

The owner of an unoccupied duplex needed to paint its interior in preparation for renting each unit. Before leaving the country on a three-month-long business trip, the owner offered a painter \$3,000 to paint the interior of each unit of the duplex. The painter told the owner that he would try to fit the job into his busy schedule. The owner replied that she would be out of the country for three months but would leave the key to each unit under the front doormat. There was no further communication between them.

Ten weeks later the painter began to paint one of the duplex units. Concerned that she had heard nothing from the painter about completing the task, the owner emailed a friend asking him to paint the duplex for \$3,000. The friend sent an email accepting the owner's offer and began painting the other duplex unit the following day.

Is the painter likely to prevail in a breach of contract action against the owner?

- A. No, because an offeree must notify an offeror that performance has begun in order to create a contractual obligation between them.
- B. No, because notification is required to enforce a contractual duty when the offeror has no convenient way of ascertaining if performance has begun.
- C. Yes, because an offeree may always accept an offer by making a return promise or by beginning performance.
- D. Yes, because notification that an offeree has begun to perform is only required if the offeror explicitly requested notification.

## Explanation:

An **offer** to form a **bilateral contract**—ie, an offer that invites acceptance by return promise—can be expressly accepted with a return promise or **impliedly accepted by starting performance**.<sup>\*</sup> Notice is not required to accept an offer by starting performance unless the offer so requires (**Choice A**). However, if the **offeree should know** that the offeror has **no convenient way of learning** within a reasonable time that **performance has begun**, the offeree **must notify** the offeror. Failure to do so will discharge the offeror's contractual duty (**Choice D**).

Here, the duplex owner offered the painter \$3,000 to paint the interior of each unit. Although the painter made no return promise (he would "*try* to fit the job into his schedule"), he began to paint the duplex 10 weeks later (acceptance by starting performance). The painter knew that the owner was out of the country (no convenient way to learn about performance), so he had to notify her that performance had begun. Since he did not, the owner's contractual duty was discharged, and the painter is *not* likely to prevail in his breach-of-contract action.

<sup>\*</sup>Acceptance is also implied when the offeree accepts a valuable benefit (eg, money, property, services) by [conduct or failure to act](#). This method of acceptance is not available here because the valuable benefit (\$3,000 payment) could not be accepted until performance was completed..

**(Choice C)** The assertion that an offeree can *always* accept an offer by making a return promise or by beginning performance is overbroad. The offeror, as master of the offer, can dictate the manner or means of acceptance.

## Educational objective:

Notice is not required to effectively accept an offer by starting performance unless the offer so requires. But if the offeree should know that the offeror has no convenient way of learning within a reasonable time that performance has begun, the offeree must notify the offeror. Otherwise, the offeror's contractual duty will be discharged.

## References

Restatement (Second) of Contracts § 62 (Am. Law Inst. 1981) (effect of performance by offeree where offer invites either performance or promise).

Restatement (Second) of Contracts § 54 (Am. Law Inst. 1981) (acceptance by performance and necessity of notification to offeror).

## Formation of a bilateral contract

