

On March 1, an excavator entered into a contract with a contractor to perform excavation work on a large project. The contract expressly required that the excavator begin work on June 1 to enable other subcontractors to install utilities. On May 15, the excavator requested a 30-day delay in the start date for the excavation work because he was seriously behind schedule on another project. When the contractor refused to grant the delay, the excavator stated that he would try to begin the work for the contractor on June 1.

Does the contractor have valid legal grounds to cancel the contract with the excavator and hire a replacement?

- A. No, because the excavator did not state unequivocally that he would delay the beginning of his work.
- B. No, because the excavator would be entitled to specific performance of the contract if he could begin by June 1.
- C. Yes, because the excavator breached the implied covenant of good faith and fair dealing.
- D. Yes, because the excavator committed an anticipatory repudiation of the contract by causing the contractor to feel insecure about the performance.

Explanation:

Anticipatory repudiation

Standard Party's clear & unequivocal words or actions indicate unwillingness to perform

Retraction Party may retract repudiation unless nonrepudiating party:

cancels contract

materially changes position in reliance thereon *or*

indicates repudiation is final

Effect Upon repudiation, nonrepudiating party may:*

treat repudiation as breach *or*

ignore repudiation & demand performance

*Nonrepudiating party may also suspend own performance

Under the doctrine of **anticipatory repudiation**, a contracting party may treat another party's repudiation as a breach and cancel the contract. A repudiation occurs when a party **clearly and unequivocally**, by words or acts, expresses an **unwillingness to perform**. But a party's mere expression of doubt as to its ability to perform or request that the contract be modified does not constitute a repudiation.

Here, the excavator *requested* a 30-day delay in the start date of his work. After the contractor denied this request, the excavator stated that he would *try* to begin work on the start date. Neither of these statements is an unequivocal assertion that the excavator would delay the beginning of his work. Therefore, the excavator did not anticipatorily repudiate the contract, and the contractor has no valid legal ground to cancel it.

(Choice B) Specific performance is an available remedy when monetary damages would be inadequate. Here, monetary damages would be adequate to compensate the excavator if the contractor unjustifiably canceled the contract.

(Choice C) All contracts contain an implied covenant of good faith and fair dealing, which prohibits the parties from engaging in improper behavior (eg, deceit). But the excavator did not breach this covenant since his request for a delay was reasonable considering his circumstances.

(Choice D) A party with reasonable grounds for insecurity about the other's performance may demand **adequate assurances** that the other party will perform. If the other party fails to provide those assurances within a reasonable time, the contract is anticipatorily repudiated. Although the excavator's statements were reasonable grounds for insecurity, the contractor did not demand assurances.

Educational objective:

An anticipatory repudiation occurs when a party clearly and unequivocally, by words or acts, indicates an intention not to perform pursuant to the contract. Mere expressions of doubt regarding one's ability to perform or a request to modify the contract does not suffice.

References

Restatement (Second) of Contracts § 250 (Am. Law Inst. 1981) (repudiation).

Restatement (Second) of Contracts § 253 (Am. Law Inst. 1981) (effect of an anticipatory repudiation).

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