

A written construction contract, under which a contractor agreed to build a new house for a landowner at a fixed price of \$200,000, contained the following provision: "Prior to construction or during the course thereof, this contract may be modified by mutual agreement of the parties as to 'extras' or other departures from the plans and specifications provided by the landowner and attached hereto. Such modifications, however, may be authorized only in writing, signed by both parties."

During construction, the contractor incorporated into the structure overhanging gargoyles and other "extras" orally requested by the landowner for orally agreed prices in addition to the contract price. The landowner subsequently refused to pay anything for such extras, aggregating \$30,000 at the agreed prices, solely on the ground that no written, signed authorization for them was ever effected.

If the contractor sues the owner on account of the "extras," which, if any, of the following will effectively support the landowner's defense?

- A. The parol evidence rule and the failure of an express condition.
- B. The parol evidence rule and the statute of frauds.
- C. The preexisting duty rule and the failure of an express condition.
- D. Neither the parol evidence rule, the preexisting duty rule, the failure of an express condition, nor the statute of frauds.

Explanation:

The **parol evidence rule** generally prevents a party to a written contract from presenting evidence of a *prior or contemporaneous* agreement that contradicts the terms of the contract as written. But this rule **does not bar** evidence of ***subsequent* agreements** between the parties (eg, the parties' oral modifications regarding "extras" that occurred after the contract was entered) **(Choices A & B)**.

An **express condition** is an explicit clause stating that an uncertain future event will (1) create a duty to perform (ie, condition precedent) or (2) extinguish a duty to perform (ie, condition subsequent). In addition, a party's **duty to perform** is **excused** if a **condition precedent fails** to occur. Here, the landowner's duty to pay for extras required a written modification signed by both parties—not the occurrence of an uncertain future event. Therefore, the failure to make such a writing was not a failure of an express condition **(Choices A & C)**.

Under the **statute of frauds**, certain types of contract modifications must be in writing and signed by the party against whom enforcement is sought. But a signed writing is not required to modify a construction contract if the modified contract can be completed within one year. And here, there is no indication that construction would necessarily take more than one year **(Choice B)**.

Contract modifications require **new consideration**—ie, each party must alter his/her duties in some way. But a promise to perform, or the performance of, a **preexisting duty does not constitute consideration**. Here, the parties agreed that any "extras" would require a written modification—ie, there was no preexisting duty to provide extras. Therefore, the parties' oral modifications *were* supported by consideration **(Choice C)**.

Educational objective:

In a contract dispute, (1) the *parol evidence rule* can exclude evidence that contradicts a written contract, (2) the *failure of an express condition* can excuse a duty to perform, (3) the *statute of frauds* can invalidate an unwritten or unsigned contract, and (4) the *preexisting duty rule* can make a contract unenforceable for lack of consideration.

References

Restatement (Second) of Contracts § 213 (Am. Law Inst. 1981) (explaining that an integrated writing supersedes inconsistent terms of prior agreements).

Restatement (Second) of Contracts § 225 (Am. Law Inst. 1981) (explaining that the non-occurrence of a condition precedent discharges the duty to perform when the condition can no longer occur).

Restatement (Second) of Contracts § 125 (Am. Law Inst. 1981) (statute of frauds vis-à-vis transfers of land).

Restatement (Second) of Contracts § 73 (Am. Law Inst. 1981) (explaining that performance of a preexisting legal duty is not consideration).

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