

An engineer entered into a written contract with an owner to serve in the essential position of on-site supervisor for construction of an office building. The day after signing the contract, the engineer was injured while bicycling and was rendered physically incapable of performing as the on-site supervisor. The engineer offered to serve as an off-site consultant for the same pay as originally agreed to by the parties.

Is the owner likely to prevail in an action against the engineer for damages resulting from his failure to perform under the contract?

- A. No, because the engineer offered a reasonable substitute by offering to serve as an off-site consultant.
- B. No, because the engineer's physical ability to perform as on-site supervisor was a basic assumption of the contract.
- C. Yes, because the engineer breached the contract by disappointing the owner's expectations.
- D. Yes, because the engineer's duty to perform was personal and absolute.

Explanation:

A contracting party's duty to perform can be discharged by **impracticability**. The defense of impracticability is available when:

an **unanticipated or extraordinary event** makes it impracticable for the party to perform the contract was formed under a **basic assumption** that the **event would *not* occur** *and* the **party seeking discharge** was **not at fault** in causing the event to occur.

Here, the engineer entered into a contract to serve in the essential position of on-site supervisor for construction of an office building. The next day, the engineer suffered a bicycle injury that rendered him physically incapable of performing. Because the engineer's physical ability to perform as on-site supervisor was a basic assumption of the contract and there is no indication that the injury was his fault, his duty to perform was discharged. Therefore, the engineer did not breach the contract by failing to perform, and the owner is unlikely to prevail **(Choice C)**.

(Choice A) An offer by a party to perform less than what was contracted for (eg, the engineer's offer to serve as an off-site consultant) will not excuse a breach. This is true even if the offered performance is a reasonable substitute.

(Choice D) Although the engineer's duty to perform was personal and absolute, he is *not* in breach—and the owner will *not* prevail—because the doctrine of impracticability excused the engineer's nonperformance under the contract.

Educational objective:

The defense of impracticability is available when (1) an unanticipated or extraordinary event makes it impracticable for a party to perform, (2) the contract was formed under a basic assumption that the event would not occur, and (3) the party seeking discharge was not at fault in causing the event to occur.

References

Restatement (Second) of Contracts § 261 (Am. Law Inst. 1981) (discharge by supervening impracticability).

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Examples of impracticability



Incapacity or death



Destruction of thing needed
for performance



Prohibition or law