

EXAMINERS' ANALYSIS OF QUESTION NO. 3

Holly's claim

The covenant between Holly and the subdivision association constitutes a contract. *Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 515 (2004) ("Under Michigan law, a covenant constitutes a contract, created by the parties with the intent to enhance the value of property."). Holly's claim for breach of that contract should succeed because the association exercised its contractual discretion in bad faith.

"Where a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith." *Burkhardt v City Nat'l Bank of Detroit*, 57 Mich App 649, 652 (1975) (citing Corbin on Contracts); see also *Ferrell v Vic Tanny Int'l, Inc.*, 137 Mich App 238, 243 (1984) (same). The party must exercise its discretion "reasonably," *Conlin v Upton*, 313 Mich App 243, 268 (2015), and not "capriciously" or "arbitrarily," *Woods v Gaar, Scott & Co*, 93 Mich 143, 147 (1892). Whether discretion was exercised in good faith depends on "all the facts, circumstances, and conditions..." *Id.*

Here, the association did not act reasonably in denying approval based on the paint color, since the association recently approved the use of the same color on numerous other houses in the subdivision. Consequently, denial of Holly's request to use the color on her house was arbitrary and capricious. Alternatively, candidates could successfully argue that the association may have acted reasonably in denying Holly's request--for example, because the association desired a variety of house colors and too many houses were already painted the color she requested.

Contractor's claims

Breach of contract:

The contractor's claim for breach of contract should be denied because the condition precedent in the contract was not satisfied and thus the contractor had no right to enforce the contract.

"A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. ... If the condition is not fulfilled, the right to enforce the contract does not come into existence." *Knox v Knox*, 337 Mich 109, 118 (1953) (internal quotation marks omitted). See also *Harbor Park Mkt, Inc v Gronda*, 277 Mich App 126, 131 (2007) (same); *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 583 (2007) ("Failure to satisfy a condition precedent prevents a cause of action for failure of performance." [internal quotation marks omitted]); Restatement (Second) of Contracts § 225(1) ("Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.").

Here, the agreement between the contractor and Holly stated that neither party was obligated to perform unless the association approved both the new roof and the painting. Since the association rejected the painting, neither party was obligated to perform. Thus, Holly had no contractual duty to pay the contractor.

Breach of the covenant of good faith and fair dealing:

The contractor's claim for breach of the implied covenant of good faith and fair dealing should fail because Michigan does not recognize such claim as a cause of action independent of a contract. "It has been said that the covenant of good faith and fair dealing is an implied promise contained in every contract that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. However, Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." *Bank of Am, NA v Fid Nat'l Title Ins Co*, 316 Mich App 480, 500-01 (2016) [internal quotation marks and citation omitted]. See also, e.g., *Triplett v Perry (In re Leix Estate)*, 289 Mich App 574, 591 (2010) ("Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing." (internal quotation marks and citation omitted)); *Fodale v Waste Mgmt of Mich, Inc*, 271 Mich App 11, 35 (2006) (same); *Hearn v Rickenbacker*, 428 Mich 32, 37 (1987) (noting that breach of duty to act in good faith is "a tort not recognized in this state").

Consequently, the contractor's claim for breach of the covenant of good faith and fair dealing should be denied. See

Rodgers v JP Morgan Chase Bank NA, 315 Mich App 301, 310 (2016) ("[B]ecause no contract was formed, plaintiffs' reliance on the implied covenant of good faith and fair dealing is unavailing.").

Another remedy for contractor

Because the contractor has no enforceable contract with Holly, the contractor could instead seek payment under the theory of quantum meruit/unjust enrichment.

"Even though no contract may exist between two parties, under the equitable doctrine of unjust enrichment, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.' Restatement Restitution, § 1, p 12. The remedy is one by which the law sometimes indulges in the fiction of a quasi or constructive, contract, with an implied obligation to pay for benefits received to ensure that exact justice is obtained." *Kammer Asphalt Paving Co v E China Twp Sch*, 443 Mich 176, 185-86 (1993) (brackets in original; internal quotation marks omitted).

"The essential elements of a quasi contractual obligation . are the receipt of a benefit by a defendant from a plaintiff, which benefit it is inequitable that the defendant retain." *Mich Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 198 (1999) (quoting *Moll v Wayne Co*, 332 Mich 274, 278-79 (1952)). "Thus, in order to sustain a claim of quantum meruit or unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195 (2006).

Here, Holly clearly received a benefit from the contractor: installation of a new roof. Whether the contractor can recover in quantum meruit for the roof work depends on whether it would be inequitable to the contractor if Holly retained the benefit of the new roof without paying the contractor for it. The agreement between Holly and the contractor envisioned that either both projects (roof and painting) would be approved or neither project would be undertaken, and the parties assumed both would be approved. But when she learned that this assumption was wrong, Holly did not inform the contractor until the contractor finished replacing the roof. In other words, Holly waited until she received the entire benefit of a new roof

before informing the contractor that the paint project had been rejected (and thus there was no enforceable contract). A strong argument can be made that under these circumstances, it would be inequitable for Holly to retain this benefit without compensating the contractor for it.