A seller entered into a contract with a buyer to sell a house for a price of $150,000. The contract contained the following clause: "This contract is conditional on the buyer securing bank financing at an interest rate of 7% or below." The buyer did not make an application for bank financing and therefore did not secure it and refused to proceed with the purchase. The seller sued the buyer for breach of contract.

Is the seller likely to prevail?

A. No, because the buyer did not secure bank financing.

B. No, because the contract did not expressly impose on the buyer any obligation to apply for bank financing.

C. Yes, because a court will excuse the condition to avoid a disproportionate forfeiture.

D. Yes, because a court will imply a term imposing on the buyer a duty to use reasonable efforts to secure bank financing.

Explanation:

Contract conditions

Condition precedent	Uncertain future event that, if it occurs, creates party's obligation to perform (e.g., A agrees to hire B *if* B graduates college)
Condition subsequent	Uncertain future event that, if it occurs, excuses party's existing obligation to perform (e.g., B agrees to work for C *until* B graduates college)

Performance is generally due once a contract is formed. However, performance can be delayed or discharged by a condition—ie, an uncertain future event that must occur before performance becomes due or is discharged. There are two types of conditions:

condition precedent* – ***delays*** **performance** until a specified event occurs

condition subsequent – ***excuses*** **performance** once a specified event occurs

A **condition precedent** will be **excused** if a party whose performance is subject to that condition **wrongfully prevents** the condition from occurring—eg, by breaching the implied duty of good faith and fair dealing. As a result, the condition no longer must occur for that party's performance to become due.

Here, the buyer's performance was *delayed* by the condition that he secured financing at an interest rate of 7% or below. The implied duty of good faith and fair dealing required the buyer to make reasonable efforts to secure financing. He breached that duty by making *no* effort to secure financing, so the condition precedent was excused and the buyer's performance became due. Therefore, the seller is likely to prevail **(Choices A & B)**.

*A condition concurrent arises when each party's obligation to perform is a condition precedent to the other party's obligation to perform (ie, when performance is due simultaneously).

(Choice C) The seller would *not* be subject to any significant forfeiture (ie, loss of benefit or right) if the buyer's condition to obtain financing is not excused. That is because the seller can sell the house to someone else.

Educational objective:

A condition precedent will be excused if a party whose performance is subject to that condition wrongfully prevents the condition from occurring—eg, by breaching the implied duty of good faith and fair dealing.

References

Restatement (Second) of Contracts §§ 224–25 (Am. Law Inst. 1981) (conditions and effect of nonoccurrence).

Restatement (Second) of Contracts § 229 (Am. Law Inst. 1981) (excuse of condition to avoid forfeiture).

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