitution. Expectation damages place the

plaintiff in the position he would have been in had the breaching party performed the contract in full. Reliance damages place the plaintiff in the place he would have been had the contract not existed. Restitution damages reimburse the plaintiff for any benefit conferred on the defendant. A plaintiff always has the duty to mitigate damages and, in the employment context, the duty to find other employment. The plaintiff is not required to find any job, but rather a job comparable to the job that has been taken. If a plaintiff cannot find replacement employment, a good faith effort must take place to find employment.

Here, P will argue that he should get his expectation, or benefit of the bargain damages, from the contract including any incidental and consequential damages that are reasonably foreseeable from D's breach.. He can easily estimate them because he was due 3 years and 3 months salary and the parcel of land. He had a right to those damages because he was under a contract for which he was improperly fired. These damages will place him in the position he would have been in had he not been fired and the contract been performed. However, he has a duty to find alternative employment and there are no facts which say he has looked for or obtained any further employment. Also, there are no facts that say he has acted in bad faith which would negate the award of damages. If and when he does, his salary from that employment can be applied against his damages from D. There are no facts indicating any incidental and consequential damages.

Also, if P spent any money in reliance on his contract with D, he may recover those costs that are reasonable and foreseeable. Any money that he spent in reliance on the contract with D is obtainable.

In conclusion, he can obtain expectation and reliance damages from D less his duty to mitigate by finding other, comparable employment.

#### VIII. Peter May Seek Specific Performance of the Land Contract, But Not the Services Contract

The issue is whether Peter can seek specific performance of the land contract. Specific performance is available when the contract has definite and certain terms, there is an inadequate legal remedy, the court can correctly adjudicate, there is mutuality between the parties and there are no defenses. Inadequate legal remedy applies when you are dealing with land or unique items. Mutuality has been relaxed and no longer requires that the parties must each be able to get specific performance. Just that the party is ready and willing to perform. Specific performance will not be applied to a services contract because it is difficult to enforce and can abridge certain constitutional provisions against servitude.

Here, the land at issue is unique and is a definite term of the contract. Money damages will not suffice. Peter contracted and performed for the piece of land. The judge can properly adjudicate the matter. However, Peter likely may not seek specific performance of the services contract.

In conclusion, P may seek specific performance of the land contract but not the services contract.