

Under the terms of a written contract, a builder agreed to construct a garage for a homeowner for \$10,000. Nothing was stated in the parties' negotiations or in the contract about progress payments during the course of the work.

After completing 25 percent of the garage according to the homeowner's specifications, the builder demanded \$2,000 as a reasonable progress payment. The homeowner refused, and the builder abandoned the job.

If each party sues the other for breach of contract, which of the following will the court decide?

- A. Both parties are in breach, and each is entitled to damages, if any, from the other.
- B. Only the builder is in breach and liable for the homeowner's damages, if any.
- C. Only the homeowner is in breach and liable for the builder's damages, if any.
- D. Both parties took reasonable positions, and neither is in breach.

## Explanation:

### Order of performances\*

<b>Simultaneous performance possible</b>	Condition <i>concurrent</i> implied (ie, performance due simultaneously)
<b>One performance requires time</b>	Condition <i>precedent</i> implied (ie, durational performance due <i>before</i> respective duty triggered)

\*These rules apply unless express contractual language or circumstances indicate otherwise.

A party breaches a contract by failing to perform a contractual duty at the time performance is due. Where only **one party's performance requires a period of time to complete**, that party's performance is **due first** unless the contract or the circumstances indicate otherwise. If that party **fails to complete performance** or repudiates the contract, the **nonbreaching party** is entitled to **withhold performance** and **recover damages**.

Here, the builder needed a period of time to construct the garage, and the parties' contract did *not* provide for progress payments—ie, payments made at certain stages in the process. As a result, the builder was required to complete construction before the homeowner was required to pay anything. The builder then repudiated the contract by abandoning the job, so the homeowner was entitled to withhold payment. Therefore, only the builder is in breach and liable for the homeowner's **damages**, if any **(Choices A, C & D)**.

### Educational objective:

Where one party's performance requires a period of time to complete (eg, construction), that party must complete performance before the other party is required to perform (eg, payment). Failure to perform results in a breach of the contract, entitling the nonbreaching party to withhold performance and recover damages.

### References

Restatement (Second) of Contracts § 234 (Am. Law Inst. 1981) (order of performance).

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