

An expert in installing equipment on top of tall buildings contracted in a signed writing to lift and emplace certain air-conditioning equipment on top of a building. An exculpatory clause in the contract provided that the expert would not be liable for any physical damage to the building occurring during installation of the air-conditioning equipment. There was also a clause providing for per diem damages if the expert did not complete performance by a specified date and a clause providing that "time is of the essence." Another clause provided that any subsequent agreement for extra work under the contract must be in writing and signed by both parties.

With ample time remaining under the contract for commencement and completion of his performance, the expert notified the owner of the building that he was selling his business to a contractor, who was equally an expert in installing equipment on top of tall buildings, and that the contractor had agreed to "take over the contract."

The owner orally agreed with the expert to accept the contractor's services. The contractor performed on time but negligently installed the wrong air-conditioning equipment.

Will the owner succeed in an action against the expert for damages for breach of contract?

- A. No, because by accepting the substitution of the contractor for the expert, the owner effected a novation, and the expert was thereby discharged of his duties under the contract.
- B. No, because the liquidated-damage clause in the contract provided only for damages caused by delay in performance.
- C. Yes, because the owner did not agree to release the expert from liability under the contract.
- D. Yes, because the owner received no consideration for the substitution of the contractor for the expert.

Explanation:

Nondelegable contractual duties

Delegation not permitted when:

- other contracting party has substantial interest in having delegating party perform (eg, in personal-services contract involving taste or special skill) *or*
- delegation is prohibited by contract

Obligations under a contract can generally be **delegated unless**:

- the other party to the contract has a **substantial interest** in having the **delegating party perform** (eg, in a personal-services contract involving taste or a special skill) *or*
- the delegation is prohibited by the contract (eg, states that "this contract may not be assigned").

However, a party may **consent** to a delegation that would otherwise be prohibited. After a successful delegation, the **delegator remains liable** under the contract **unless** the other party **agreed to release** the delegator and substitute a new one (ie, agreed to a novation).

Here, the building owner likely had a substantial interest in having the expert perform the contract—especially since the installation of the air-conditioning equipment required special skills. As a result, the expert could not delegate his duties to the contractor without the owner's consent. And although the owner consented, the owner did *not* agree to release the expert from liability under the contract. Therefore, the owner can sue the expert for damages caused by the contractor's negligent installation of the air-conditioning equipment.

(Choice A) A novation is a substituted contract in which the parties agree to replace an original contracting party with a new party. But merely consenting to a delegation (as seen here) does *not* create a novation.

(Choice B) The liquidated-damage clause provided only for damages caused by delay in performance. It does not preclude recovery for damages caused by other breaches (eg, negligent installation).

(Choice D) The building owner's consent to the delegation did not need to be supported by **consideration** to be valid, so this is not a basis for the owner to succeed. Instead, the owner will succeed because the owner did not release the expert from liability under the contract.

Educational objective:

After a delegation (ie, transfer of contractual duties), the delegating party remains liable under the contract unless the other party agreed to release the delegating party and substitute a new one (ie, agreed to a novation).

References

- Restatement (Second) of Contracts § 318 (Am. Law Inst. 1981) (delegation of duties).

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