

On March 1, a homeowner contacted a builder about constructing an addition to the homeowner's house. The builder orally offered to perform the work for \$200,000 if his pending bid on another project was rejected. The homeowner accepted the builder's terms, and the builder then prepared a written contract that both parties signed. The contract did not refer to the builder's pending bid. One week later, upon learning that his pending bid on the other project had been accepted, the builder refused to perform any work for the homeowner.

Can the homeowner recover for the builder's nonperformance?

- A. No, because efficiency principles justify the builder's services being directed to a higher-value use.
- B. No, because the builder's duty to perform was subject to a condition.
- C. Yes, because the builder's attempt to condition his duty to perform rendered the contract illusory.
- D. Yes, because the parol evidence rule would bar the builder from presenting evidence of oral understandings not included in the final writing.

## **Explanation:**

### **Exceptions to parol evidence rule**

Evidence of prior or contemporaneous oral or written agreement is admissible to establish:

- whether writing is integrated and, if so, completely or partially
- meaning of ambiguous term
- defense to formation or enforcement (eg, fraud, duress, mistake)
- ground for granting or denying remedy (eg, rescission, reformation)
- subsequent contract modifications
- condition precedent to effectiveness

The **parol evidence rule** generally bars evidence of a prior or contemporaneous agreement to modify or contradict the terms of an integrated writing. But this rule **does not apply** when a party is **attacking the validity** of the agreement—eg, by asserting there was a **condition precedent to effectiveness** that **failed to occur**. As a result, evidence of such a condition precedent is admissible.

Here, before the contract was signed, the parties orally agreed that it would become binding (ie, take effect) only if the builder's other pending bid was rejected—a condition precedent to effectiveness. Therefore, the parol evidence rule does not bar evidence of the oral agreement to prove that the contract failed to take effect because the builder's other pending bid was accepted (**Choice D**). Accordingly, the homeowner cannot recover for the builder's nonperformance because the builder's performance never became due.

**(Choice A)** Efficiency principles justify (but do not excuse) a breach if it is more economically advantageous for a party to breach and pay damages than to perform. But the builder did not breach the contract, and even if he had, the facts do not indicate that it was economically advantageous for him to do so.

**(Choice C)** An illusory promise is one so vague that the promisor has discretion whether to perform. Here, the builder's promise was *not* illusory because he was obligated to perform if his pending bid was rejected.

### **Educational objective:**

Evidence used to establish a condition precedent that must occur before a contract becomes effective is admissible under the parol evidence rule.

### **References**

- Restatement (Second) of Contracts § 217 (Am. Law Inst. 1981) (integrated agreement subject to oral requirement).

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