

Under a written agreement, a pastry supplier promised to sell its entire output of baked buns at a specified unit price to a retailer, for one year. The retailer promised not to sell any other supplier's baked buns.

The parties' contract included a provision for termination by either party at any time upon reasonable notice. After six months of performance on both sides, the supplier, claiming that its old bun-baker had become uneconomical and that it could not afford a new one, dismantled the bun-baker and began using the space for making dog biscuits. The supplier's output of baked buns having ceased, the retailer sued for breach of contract. The retailer moves for summary judgment on liability, and the supplier moves for summary judgment dismissing the retailer's claim.

How should the court rule?

- A. Deny both motions, because the supplier may legally cease production of baked buns, but under the circumstances it must share with the retailer its profits from the manufacture of dog biscuits until the end of the first year.
- B. Deny both motions, because there are triable issues of fact as to whether the supplier gave reasonable notice of termination or whether its losses from continued production of baked buns were sufficiently substantial to justify cessation of production.
- C. Grant summary judgment for the retailer, because as a matter of law the supplier could not discontinue production of baked buns merely because it was losing money on that product.
- D. Grant summary judgment for the supplier, because its cessation of baked-bun production and the retailer's awareness thereof amounted as a matter of law to valid notice of termination as permitted by the contract.

Explanation:

Ways to discharge contractual obligations

Full performance of contractual obligations

Impossibility, impracticability, or frustration of purpose

Release (in writing only)

Mutual rescission

Substituted contract

Contract or covenant not to sue

Accord & satisfaction

Novation

Mnemonic: **FIRM SCAN**

A **motion for summary judgment** is a request that the court enter judgment without a full trial because there is no genuine issue of material fact and the movant is entitled to **judgment as a matter of law**. A fact issue is material if it is of consequence to the outcome of the case.

In this breach of contract case, one material fact issue is whether the supplier's cessation of baked-bun production and the retailer's awareness thereof amounted to *reasonable* notice of termination as required by the parties' contract. Reasonableness is a question of fact that must be answered by the trier of fact, so it cannot be decided on summary judgment **(Choice D)**.

Another material fact issue is whether the supplier's monetary losses from the continued production of baked buns were *substantial* enough to give rise to an impracticability defense or otherwise discharge the supplier's contractual obligation. The **defense of impracticability** is available when:

an **unanticipated event** makes a party's **performance impracticable**
nonoccurrence of the event was a basic assumption of the contract *and*
the party seeking discharge is not at fault.

Although non-extraordinary increases in the cost of performance do not make performance impracticable, there is no bright line rule for determining as a **matter of law** whether an increase in cost rises to the level of impracticability. Instead, this is a question of fact to be answered by the trier of fact **(Choice C)**. Accordingly, both parties' motions for summary judgment should be denied.

(Choice A) Even if the supplier can legally cease production of baked buns, there is no indication that the contract entitles the retailer to a share of the supplier's profits from the manufacture of dog biscuits.

Educational objective:

The defense of impracticability is available when (1) an unanticipated event makes performance impracticable, (2) nonoccurrence of the event was a basic assumption of the contract, and (3) the party seeking discharge is not at fault. Non-extraordinary increases in the cost of performance do not make performance impracticable.

References

Restatement (Second) of Contracts § 261 (Am. Law Inst. 1981) (impracticability).

Fed. R. Civ. P. 56 (summary judgment).

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