

Question 4

On March 1, Ben, a property owner, and Carl, a licensed contractor, executed a written agreement containing the following provisions:

1. Carl agrees to construct a residence using solar panels and related electrical equipment manufactured by Sun Company ("Sun") and to complete construction before Thanksgiving.
2. Ben agrees to pay Carl \$200,000 upon completion of construction.
3. Ben and Carl agree that this written agreement contains the full statement of their agreement.
4. Ben and Carl agree that this written agreement may not be modified except upon written consent of both of them.

Prior to execution of the written agreement, Ben told Carl that Carl had to use Sun solar panels and related electrical equipment because Sun was owned by Ben's brother, and that Carl had to complete construction prior to Thanksgiving. Carl assured Ben that he would comply.

In August, Ben began to doubt whether Carl would complete construction prior to Thanksgiving; Ben offered Carl a \$25,000 bonus if Carl would assure completion, and Carl accepted and gave his assurance.

To complete construction prior to Thanksgiving, Carl had to use solar panels and related electrical equipment of equal grade manufactured by one of Sun's competitors because Sun was temporarily out of stock.

Carl completed construction prior to Thanksgiving. Ben, however, has refused to pay Carl anything.

What are Carl's rights and remedies against Ben? Discuss.

SELECTED ANSWER A

Governing Law

Contracts are governed by either the UCC or Common Law. The UCC relates only to contracts for the sale of goods. Here, the contract is for the construction of a residence, using certain products manufactured by Sun. Although this involves the goods manufactured by Sun, it is primarily for the purpose of having Carl build a residence for Ben. Therefore, common law controls.

Valid Contract

To have a valid and enforceable contract there needs to be (1) an offer, (2) acceptance, and (3) consideration. Here, the facts indicate that Ben and Carl reached an agreement related to the terms. Thus, the first two elements are present. Additionally, the contract calls for Carl to construct a residence to Ben's specifications and for Ben to pay Carl \$200,000 in return. Thus, there is a bargained-for exchange of legal detriment by the parties because they are both doing something that they have no legal obligation to do, in exchange for a benefit.

Therefore, there is a valid contract formed between Ben and Carl.

Terms of the Contract

Generally, the terms of the contract are determined by the written agreement itself. Here, the written agreement indicates certain terms, including that Carl will construct a residence using solar panels and related electrical equipment manufactured by Sun and that Ben will pay Carl the \$200,000 upon completion.

However, these promises contained in the agreement are not the only terms that the parties may claim exist.

Parol Evidence Rule

The parol evidence rule bars the introduction of an oral or written agreement which was made prior or contemporaneous to the execution of the contract and which contradicts or varies the terms of the integrated contract.

Here, Ben may argue that prior to the execution, Ben and Carl agreed that the use of Sun products and completion prior to Thanksgiving were conditions, not promises. A condition precedent to performance is a term in the agreement that must be satisfied strictly in order for the party's performance to be due. If the condition never occurs, the party never has a duty to perform. A promise, on the other hand, only needs to be substantially performed under the common law in order for the other party's performance to become due. In the contract, the use of Sun products and completion by Thanksgiving are merely promises because they do not indicate any mandatory language or language to show that Ben's performance is not due unless they are strictly followed.

Carl will argue that introducing the evidence of Ben and Carl's oral agreement prior to the execution of the contract regarding the mandatory nature of the Sun product and completion terms is barred by the parol evidence rule.

Although this does constitute a prior oral agreement, the parol evidence rule does not bar the introduction of evidence to show that there was a condition precedent to performance. This is one of the rule's exceptions. Therefore, if this agreement did make those terms conditions, rather than promises, then the argument can be used to show that.

Here, the agreement between Carl and Ben does show that Ben told Carl that he "had to use Sun" products and that he "had to complete construction prior to Thanksgiving." Although these do indicate more definiteness, there is no express language stating that unless Carl does so, Ben will not have to perform. Thus, Carl will argue that this agreement only enforced the terms of the written agreement, not changed them into conditions.

Ultimately, because there is no express language and because the courts do favor promises over conditions because of the strict compliance requirement of conditions, this will likely be found to be an enforcement of the promise in the agreement and therefore not parol evidence to contradict the terms.

Bonus Agreement

Ben began to doubt whether Carl would complete construction prior to Thanksgiving, so he offered Carl a \$25,000 bonus if Carl would assure completion. Carl accepted and gave such assurances. Carl will argue that this was a new contract or a modification to their existing contract.

Modification in Writing

If Carl argues that this agreement modified the written agreement that Carl and Ben had, Ben will point to the term in the agreement which states that "this written agreement may not be modified except upon written consent of both of them." These modifications in writing terms are generally not enforced under common law.

Statute of Frauds

A writing is only required to modify an existing agreement under common law if the modification places the contract within the statute of frauds. The statute of frauds generally does not apply to services contracts unless they are not capable of being performed within one year. Here, the agreement that attempts to modify the existing agreement states that performance must be completed by Thanksgiving (late November). The original contract was made on March 1, and the modification in August. Therefore, this is requiring that performance be completed under a year from the time of the contract or the modification. Therefore, the statute of frauds does not require a writing.

Therefore, Ben cannot challenge this modification on the basis of a lack of a writing.

Enforceable Agreement

Although it is permissible for the parties to orally modify their agreement, a modification or subsequent contract requires the three elements required in every contract: (1) offer, (2) acceptance, (3) consideration. Here, there was an offer from Ben to Carl for \$25,000 extra if Carl finished construction prior to Thanksgiving. There was an acceptance because Carl accepted these terms as they were, without condition. There also must be, however, consideration.

Pre-Existing Duty Rule

The pre-existing duty rule holds that a promise to do what a party is already contractually or otherwise obligated to do is not consideration for a new agreement. The exceptions to this agreement are for (1) if a third party will perform the obligation, (2) if unforeseen circumstances have made it such that the performance would otherwise be excused, or (3) there is a change in the amount or type of performance.

Here, the performance between Ben and Carl was set in the agreement to be completed before Thanksgiving. Thus, Carl was under a pre-existing contractual duty to perform by Thanksgiving. As such, there is no consideration given by Carl in the agreement, only by Ben in offering to pay more money.

Carl might argue that because Ben began to doubt Carl's ability to perform, this rule is excused. However, that is not the law. Common law, unlike the UCC, strictly requires adequate consideration for a modification or a creation of a new agreement. Here, there was not an excuse of Carl's performance under the circumstances, nor did he promise to do more than he was already obligated to do under the agreement, and he did not assign his duties to a third party.

Therefore, there is no consideration to support the agreement between Ben and Carl made in August. Thus, Ben has no obligation to pay Carl \$25,000.

Thus, the terms of the agreement are unmodified and remain just as they were in the original written integration.

Performance of the Contract Terms

Carl's Performance

Under common law, a breach of contract occurs if a party fails to fully perform its obligations under an existing contract. However, in order to discharge the other party's obligation to perform its obligations, there must be a material breach. Therefore, in order for Carl to have sufficiently performed to give Ben an obligation to perform, Carl must have substantially performed his obligations under the contract.

Under this contract, Carl constructed a house for Ben. That was his primary obligation and he completed it. Additionally, he completed it on time: by Thanksgiving. Therefore, Carl fully and completely performed two of his three obligations under the contract.

Carl did not, however, perform his obligation to use Sun manufactured solar panels and related electrical equipment in constructing the house. Carl knew he was supposed to do this, but he failed in this because in order to get it done on time, he had to use solar panels manufactured by one of Sun's competitors. Therefore, by not complying with the contract terms as to this requirement, Carl did commit a breach of contract.

This breach, however, is minor. Carl substantially performed his obligation under the contract because he built an entire house for Ben and got done on time. Therefore, the failure to use Sun products was a minor breach for which Carl is liable, but it does not discharge Ben's obligation to perform.

Ben's Performance

Ben flatly refused to perform at the time that his performance was due: upon completion of the construction. Therefore, because his performance was due, he is in material breach of the contract.

Excuses for Non-Performance

Carl's Non-Performance

Waiver of Promise

Carl will argue that his performance was discharged by Ben's waiver of the promise to use material made by Sun when he mandated and offered more money for Carl to complete performance by Thanksgiving.

Generally, a party may waive a condition precedent to performance if the condition is in the contract to protect them, but it is not permissible to waive performance of a promise under a contract unless there has been a modification of the agreement.

Here, as shown above, the offer to give Carl an extra \$25,000 was not supported by consideration. Therefore, it is not enforceable as a modification. Further, even if it was enforceable as a modification, it does not indicate that Ben "waived" the right to have Sun products used in his home. Carl never informed him that it would not be possible to use those products and perform on time.

Therefore, the promise is not waived.

Impossibility/Impracticability

Carl will also argue that impossibility or impracticability discharged him of the obligation to use Sun products. Impossibility discharges performance if it would be objectively impossible to perform due to unforeseen circumstances. Impracticability discharges a party's performance if the performance has become extremely and unreasonably difficult and expensive as a result of unforeseen circumstances.

Here, although Carl may claim that it was objectively impossible to get Sun products in time to construct the house before Thanksgiving, Ben will counter that difficulty in obtaining Sun products was not an "unforeseen circumstance."

To be unforeseen, the circumstance must be one that the parties did not, or could not, contemplate at the time of the agreement. Here, the possibility that it would be

challenging to get Sun products specifically, is a condition that the parties, particularly Carl, should have contemplated at the time of the agreement since the agreement was specific as to their use. Further, it is unknown exactly what the hardship or difficulty was in obtaining those products on time. If it was a totally unforeseen circumstance which led to the hardship, then Carl would have a stronger argument.

However, in the absence of information showing that an unforeseen event caused the inability to obtain these products on time, Carl's performance on that term will not be excused.

Ben's Non-Performance

Non-Occurrence of a Condition Precedent

Ben will argue that the condition precedent that the house be built using Sun products discharges him of any liability for payment. However, as discussed above, it is most likely that the court will construe the written term and the oral agreement as creating a promise, not a condition.

Therefore, his obligation is not discharged since Carl substantially performed his obligation under the contract (see above).

Conclusion

Therefore, Ben is liable to Carl for a material breach of the agreement. Ben is not responsible to pay the extra \$25,000. But Carl is responsible for the damages caused by his minor breach of the agreement.

Carl's Remedies

Compensatory Damages

Compensatory damages in contract are aimed to place the plaintiff in the position that he expected to be in but for the breach. This is the general measure of contract compensatory damages.

In order to recover compensatory damages, the damages must be shown to be (1) caused by the defendant, (2) foreseeable, (3) unavoidable, and (4) certain.

Here, the damages were caused by Ben's refusal to pay. They were foreseeable because it was foreseeable that Ben would simply refuse to pay; this is not an attenuated or unexpected event. The damages were unavoidable to the extent that Carl could not have done anything else to mitigate his loss. He built the house and has not received payment; he is not in the type of contract where he can seek cover or performance from another.

Finally, the damages must be certain. In a construction contract, the damages for a party who completes a performance but is not paid is the contract price. Here, the contract price is \$200,000. Therefore, Carl's damages are certain in sum based on the contract.

Therefore, he can recover \$200,000 in compensatory damages from Ben.

Offsetting Damages

Carl's compensatory damages award will be offset by the damages that he caused Ben as a result of his failure to use Sun products. Since the products used by Carl were of equal grade to those used by Sun, the damages will be fairly nominal.

Ben will try to retrieve consequential damages arising from his brother's lost profits. However, although Ben's brother owns Sun and would have benefitted from the contract, it was only incidentally. Thus, Ben's brother is not entitled to anything on a third party beneficiary theory since only intended beneficiaries have such rights.

Consequential damages here would not be available for loss to the brother's business unless Ben can show that those are his own personal damages. However, if he can show a personal loss stemming from this failure, he can recover consequential damages since the ownership of Sun was known to Carl at the time of making the contract.

Therefore, Ben's \$200,000 will be offset by Ben's damages.

Specific Performance

Specific performance is an equitable remedy which requires the contract to be performed. To be granted, it must be shown that (1) there is a valid, certain, and definite contract, (2) the plaintiff's conditions for performance were met, (3) there is not an adequate remedy at law, (4) enforcement is feasible, and (5) there are no defenses.

Here, the contract is valid, and definite in the terms of the integrated writing (see above). Carl (the plaintiff's) conditions for performance were met. But there is an adequate remedy at law. Since the payment of money is not unique, unless there is an indication that Ben is insolvent, there is a perfectly adequate legal remedy in compensatory damages. Finally, feasibility would be enforceable.

Unclean Hands

Further, even if there was not an adequate remedy at law, Ben might raise the defense of unclean hands. Unclean hands is an equitable defense which says that the contract should not be enforced in equity if the plaintiff committed wrongdoing in the transaction. Here, Ben will argue that Carl breached the agreement by not using Sun products and therefore comes to the court with unclean hands. This will likely not prevail since Carl's breach was minor.

Regardless, Carl's best remedy is legal. Specific performance will not be granted.

SELECTED ANSWER B

Carl's rights and remedies against Ben will be determined by principles of contract law.

Applicable Law

The common law of contracts will govern the contract that Carl and Ben made. The common law governs all contracts except for contracts regarding the sale of goods, which are governed by the UCC. The common law governs services contracts, and therefore covers construction contracts. Here, Carl is a licensed contractor, and he has agreed to construct a residence for Ben. Therefore, Carl has entered into a services contract, which will be governed by the common law. One may argue that Carl has agreed to provide a house, which is a good, but this argument will fail. Carl was hired for his services in constructing a house.

Formation

The facts show that a validly executed contract was formed. A contract requires mutual assent and consideration. Here, Ben and Carl entered into a written agreement, whereby both manifested consent to be bound by the terms of the contract.

Moreover, there is adequate consideration. Consideration is a bargained-for legal detriment. Here, Carl agreed to build a house and Ben agreed to pay \$200,000 in consideration.

Terms of the Contract and Ben's Alleged Breach

The written contract states that Carl agreed to construct a residence using solar panels and related electrical equipment manufactured by Sun Company. In addition, Carl agreed to complete construction before Thanksgiving. Ben agreed to pay Carl \$200,000 upon completion of the contract.

Carl constructed the home before Thanksgiving. Now, Ben refuses to pay Carl anything. Carl's rights and remedies under the contract will be determined by the court's interpretation of the contractual terms and whether the parties modified the terms of the contract.

Promise or Condition to Use Panels from Sun Company

A condition precedent is a condition that must be fulfilled in order to require the party with the benefit of the condition to render full performance under the contract. If a condition precedent is not fulfilled, the party with the benefit of the condition is not required to perform. Here, Ben will argue that the contract includes a condition precedent that Carl had to use Sun Company solar panels in construction of the house. Ben will argue that Carl did not use Sun Company solar panels and related electrical equipment, and that Carl therefore did not satisfy the condition. Therefore, Ben will argue that he was not required to render performance under the contract and pay Carl the \$200,000 for the house.

In contrast, the non-occurrence of a promise or the failure to fully satisfy a promise contained in a contract does not relieve the other party of liability. If a party promises to render performance of a contract, the other party will not be relieved of performance unless the party who made the promise materially breached the contract. A material breach occurs when the party does not render substantial performance. A minor breach does not relieve the non-breaching party of their duty to perform, although they can sue for damages. In order to determine whether a breach is minor or material, a court will consider the extent of performance, the hardship to the breaching party, the adequacy of compensation, and the additional work needed to fulfill the promise.

A court will consider the intent of the parties in order to determine whether a clause at issue is a condition or a promise. As explained above, Ben will argue that the use of Sun Company products in construction of the house was a condition while Carl will argue that he merely promised to use the products. Here, the court will likely hold that, under the terms of the written contract, the agreement to use Sun Company products was a promise. The language of the contract does not expressly condition Ben's

performance on the use of Sun Company products. In a large construction project like this, a court will likely require unambiguous language that the parties intended to create a condition and not a promise. Solar panels and electrical equipment are relatively minor elements of an overall house. Therefore, based on the terms of the contract, the court likely will not find that the clause requiring Sun Company products was so important that the parties intended for it to be a condition. Here, Carl used solar panels of equal grade and otherwise constructed the house per the terms of the contract.

Parol Evidence

However, Ben will argue that the court should consider the parties' discussions prior to entering into the contract when interpreting the terms of the contract. Ben will argue that he explicitly told Carl that he had to use Sun Solar panels and related electrical equipment, because Sun was owned by Ben's brother. Therefore, Ben will argue that the use of the Sun Company products was a very important part of the contract. Ben will argue that he would not have made the contract with Carl unless Carl agreed to use Ben's brother's products.

Carl will argue that the Parol Evidence rule bars the court from considering evidence of these discussions. The parol evidence rule applies when a contract has been fully integrated. Integration occurs when the parties intend the contract to integrate all prior discussions and that all terms be included in the final written agreement. A merger clause in a contract is probative of the parties' intent to integrate but it is not conclusive.

If a contract is integrated, prior communications between the parties cannot be used to contradict the terms of the contract. However, the parol evidence rule does not bar the use of prior communications to show the non-occurrence of a condition, to challenge the validity of the contract, or to construe ambiguous terms.

Here, the court will likely find that the contract was integrated. The contract contains a merger clause, which shows that it is likely that the parties intended to reduce their agreement to a final written agreement. Moreover, the written contract is complete and includes all material terms.

Therefore, the use of parol evidence to contradict the terms of the contract will be prohibited. Carl will argue that Ben's statement that Carl "had to use Sun Solar Panels . . . because Sun was owned by Ben's brother" cannot be considered by the court, because it contradicts the terms of the written contract. Carl will argue that the contract language is clear, and it does not state that the use of Sun Company products was a condition. Carl will argue that such an important provision of the contract would have been included in the final written agreement. However, Ben will likely prevail in arguing that this statement can be used by the court to consider whether clause 1 of the contract is condition. As explained above, prior communications can be used to show the non-occurrence of a condition. Moreover, the parol evidence does not directly contradict clause 1 of the contract. Instead, whether clause 1 is a condition or promise is unambiguous and will need to be determined by the court. Therefore, the court will likely consider this evidence in order to determine the parties' intent. Here, the oral communication shows that Ben told Carl that he "had to use" Sun Company products and Carl assured him that he would comply. However, even if the court does use the parol evidence, it still may not conclude that the parties intended the use of Sun Company products to be a condition. As explained above, a court usually will presume that a clause is a promise and not a condition.

Material v. Minor Breach

If the court determines that the clause was a promise and not a condition, then Carl will argue that Ben must pay him for constructing the house. However, Ben will argue that Carl still breached the promise by not using Sun Company products. Therefore, Carl will be liable for some damages. Whether Ben will be required to pay Carl for the house will be determined by whether Carl committed a material or minor breach.

As explained above, the court will consider several factors in determining whether a breach is minor or material. Here, the court will likely conclude that the breach was minor. Carl substantially performed under the contract. He built a house for Ben and he did so within the time limit that Ben wanted. Moreover, solar panels are a minor component of the house, and not a very important part of the overall construction. Finally, the solar panels and products used were similar in quality and design to the Sun

Company products. Therefore, the hardship to Ben here is minimal. Carl has provided Ben with a sufficient home, and Ben should not be allowed to escape payment by arguing that Carl materially breached for the mere failure to use Sun Company products.

Impossibility

Even if Ben is successful in arguing that Carl materially breached, Carl will argue that his breach is excused by impossibility. Impossibility occurs where the nonoccurrence of an event was a basic assumption of the parties, and neither party assumed the risk of the occurrence of the event. Impossibility must be objective. Here, Carl will argue that Sun was temporarily out of stock of solar panels and products. Therefore, it was impossible for him to use Sun Company products in the home.

Carl will likely succeed in this argument. Ben will argue that the impossibility was not objective, because Sun Company was only out of stock temporarily.

However, Carl was limited by the term in the contract requiring construction to be finished by Thanksgiving. Therefore, under the terms of the contract it was impossible for him to use both Sun Company products and complete the construction prior to Thanksgiving.

Frustration of Purpose

Carl may also argue that the purpose of the contract was frustrated. This occurs when an event occurs that was not foreseeable, the non-occurrence of which was a basic assumption of the contract, and the occurrence of which frustrates a purpose of the contract that both parties intended. Carl will argue that Sun Company's inability to provide product was a supervening event which frustrated the purpose of his contract with Ben. Therefore, he will argue that his performance of his promise to use Sun Company products was excused.

Carl's Liability and Damages

Therefore, Carl likely committed a minor breach of the contract. Ben can sue Carl for damages caused by the breach. But, Ben must perform under the contract and pay Carl for his work. Therefore, Ben will be required to pay the \$200,000 less any damages caused by Carl's breach. Here, the damages are likely minimal. The purpose of damages is to compensate the damaged party. Carl may ask for expectation damages, which is measured by the damaged party's expectations. The purpose is to put the party in a position they would have been in but for the breach. Here, Ben expected a home constructed with Sun Company products. However, he received a home constructed with products of equal grade. Therefore, he has not suffered any economic damages, for which he can be compensated. He may argue that he is personally dissatisfied with the home, but the court will be unlikely to recognize these damages as legitimate or be able to quantify these damages.

Ben may also argue for specific performance. Here, the court will be unwilling to grant specific performance. Requiring Carl to deconstruct and then reconstruct the home using Sun Company products would place an extreme hardship on him and be difficult to supervise by the court.

Even if Carl is found to have materially breached the contract or failed to perform a condition under the contract, he will likely be compensated under a quasi-contract restitution theory. Ben will not be allowed to be unjustly enriched by Carl's work. Under this theory, Ben will have to pay Carl for the value of the benefit that Ben received less any damages that Ben suffered.

Modification

Carl will argue that he is also owed the \$25,000 bonus that Ben offered him in order to complete the home by Thanksgiving. A modification to a contract under the common law must be supported by consideration. Under the UCC, modifications in good faith without consideration are permitted. Here, Ben will argue that the modification is not valid or binding, because it was not supported by any consideration. Consideration is a bargained-for legal detriment. Ben offered to pay \$25,000; however, Carl merely

agreed to assure completion by Thanksgiving. Ben will argue that under the terms of the contract, Carl was already required to complete the construction by Thanksgiving. Therefore, consideration does not exist.

Carl may argue that the contract pre-modification was not a “time is of the essence” contract. Therefore, pre-modification Carl did not agree to forfeit his pay if the contract was not fully performed by the specific date (Thanksgiving). He may argue that the modification made performance by Thanksgiving mandatory, because time is of the essence. Therefore, Carl will argue that there was consideration. This argument will likely fail. Regardless, under the terms of the contract Carl agreed to perform by Thanksgiving. Even though he might not have committed a material breach by performing later, his agreement to perform an obligation he already has is not consideration.

Second, Ben will argue that the modification was invalid, because it was not made in writing. The parties’ contract in clause 4 states that the agreement may not be modified except upon written consent of the parties. This argument will fail. Under the common law, a clause requiring modifications to be in writing is not enforceable, although such a clause is enforceable under the UCC.